Reverse Advisory Opinions—DRAFT

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Federal courts have increasingly issued demands and requests for legal advice from the executive branch and other parties. Without offering any justification, federal judges simply assume that they may seek legal advice from virtually anyone. These practices warrant further scrutiny. First, we believe that the federal courts lack the power to compel judicial advice, from parties to a case or otherwise. To begin with, the federal courts cannot demand opinions of Congress or the President, for Article III never grants any such power. Indeed, such a power would be inconsistent with the independence and equality that each branch enjoys. Nor can courts compel parties to supply legal arguments because such a power is inconsistent with the autonomy that parties enjoy in litigation. Courts can no more demand that parties address particular legal questions than they can demand that parties file suits. Second, with respect to nonparties, the federal courts generally lack authority even to request legal opinions. The Supreme Court's practice of calling for the views of the solicitor general is as unjustified as it has been long-lived. The lack of justification is crucial, for current practice suggests no limits. Courts might request the advice of law professors or the National Rifle Association; they might even poll former solicitors general of the United States about what the law is. We believe this power to request legal advice is alien to Article III's adversarial system and is instead a feature of civil law systems and congressional committees, where the inquisitors have much more latitude. The only time the federal courts may request legal advice from nonparties is when a party refuses to address a legal question deemed relevant by the court and the court asks a nonparty to provide an adversarial argument.

INTRODUCTION

A federal court recently handed out a "homework assignment" to the attorney general of the United States.[1] The assignment raises fun-

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[1] See, for example, Matt Negrin, Eric Holder Completes 'Obamacare' Homework Assignment; Criticism of Obama Supreme Court Comments Persists, ABC News' The Note (ABC News Apr 5, 2012), online at http://abcnews.go.com/blogs/politics/2012/04/eric-holder-completes-obamacare-homework-assignment-criticism-of-obama-supreme-court-comments-persists (visited Nov 14, 2012) (discussing the court's reaction to the President's comments on the court's role with respect to determining the constitutionality of the Affordable Care Act, the resulting order requiring a letter from Attorney General Holder, and Attorney General Holder's response).

damental questions about the powers of the federal courts, their relationship with the political branches, and their power to demand or request legal advice. In April 2012, the Fifth Circuit Court of Appeals "directed" the Department of Justice to explain whether the Obama administration endorsed judicial review.[2] The order followed in the wake of President Barack Obama's claim that it would be an "unprecedented, extraordinary" step for "unelected judges" to invalidate the Affordable Care Act.[3] The court ordered Attorney General Eric Holder to draft a letter spelling out the department's stance toward judicial review. The letter had to discuss the President's remarks, essentially ordering the attorney general to repudiate or endorse them.[4] Finally, the Fifth Circuit decreed that the letter was to be "no less than three pages, single spaced, and" filed no later than forty-eight hours later.[5]

The Fifth Circuit's order may have seemed extraordinary, but it was part of an emerging pattern. Almost a year earlier, in July 2011, the Ninth Circuit ordered the parties before it, including the Department of Justice, to file a brief on the question of whether the implementation of the Don't Ask, Don't Tell Repeal Act of 2010[6] meant that the pending case challenging the Don't Ask, Don't Tell[7] statute was or would be moot.[8] This order was less overbearing than the Fifth Cir-

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2 **[Proposed Citation]**Order, Physician Hospitals of America v Sebelius, Civil Action No 11-40631, *1 (5th Cir filed Apr 3, 2012) (available at http://amicuscuriousdotcom.files.wordpress.com/2012/04/oral-argument-letter.pdf) (visited on Nov 14, 2012) ("Sebelius Order").

3 **[Proposed Citation]**Pub L No 111-148, 124 Stat 119, codified in various sections of Title 42; The White House Office of the Press Secretary, Joint Press Conference by President Obama, President Calderon of Mexico, and Prime Minister Harper of Canada (Apr 2, 2012), online at http://www.whitehouse.gov/the-press-office/2012/04/02/joint-press-conference-president-obama-president-calderon-mexico-and-pri (visited Nov 14, 2012) (asserting the President's confidence in the constitutionality of the Affordable Care Act and his belief that overturning it would be an example of judicial activism).

4 **[Proposed Citation]**Oral Argument, Physician Hospitals of America v Sebelius, No 11-40631, 00:18:00 (5th Cir Apr 3, 2012), online at http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx (visited Nov 14, 2012).

5 Oral Argument, Physician Hospitals of America v Sebelius, No 11-40631, 00:18:00 (5th Cir Apr 3, 2012), online at http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx (visited on Nov 14, 2012) (describing the requirements of the court's order to the Department of Justice); Sebelius Order at *1(cited in note 2).

6 **[Proposed Citation]**Pub L No 111-321, 124 Stat 3515 (2010), codified at 10 USC § 654.

7 **[Proposed Citation]**Pub L No 103-160, 107 Stat 1670 (1993), repealed by Don't Ask, Don't Tell Repeal Act of 2010, Pub L No 111-321, 124 Stat 3515 (2010), codified at 10 USC § 654.

8 **[Proposed Citation]**See Log Cabin Republicans v United States, 658 F3d 1162, 1165 (9th Cir 2010) (considering whether the constitutional challenge to Don't Ask, Don't Tell constitutes a "live case or controversy" for the court to decide).

cuit's order: briefs had to be filed in ten days and could be up to 10 pages or 2,800 words.[9]

Without question, the practice of federal courts, including the US Supreme Court, either ordering or requesting the Department of Justice to provide legal advice is on the rise. The Supreme Court increasingly calls for the views of the solicitor general on whether the Court should grant certiorari in cases in which the government is not a party.[10] On other occasions, the Court solicits a merits brief from the solicitor general.[11]

The extent to which courts can demand or request the legal opinions of the executive and others is an uncharted area, one ripe for scholarly consideration. In this Essay, we begin that long-overdue exploration.

We do not believe that the federal courts can demand legal opinions of anyone, parties to a case included. To begin with, we do not believe that federal courts can demand the legal opinions of the other branches, treating them as glorified law clerks. Courts have no more power to command the other branches to supply legal advice than the other branches have the power to demand the same of the courts. This conclusion arises from the absence of authority under Article III to order such opinions and from the damage it would do to the Constitution's system of independent and coequal branches. Furthermore, we reject the notion that courts can force parties to a case to advance legal arguments or supply legal advice. Binding demands for legal advice would be inconsistent with the litigation autonomy that parties enjoy and that Article III presumes. Such demands would suggest a judicial power to compel parties to reveal their weakest points and even to advance the best legal arguments for the other party. Article III does not permit the courts to demand of parties whatever legal arguments or advice the courts would find useful.

Moreover, while federal courts certainly may ask the parties to a case for legal arguments, we do not believe that those courts can ask nonparties for their view on federal law, be they in the executive branch, members of Congress, or legal experts.[12] Basic differences be-

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9 Order, Log Cabin Republicans v United States, Civil Action No 10-56634, *3 (9th Cir filed July 11, 2011) (questioning whether the government intends to defend the constitutionality of Don't Ask, Don't Tell and whether the case should be dismissed as moot).

10 See Part II.A.

11 See, for example, Miscellaneous Order, *10 (S Ct filed Jun 29, 2012) (available at www.supremecourt.gov/orders/courtorders/062912zr4f6k.pdf) (requesting the solicitor general to express views of the United States in two pending cases).

12 Our Essay is limited to the question of federal courts seeking legal advice on issues pertaining to federal law and, consequently, we do not consider the question of federal courts certi-

tween courts and legislatures and between inquisitorial civil law systems and the federal courts underlie this limit.[13] Unlike congressional committees,[14] federal courts cannot hold hearings in which legal experts submit testimony and answer questions deemed relevant by judges and justices. Unlike the civil law inquisitorial system, Article III does not look to judges to call witnesses, assemble evidence, and otherwise define the pertinent facts and legal issues.[15] In our view, when the parties to the case are perfectly willing to advance all legal arguments that a federal court deems relevant but the court nonetheless solicits legal arguments from nonparties, the court operates outside the boundaries of Article III. Because our argument suggests that the Supreme Court's routine practice of seeking the legal advice of the solicitor general when the government is not a party is ultra vires, some may regard it as radical and hence mistaken. We demur. In our view, current practice is truly radical and mistaken because it suggests there are no limits to the power of federal courts to seek legal advice from nonparties. If the Supreme Court regularly may request the views of the solicitor general, it may equally call for the wisdom of Professor Larry Tribe, the Chamber of Commerce, or former solicitors general. In seeking to better declare what the law is, the justices of the Supreme Court have seized a power that Article III never confers.

The questions raised in this Essay are distinct from a range of issues dividing academics and jurists over whether federal courts should adhere to a party-controlled dispute resolution model or, instead, a law declaration model.[16] Under the party-controlled model,

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fying questions of state law to state courts. For an insightful treatment of this practice, see generally Jonathan Remy Nash, Examining the Power of Federal Courts to Certify Questions of State Law, 88 Cornell L Rev 1672 (2003) (examining whether a federal court can either temporarily relinquish or abstain jurisdiction in a case).

13 **[Proposed Citation]**See Thomas D. Rowe Jr., Authorized Managerialism under the Federal Rules — And the Extent of Convergence with Civil-Law Judging, 36 Sw U L Rev 191, 203–06 (2007) (summarizing the differences between the archetypal common law and civil-law systems and examining the ways in which American courts may be adopting civil-law like methods); James G. Apple and Robert P. Deyling, A Primer on the Civil-Law System 37 (Federal Judicial Center 1995) (explaining the differences between civil-law and common law courts).

14 **[Proposed Citation]** United States Senate, Senate Manual XXVI (Nov 24, 2008), S Doc No 112-1; United States House of Representatives, Constitution Jefferson's Manual and Rules of the House of Representatives of the United States XI (2009), H Doc No 110-162.

15 See text accompanying notes 102–114. See also Thomas D. Rowe Jr, Authorized Managerialism under the Federal Rules — And the Extent of the Convergence with Civil-Law Judging, 36 Sw U L Rev 191, 203–06 (2007) (highlighting some similarities as well as differences between adversarial and inquisitorial models).

16 Contrast Amanda Frost, The Limits of Advocacy, 59 Duke L J 447, 499–508 (2009) (defending actions by judges that raise legal claims and arguments as consistent with law pronouncements and adversary theory), with Brianne J. Gorod, The Adversarial Myth: Appellate Court Extra-Record Factfinding, 61 Duke L J 1, 53–68 (2011) (arguing that courts' nominal

courts would decide cases based on party filings and nothing else; there would be no place for courts seeking the views of nonparties. Under the law declaration model, however, the adversarial process yields in several respects. Courts may ask for argument on issues the parties do not raise, look to amicus briefs, use the internet to research issues, and appoint amici to litigate so-called orphaned issues that parties refuse to press.[17]

Over the past decade, the law declaration model has made substantial inroads and arguably now dominates Supreme Court decision making.[18] We think this development helps explain the growing tendency of federal courts to either order or solicit the views of Department of Justice lawyers. In particular, federal courts see themselves less as umpires resolving party disputes and more as active players in sorting out what legal rules and questions are relevant.[19]

Nonetheless, the practice of either ordering or soliciting legal opinions from nonparties is alien to Article III. More to the point, neither adjudicatory model suggests or supports a judicial power to demand or request legal advice. In our view, when both parties are willing and able to argue those legal issues deemed relevant by the court, the courts cannot seek the assistance of a law professor, a blue-ribbon panel composed of members of the Supreme Court bar, or the solicitor general. Solicitation of legal arguments is defensible only as a means of ensuring an adversarial presentation of legal issues, meaning that

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commitment to the adversarial model obscures their reliance on extra-record facts and discussing the negative effects of assuming that all relevant information is presented through the adversarial method); Gary Lawson, Stipulating the Law, 109 Mich L Rev 1191, 1227–34 (2011) (supporting party control of litigation including with respect to agreement on legal issues); Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum L Rev 665, 679–85 (2012) (exploring recent Supreme Court developments and linking them to increasing adoption of the law declaration model's premises).

17 See Frost, 59 Duke L J at 461–69 (cited in note 16) (describing the practice of raising relevant legal issues not discussed by the parties); Gorod, 61 Duke L J at 26–35 (cited in note 16) (noting the research conducted by appellate courts outside of the traditional adversarial process of factfinding). See also Allison Orr Larsen, Confronting Supreme Court Fact Finding, 98 Va L Rev 1255, 1286–90 (2012) (discussing how changes in technology have increased the Court's use of in house research of both a legal and non-legal nature); Brian P. Goldman, Note, Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?, 63 Stan L Rev 907, 912–24 (2011) (surveying the history and characteristics of orphaned arguments and appointed amici at the US Supreme Court).

18 See Monaghan, 112 Colum L Rev 668–69 (cited in note 16) (arguing that, despite purported dominance of the dispute resolution model, the Supreme Court has embraced the law declaration model as a way of setting the legal agenda).

19 **[Proposed Citation]**Consider Frost, 59 Duke L Rev at 469 (cited in note 16) ("Even though judges widely agree that they should decide cases as framed by the parties, these cases demonstrate that they are also willing to raise new issues when they believe that litigants have mischaracterized the law they have asked the courts to apply.").

such requests are permissible only when the parties will not advance pertinent legal arguments.[20]

Some clarifications are in order. Ours is not a claim that the executive or Congress is constitutionally incapable of opining on legal matters, in a brief or otherwise. To the contrary, we think that the political branches may share their constitutional views with others. Furthermore, we admit that the courts and Congress can compel the executive to provide facts, documents, and evidence.[21] Hence we do not discuss subpoenas,[22] compliance with the Brady rule requiring prosecutors to disclose exculpatory evidence,[23] or situations where the government has unique access to facts that a court believes are necessary to decide a case. Moreover, our inquiry focuses on the constitutional powers of the three branches. We do not address whether Congress may delegate to the President or the courts the power to either demand or request opinions from the other branches or private parties. In addition, our argument centers on the power of federal institutions. We do not discuss whether state institutions may compel legal advice of federal entities.[24] Finally, we do not consider the merits of the law-declaration model or the party-controlled model.[25]

Part I argues that federal courts cannot demand or compel legal advice from anyone—the political branches, the parties to a case, or nonparties. To begin with, the courts lack the power to treat the other branches as law clerks. Moreover, federal courts also lack the power to compel parties to make legal arguments they do not wish to make. Part II contends that federal courts may not request opinions from nonparties when the actual parties are ready, willing, and able to address all legal questions posed by the courts.

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[20] See Goldman, Note, 63 Stan L Rev at 939–41 (cited in note 17) (proposing criteria with which to judge the appointment of amici for orphaned arguments).

[21] **[Proposed Citation]**2 USC §§ 192–94 (criminalizing failure to testify or produce documents for Congress and establishing associated privileges); FRCP 37 (providing courts with the ability to order disclosure or compel cooperation with discovery), 45 (establishing rules for the subpoena power). For a discussion of the constitutionality of this practice, see McGrain v Daugherty, 273 US 135, 175 (1927) (holding that "auxiliary powers as are necessary and appropriate" to "exact information in aid of the legislative function" are included in "the constitutional provisions which commit the legislative function… that the function may be effectively exercised").

[22] See United States v Nixon, 418 US 683, 713 (1974) (establishing when executive privilege cannot be used to protect materials demanded through subpoena).

[23] See Brady v Maryland, 373 US 83, 86–88 (1963) (finding violations of constitutional due process rights when prosecutors suppress evidence favorable to defendants, whether the suppression was in good faith or bad faith).

[24] Though we do not believe that the states enjoy such power, we do not address that question in our Essay as it would involve a detour into the federal–state relationship.

[25] See Monaghan, 112 Colum L Rev at 711–22 (cited in note 16) (critiquing various commentaries on the appropriate models for the legal system).

I. JUDICIAL DEMANDS FOR LEGAL ADVICE

In the course of deciding cases and controversies judges have the power to "say what the law is" in their judicial opinions.[26] This power is vital, for it not only helps resolve a particular case, it also generates caselaw that affects the course and resolution of subsequent disputes. Given its significance, the power to pronounce the law's meaning should be exercised with care and an open mind. In deciding what the law is (and is not), a judge consults her own accumulated legal wisdom, the briefs, the oral arguments, and even Google search results.[27]

Judges may conclude that in deciding what the law is, hearing from experts in Congress and the executive branch is imperative, even decisive. On any account of legal meaning, it is easy to see why such consultation could be useful. Should a court believe that intentions and purposes are relevant, members of the Congress may have peculiar knowledge and expertise about congressional intentions. Where practice and policy matter to a court, executive officers have insights on both. Finally members of Congress and executive officers may articulate arguments that speak to resolute textualists on the bench who care neither about intent nor policy.

If a judge sincerely believes that the solicitor general and the chairman of the House Ways and Means Committee have much needed legal expertise—say about whether a so-called "penalty" is really a tax for purposes of the Constitution[28]—may that judge demand or compel legal advice from these quarters?

As discussed in Part I.A, despite the utility of political-branch legal advice, the courts have neither power nor right. Such demands are ultra vires because federal courts have no power to demand legal opinions. Moreover, the courts have no right to such opinions because the Constitution never subordinates the executive or Congress to the judiciary by requiring either to opine whenever a court would find an opinion useful in deciding what the law is.[29]

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[26] See Marbury v Madison, 5 US (1 Cranch) 137, 177 (1803) (declaring law pronouncements the province of the judiciary).

[27] See Larsen, 98 Va L Rev at 1257–60 (cited in note 17) (describing methods of legislative factfinding employed by the US Supreme Court). See also Robert Barnes, When Justices Call On-search Engines, Wash Post A17 (July 9, 2012) (discussing independent research conducted by Supreme Court justices to supplement their arguments).

[28] See National Federation of Independent Business v Sebelius, 132 S Ct 2566, 2594–2600 (2012) (including congressional intent in its analysis concluding that the penalty qualifies as a tax).

[29] When we say that the courts cannot compel legal advice from Congress or the executive, we mean no more than that the courts cannot compel, upon pain of contempt, the other branches to generate and yield up legal advice. While courts have held executive officials in contempt, we do not know of any instance in which they have held Congress in contempt.

Wholly apart from the separation of powers, demands for legal opinions also are inconsistent with the autonomy parties enjoy in litigation. As discussed in Part I.B, the parties decide which claims to bring and which arguments to press. Should a plaintiff bring a tort claim alone or append a contract claim? Should a defendant raise an unclean hands defense or merely argue that the plaintiff has not satisfied the elements of the cause of action? The parties may decide these questions for themselves taking into account their resources and interests. The alternative, one where courts decide which claims and arguments a party to a suit must make, envisions far too much power in the courts. For instance, a power to compel arguments would imply a power to force parties to reveal their weakest points. Courts could even require parties to advance arguments advancing their opponent's cause as a means of edifying the court in its search for the law. As powerful as federal courts are, they cannot compel parties to make particular claims and arguments, against interest or otherwise.[30]

We conclude with brief comments explaining why even if a court can decide matters against parties that fail to address arguments that the court believes are relevant, such a power is not part of a general authority to demand legal argumentation. Rather if such retaliation is permissible, it is so only because the federal courts otherwise have power to decide cases without regard to their legal merits. In other words, though there may be an ability to retaliate against parties that do not supply requested legal advice that ability does not imply that parties are legally obliged to yield up device whenever a court makes a demand.

A. Demands for Legal Opinions from the Branches

The Constitution never authorizes the federal courts to compel the political branches to say what the law is. The text never grants such power. The power is inconsistent with the separation of powers because it runs afoul of the independence and dignity that each

[30] Again, when we say that the courts cannot compel legal advice from the parties to a case, we mean no more than that the courts cannot hold parties in civil contempt for the failure to supply such advice.

To be clear, courts may identify legal issues pertinent to the resolution of a dispute. For example, the Supreme Court sometimes calls upon parties to brief issues not raised by the parties, including whether the Court should overturn a precedent relevant to the resolution of the dispute. See Citizens United v Federal Election Commission, 130 S Ct 876, 893 (2010). If the parties refuse to brief these issues, the Court sometimes appoints an amicus to make arguments that the parties to a dispute are unwilling to make. For additional discussion, see text accompanying notes 116–119.

branch enjoys. And there is no general practice of courts acting as if they could force the branches to opine for their benefit.

As a matter of text, when the Constitution grants a power to demand information, of whatever sort, it is generally explicit.[31] It usually does not leave such matters to shadowy implications of the basic power grants. Because no branch has an express, generic power to command the legal opinions of its counterparts, none of them may command the other two to provide legal opinions.

Consider Article II and its grants of authority. The President may demand the opinions in writing of the executive departments.[32] He may demand the advice of the Senate on treaties and appointments, or so Article II strongly implies.[33] One implication of the Opinions Clause is that the President cannot demand the opinions of judges, as the justices concluded in 1793.[34] An implication of the Appointments and Treaty Clauses is that while the Senate is a counsel to the President with respect to treaties and appointments,[35] it is not a counsel with respect to all matters. Hence the President has no right to the Senate's opinions on pardons or faithful law execution. A sound inference from both provisions is that the President lacks generic power to demand the written opinions of, or oral advice from, the House, Senate, and federal courts.

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31 The power of Congress to subpoena information from private parties and public officials would seem to be an exception to our claim. But we think that such a power is a background feature of what it means to be a legislature such that it is subsumed in many legislative powers granted to Congress. The same might be said of the judiciary's power to subpoena information—it too might be a background feature of courts. The power to demand legal advice, from whatever quarter, was not understood to be a background or understood feature of the judicial power, or so we argue below. For additional discussion, see notes 22–24 and accompanying text (discussing judicial power to subpoena information).

32 US Const Art II, § 2, cl 1 ("[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."). Alexander Hamilton argued that the Clause was redundant because the power was implicit in the hierarchical relationship between the President and department heads. See Federalist 74 (Hamilton), in The Federalist 447 (Wesleyan 1961) (Jacob E. Cooke, ed). We cite the Clause not for its effect on secretaries but for its implications vis-à-vis other branches.

33 See US Const Art II, § 2, cl 2 (providing that the president may make appointments and treaties "by and with the Advice and Consent of the Senate").

34 See Letter from John Jay to George Washington (Aug 8, 1793), in Henry P. Johnston, ed, 3 The Correspondence and Public Papers of John Jay 488–89 (Knickerbocker 1891) (concluding that the constitutional separation of powers "afford[s] strong arguments against the propriety of our extra-judicially deciding" a question posed to the Court by the President). For further discussion, see text accompanying note 41.

35 See Philip B. Kurland and Ralph Lerner, eds, 4 The Founders' Constitution 62–63 (Chicago 1987) (elaborating on the time, place, and manner through which the Senate may council the President).

Drawing inferences about the powers of the other two branches from a consideration of the President's powers in Article II is admittedly more speculative. But perhaps it is reasonable to suppose that the creation of express executive duties has negative implications for whether other such duties also exist. If the President must share information or advice in particular areas, that suggests that he lacks a wide-ranging obligation to share information and advice.

Consider the Presentment Clause.[36] When the President objects to a presented bill, he must return it with "objections" to the originating chamber. If those objections are constitutional, he should explain why the bill would be unconstitutional if enacted into law. If those objections sound in policy, he should explain why the proposed policy changes are objectionable. In the course of stating his policy objections, his readings of current law and the bill will constitute (unwanted) legal advice to Congress. The presence of this narrow duty to opine on what the Constitution, federal law, or a bill means suggests that there is no generic duty on the part of the President to supply legal advice to Congress.

Or consider the State of the Union Clause.[37] The President must share with Congress information about the Union. Although people today speak of this duty as if it is satisfied by an annual speech ("The State of the Union"), in fact the President complies whenever he conveys facts and impressions to Congress.[38] It may well be that the President must provide legal advice of a sort when he provides information on the State of the Union. For instance, if he believes that a statute is triggering unrest in certain portions of the Union, he may have to explain why the statute could be so read. But this legal advice would be narrowly related to the goal of addressing the State of the Union. By obliging the President to provide some information related to the Union, but not requiring him to opine on all legal matters, we think the Clause implicitly suggests that Congress has no generic right to the executive's legal advice.

Our point is that when one juxtaposes the presence of specific du-

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36 US Const Art I, § 7, cl 2–3 (providing that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States" and describing the veto power and procedure).

37 US Const Art II, § 3, cl 1 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.").

38 See Writing of George Washington to the Senate and the House of Representatives (Jan 8, 1790), in John C. Fitzpatrick, ed, 30 The Writings of George Washington from the Original Manuscript Sources, 1745–1799 494 (US Government 1939) (mentioning that aides would provide "such papers and estimates" to fulfill the President's obligation under the State of the Union clause).

ties related to opinions and information next to the conspicuous absence of an explicit generic Article II duty to supply legal opinions and the lack of any specific authority in Articles I and III to command such advice, the juxtaposition strongly suggests that neither Congress nor the courts may demand the executive's legal advice. In sum, the text neither authorizes judicial or congressional demands for legal advice nor obliges the executive to comply with such demands.

Structure points in the same direction. The Constitution creates three independent and coequal branches. They are independent in the sense that none is wholly dependent upon the others. They are coequal in the sense that they have an equal dignity, with none subordinate to the others. That independence and equality would be compromised, if one branch could force another to opine on legal matters. By the same token, a generic duty to opine would tend to subordinate the institution so obliged. A generic power to demand legal advice from another branch implies a certain subordinacy, in much the same way that the Opinions Clause suggests a subordinacy between the President and the departments heads. To be sure, complete subordinacy does not automatically follow from a power to command opinions. But there is a subordinacy insofar as the power to command advice or a duty to supply it necessarily envisions one branch as the principal (the commander) and the other as the agent (the commanded). We believe that the Constitution's structure suggests that the courts are not the aides or assistants of Congress or the President, even as they execute the laws made by both; the President is not the legal adviser of Congress or the courts, even as he must execute the laws of the former and the judgments of the latter; and Congress is certainly not a legal resource for the courts or the executive.

The inability of each branch to demand opinions from the others makes sense because each is fully capable of reaching its own legal conclusions. Members of Congress have aides, including expert lawyers, who help them navigate the thousands of federal laws and treaties. Additionally, members can hear expert testimony from practitioners and professors. Similarly, each executive department has a general counsel's office charged with the making sense of the laws committed to it. Should difficult questions arise, executive officials can seek a legal opinion from the Office of Legal Counsel in the Department of Justice.[39] Finally, the courts have their accumulated legal wisdom, party and amicus filings, the oral arguments, and their law

[39] **[Proposed]**The requirements for agencies' Offices of General Counsel are provided for in 28 CFR § 0.25. This regulation is authorized by 28 USC §§ 509, 510, 515–19.

clerks. Given the multiple sources of legal advice from which each branch may draw, none needs the power to require the legal advice of the others.

What is implicit in text and structure also seems to have been accepted from the Constitution's beginning. Long ago, President George Washington sought the advice of the justices on legal questions related to the French Treaty of Alliance.[40] The justices demurred, saying that the "lines of separation drawn by the Constitution" afforded a "strong argument[ ]" that giving judicial advice would be inappropriate.[41] We think the Constitution's "lines of separation" similarly counsel against reading it as if it authorized any branch a general power to demand the opinions of the others.

As relevant for our purposes is the manner in which Secretary of State Thomas Jefferson sought the legal advice of the justices. Jefferson's letter declared that Washington would be "much relieved" if the justices could answer several legal questions related to the treaty.[42] He then "asked" for the attendance of the justice to further inquire whether the public could benefit from their opinions.[43] We think the letter suggests that neither Washington nor Jefferson believed that the President could demand the opinions of the justices. After the justices declined, the lack of any executive pushback or protest suggests the same. Washington could do no more than request their advice because it was obvious that he had no constitutional right to it.

Another episode suggests that Congress did not believe it could command opinions. During the extraordinarily long debate that preceded the Decision of 1789,[44] it never occurred to members of Congress that they might demand that the holdover secretaries of the executive departments provide their expert opinion on the best way to read the Constitution. Congress never sought such opinions despite

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40 **[Proposed Citation]**See 54 Yale L J 307, 339 n 147 (1945).

41 See Letter from Jay to Washington at 488–89 (cited in note 34) (reasoning that the checks created by the separation of powers and that the Court's status as one of last resort favored this conclusion).

42 Letter from Thomas Jefferson to the chief justice and judges of the Supreme Court of the United States (July 18, 1793), in Paul Leicester Ford, ed, 6 The Writings of Thomas Jefferson 351 (Knickerbocker 1895) (discussing the complicated legal questions presented by treaties and noting that these questions are "so little analogous to the ordinary functions of the Executive, as to occasion much embarrassment & difficulty").

43 Id.

44 The Decision of 1789 relates to the statutes passed by the First Congress that implied that the President had a constitutional power to remove executive officers. For a discussion of this episode, see generally Saikrishna Prakash, New Light on the Decision of 1789, 91 Cornell L Rev 1021 (2006) (detailing and explaining the events relating to Congress's resolution of the question of the President's removal power).

the fact that secretaries regularly gave opinions to the Continental Congress under the old regime. Members of Congress likely understood that while the secretaries were their assistants under the old order, they were not so under the Constitution. More to the point, members perhaps recognized that the Constitution did not empower them to draw upon the legal wisdom of executive branch officials.[45]

We are unaware of any early incident suggesting that the courts are without power to demand the opinions of the executive or Congress. Yet perhaps more instructive is that the courts apparently never made such demands, despite the utility of such opinions. The Washington administration housed some of the finest legal minds of the era, including Alexander Hamilton, Edmund Randolph, and Thomas Jefferson.[46] The courts surely could have benefitted from their wisdom. The absence of any such orders suggests that the courts were not thought to possess a generic power to treat executive branch officials as involuntary clerks.[47]

When we expand our inquiry beyond the Founding era, we are unaware of any episode where the courts have demanded to know what the President or leading members of Congress thought the law was. Chief Justice John Marshall never issued a rule to members of Congress seeking legal opinions on when an appointment vests.[48] Chief Justice Roger Taney never demanded to know the opinions of members on whether Dred Scott could be a citizen and whether he had been freed by virtue of his travels into the Northwest Territory.[49] Justice Rufus Peckham never directed the executive or Congress to file a brief about the validity of New York's law limiting the work hours of

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[45] The First Congress did pass a statute obliging the Treasury secretary to provide various materials to Congress. See An Act to Establish the Treasury Department § 2, 1 Stat 65, 65–66 (1789), codified as amended at 31 USC § 301. But these reports were to concern plans for the collection of revenue and for the support of the public credit. They did not relate to the meaning of the law. It should be noted that some opposed this reporting requirement on the grounds that it violated separation-of-powers principles. They thought that giving an executive officer such a role in legislation smacked too much of the English ministry. See Ron Chernow, Alexander Hamilton 281 (Penguin 2004) (explaining the reasons for the opposition to the act defining the Treasury secretary's duties).

[46] **[Proposed Citation]**See R. Gordon Hoxie, The Cabinet in the American Presidency, 1789–1984, 14 Presidential Studies Quarterly 209, 211–14 (1984).

[47] For a discussion of the Supreme Court's order to show cause issued to James Madison in Marbury, see Part I.B.

[48] See generally Marbury, 5 US (1 Cranch) at 137 (mentioning the previous order to show cause, laying out the legal contours of the case, and undertaking its own analysis of the distinction between commissions and appointments).

[49] See Dred Scott v Sandford, 60 US 393, 403 (1857) (determining that the question before the Court was whether or not the plaintiff was a citizen, and consequently had "the privilege of suing in a court of the United States").

bakers under the Fourteenth Amendment.[50] If there is evidence from practice of a generic judicial power to demand legal advice from the political branches, it has remained remarkably hidden.

Lest our point be misunderstood we add two caveats. First, our argument does not reach the duty of the executive to share information with the branches, particularly information under its control. We believe that information requests directed to the executive related to documents and testimony are cut from a different cloth than are demands for legal opinions. As noted earlier, the executive must provide information to Congress as part of its State of the Union obligation.[51] The executive likewise has an obligation to provide evidence to the courts. That is the lesson of United States v Nixon,[52] and it is one that goes back to President Thomas Jefferson's tangle with John Marshall during the trial of Aaron Burr.[53]

Such information requests, when fulfilled, help a coordinate branch make decisions committed to it. Knowledge of certain facts peculiarly within the purview of the executive is typically crucial for Congress to decide if new laws are needed, existing laws ought to be reformed, or the executive has committed an impeachable offense. Similarly, the executive must sometimes disclose facts and documents to the courts if the latter are to decide cases.

In contrast to the need for facts that are peculiarly known to the executive, there simply is no need for the courts or Congress to access the legal conclusions formed in the executive branch. Again we admit that the executive's legal opinions would be useful to the other branches. Yet their bare utility does not authorize the other branches to demand them, particularly in a context in which each branch has ample means to reach its own legal conclusions.

Second, our argument against compelled legal opinions does not deny that each branch may choose to share its legal opinions with others. There was a time when some thought that one branch should

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50 See Lochner v New York, 198 US 45, 53–56 (1905) (determining that freedom of contract is protected by the Fourteenth Amendment, and that the state can only legitimately interfere with this freedom if its actions are "fair, reasonable, and appropriate").

51 The executive is also obligated to provide information to Congress in conjunction with legitimate exercises of Congress's subpoena authority. See text accompanying note 34. For a discussion of the ways in which Congress and the executive negotiate over the boundaries of Congress's subpoena power, see generally Neal Devins, Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing, 48 Admin L Rev 109 (1996).

52 418 US 683, 703–07 (1974) ("Neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.").

53 United States v Burr, 25 F Cases 30, 30–34 (CC Va 1807) (summarizing the disagreement over whether a subpoena duces tecum may be issued to the President).

not share its views about how another branch ought to exercise its powers.[54] The supposed bar likely was based on the notion that such advice would constitute an intrusion into the prerogatives of another branch.[55] But we think that view is mistaken, as it raises the wall of separation between the branches much too high. Each political branch may share advice with the other two branches and the public, of whatever sort.[56] Both of the political branches have the power to generate legal conclusions and publicize them, without limit.

B. Demands for Legal Opinions from the Parties

Till this point, our focus has been on the separation of powers. But another facet of our argument rests on the principles of party autonomy and the limited power of federal courts. We believe that the parties to a case have the right to decide which claims and arguments to make. A court's authority to say what the law is does not permit the court to compel whatever legal advice that might facilitate the exercise of that authority.

We recognize that our argument may strike some as contrary to current practices, and hence counterintuitive. Judges may seem quasi-sovereign over their (rather limited) territory. Jurists wear ceremonial robes, insist upon decorum and civility, and command respect. But these trappings hardly suggest that the judicial power has little or no limits. In particular, the considerable authority that judges wield in their courtrooms by no means suggests that they may order parties to make unwanted arguments, any more than it means that judges can force individuals in their courts to file unwanted suits.

We freely admit that when a court is seized of a case, it has a raft of powers that arise from what it means to be a court. Article III obviously grants some authority over the case proceedings and some authority over the parties themselves. A partial list would include the

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54 Washington complained to Jefferson that congressional requests to convey salutations to foreign nations was an invasion of the executive. See Franklin B. Sawvel, ed, The Complete Anas of Thomas Jefferson 68 (Round Table 1903) (recording that Washington told Jefferson that the House's actions were unexpected and "[t]hat [Washington] apprehended the legislature would be endeavoring to invade the executive").

55 **[Proposed Citation]**See Letter from Jay to Washington (Aug 8, 1793) at 488–89 (cited in note 34).

56 In our view, the branches ought to share their views with each other as a means of fulfilling their vow to support the Constitution. If one branch can help another arrive at the correct legal conclusion, then the Constitution is better defended. Moreover, a regime where the branches share their legal views may lead to a more stable understanding of the Constitution. See Neal Devins and Louis Fisher, Judicial Exclusivity and Political Instability, 84 Va L Rev 83, 106 (1998) (finding stability in each branch opining on the Constitution, gradually forming consensus, and allowing legitimacy-enhancing public participation in the process).

power to impose decorum, to control admission to their bar, to punish contempt, to compel disclosure of evidence and facts, and to dismiss stale suits.[57] But this power does not include the qualitatively different authority to compel legal advice or arguments. The difference is that while the above authorities are arguably necessary for the court to function and have long been thought so, the power to demand legal advice is hardly necessary for proper judicial functioning and, to our knowledge, has never been thought to be so.

Notwithstanding the modern movements away from the dispute resolution model and towards the law declaration model and other innovations in judicial practices,[58] the parties retain a great measure of autonomy. In every case before a court, each party decides for itself what claims it will bring and which arguments it will make. A plaintiff may decide not to bring a plausible tort claim and raise a contract claim only. The defendant may elect, for whatever reason, to omit a potentially successful defense or not bring a colorable counterclaim. Courts cannot force parties to articulate arguments, claims, or defenses, even if they suspect that they are legally valid or case dispositive.

This has long been the case, as far as we know. In Marbury v Madison,[59] Chief Justice Marshall never suggested that James Madison had violated a constitutional or legal duty by failing to submit any response to the Court's rule (the order to show cause why a mandamus should not issue).[60] Though Marshall condemned the failure to issue a commission to William Marbury, he never faulted Madison for his default. Marshall ought to have found Madison in contempt if the secretary of state was legally obliged to provide an answer to the Court's order to show cause. In the modern context, when the Supreme Court decides which legal questions to hear, the parties are free to demur. It is not uncommon for the Court to grant certiorari in a case where the party who won below chooses not to litigate any further.[61] In these circumstances the Court has never held such a party in contempt or more generally claimed a power to direct the respondent to expend funds and argue as the Court would have them litigate. The Court in-

57 See Chambers v NASCO, Inc, 501 US 32, 43 (1991) (explaining that courts have certain implied and necessary powers given the nature of their institution and their exercise of other express powers).

58 See notes 16–17 and accompanying text.

59 See 5 US (1 Cranch) 137 (1803).

60 See Id at 153–54 (mentioning that "no cause has been [shown]" but discussing that fact no further).

61 For a sampling of cases in which one or both parties to a dispute refuse to pursue potentially germane legal issues, see Goldman, Note, 63 Stan L Rev at 918–39 (cited in note 17).

stead asks an amicus to argue the questions presented.[62] This means of satisfying the Court's appetite for particular arguments suggests that the Court does not believe that it may simply order the parties to contest legal questions.[63]

To be sure, when a court asks a party to pursue a point not found in their filings, parties typically accept the invitation. A party may even welcome the invitation, especially when it seems designed to further the party's case. But it is an invitation, not a command. Like all invitations it may be declined, to the chagrin of the inviter. And it will be declined if the party believes it gains nothing by doing what the court desires. As noted, sometimes parties before the highest Court in the land decline to address an issue that the Court believes is relevant. In these cases the Court never acts as if the party has violated a duty. What is true for the Supreme Court is no less true for the inferior courts.

If we step back for a moment and consider the consequences of a power to demand legal advice of parties, we can see why the courts have not generally asserted the power. To begin with, there is the problem associated with the breadth of such a power. If courts could force parties to make legal arguments, a court could force the plaintiff to amend her complaint and bring ancillary claims the plaintiff would otherwise not wish to bring. The court might command the plaintiff to bring a contract claim, in addition to the tort claim that was actually part of her complaint. In many cases this would waste resources and act as a deterrent to the initiation of suits because bringing a suit could lead the party to incur all sorts of uncertain costs as the court seized control of the litigation.

Going further, a power to compel legal advice could be used to force the parties to yield up the weakest points of their own arguments. "Tell us all the flaws in your briefs and pleadings," a court might demand and the parties would be obliged to comply, on pain of contempt, with potentially disastrous results for one side. While courts might ask some variant of this question during oral arguments, counsel often evades the question in some clever way. If courts may compel such concessions, however, the evasion might lead to contempt charges.

At the extreme, a power to demand legal opinions from parties could be used to force both parties to file briefs and motions for the

62 See id at 918–19 (describing the reasons for which parties fail to defend lower court judgments and thus prompt amicus appointments by the Court).

63 Alternatively, it may be that the Court does not believe that compelled arguments will be good ones.

other party. The plaintiff might be forced to lodge a filing refuting her complaint. The defendant could be compelled to file documents suggesting that his legal defense is without merit. The obligation would extend beyond the filings to the oral arguments. In a case where one party has an extraordinary oral advocate, a court might greatly benefit from being able to force that lawyer to argue both sides.

Those who believe that federal courts may force a party to make arguments must defend all of this. Or, at the very least, they must at least articulate and defend a line that permits a court to order some arguments, claims, and opinions and not others. We do not believe that this can be done with success.[64]

Our task is simpler, for our line is cleaner. We do not believe that the power to decide cases and controversies includes any power, sweeping or narrow, to force parties to articulate legal arguments on demand. To find such a power in Article III is to read too much into it. The commencement of a case does not grant a court the power to force a party to articulate any legal claims or arguments, much less the best argument against the party's interests.[65]

Although we have focused on the parties to a case, an even stronger argument can be made that nonparties cannot be forced to articulate claims, arguments, and opinions. While courts have the power to compel information from nonparties, such as witnesses or custodians of evidence, that is not the same as being able to treat a nonparty as a font of legal wisdom. A district court cannot dragoon either former Solicitor General Seth Waxman or former Solicitor General Paul Clement into supplying legal advice, with or without compensation for service rendered, because the federal courts have no power to require legal service on demand.

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[64] One might suppose that courts can force a party to advance only those arguments that are potentially advantageous to that party. This seems simple enough in theory but is fraught with difficulties. A court may wish to hear a particular argument and issue an order compelling as much. But the party so compelled may already have concluded that a particular argument is wholly meritless and hence not worth advancing. At this point, the party will be forced to make claims or argue points for no other reason than to satisfy the court's legal curiosity. The end result, more likely than not, is that the court ultimately reaches the same conclusion. This is all a waste of resources, suggesting that there are sound policy reasons underlying party autonomy. **[Proposed citation]** See Larsen, 98 Va L Rev at 1302–03 (cited in note 16) (describing the virtues of promoting party autonomy in the legal system). As compared to the courts, the parties are generally better positioned to know which arguments best advance their goals.

[65] Courts, of course, are free to raise legal issues they think germane to the legal dispute and ask the parties to address those issues. If the parties refuse, however, courts cannot compel such arguments but, instead, may appoint amici to make those arguments. See text accompanying notes 116–119.

C. The Possibility of Judicial Reprisals

If we are right that the federal courts lack a constitutional power to demand legal advice, two things follow. First, those who ignore a judicial demand for an opinion do no violence to the Constitution. Ignoring an ultra vires order is perfectly legal. Second, courts cannot punish for failure to comply with such demands. If a court demands an opinion and the executive chooses not to supply legal advice, the court cannot fine or jail the officers who rebuff it. Likewise, a judge cannot punish a private party's failure to opine as the judge would have it. In sum, those who refuse judicial demands for legal advice are not contemnors.

Can a court do something short of punishing via fine or jail time? Courts sometime decide a legal question against a party when the party fails to address it.[66] We are unsure of what to make of this practice. Although it is common, it is in tension with the notion that courts should decide cases consistent with the law. If a plaintiff files a meritless complaint and the defendant elects to ignore the judicial summons issued in response, perhaps the court ought to consider the merits of the plaintiff's complaint before deciding the case and not merely sanction the defendant for its absence.[67] That is what Chief Justice Marshall did in Marbury. He did not rule that William Marbury had been appointed simply because James Madison never addressed the matter.[68]

In any event, deciding an issue against a party because it fails to address it is not the same as punishing the party for having violated the law. Consider a different context. The branches often retaliate against the others as a means of displaying their displeasure. The executive may veto legislation to exhibit his unhappiness stemming from the Senate's rejection of a treaty. Congress may curb a court's jurisdiction to signal its discontent with the latter's judicial decisions.[69] Such retaliation is not taken to mean that the victimized branch necessarily has violated a constitutional duty or that the retaliating branch enjoys a constitutional right that was somehow violated. All it typically means is that a branch is using a discretionary power to re-

66 See, for example, Dred Scott, 60 US at 393.

67 **[Proposed Citation]**See Arthur J. Park, Fixing Faults in the Current Default Judgment Framework, 34 Campbell L Rev 155, 155–58 (2011) (summarizing the history of default judgments).

68 See generally Marbury, 5 US (1 Cranch) 137 (never deciding whether Marbury should receive a commission by reference to Madison's default).

69 **[Proposed Citation]**See Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearings Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 108th Cong. 137 (2004).

taliate and thereby conveying its displeasure. So if Congress pares the White House budget because members do not like the President's economic agenda that cut does not imply that the agenda is somehow illegal or unconstitutional.

Similarly, if the courts can decide an issue or a case against a party based on that party's failure to make a legal argument that the court desires, that power to so rule does not imply a constitutional power to compel the production of opinions. It just means that the court has a limited power to decide an argument or case without regard to the merits and has chosen to exercise it, likely as a means of expressing its irritation with a party. The power to retaliate against a litigant in this way does not imply a power to compel the production of legal arguments for the benefit of a court, even as it often has the in terrorem effect of inducing compliance.

Before considering judicial requests for opinions, a summation might prove helpful. The federal courts cannot compel the executive or Congress to produce legal opinions. Any such power would make either branch something of a permanent clerk of the courts, a status inconsistent with their independence and equality. If such an extraordinary power were given to the courts, it surely would be found in a specific provision and not left to implication. It follows that neither Congress nor the President must comply within any "demand" the courts might make. Satisfaction is a matter of prudence or desire to help the court, not a course of action the Constitution obliges.

More generally, we believe in the principle of party autonomy. The parties rightfully decide which claims to make and which arguments best further those claims. After all it is their case. Federal courts lack power to force litigants to articulate legal arguments merely because the courts wish to adjudicate them. In particular, federal judges cannot compel a litigant to amend her complaint to include new claims or to file motions that address issues that the court wishes to consider. Any such power would suggest that the courts could force one party to articulate arguments for its opponent, something we are sure is beyond the power of an Article III court.

When the Fifth Circuit demanded a legal opinion announcing the Department of Justice's views on judicial review and insisted that the letter address the President's claim about the Affordable Care Act, it lacked authority to compel the production of an opinion.[70] When the Department of Justice produced the three-page letter in forty-eight hours, as the Fifth Circuit panel demanded, it acted under no real legal

[70] **[Proposed Citation]**See text accompanying notes 1–3.

compunction. Habit, respect, and a desire to curry favor might have compelled the production, but not the Constitution itself.[71] Despite the crucial role that judges play in our constitutional system and despite their need to correctly decide what the law is, the Constitution never places the executive, or parties to a case more generally, on a retainer for the benefit of the judiciary.

II. JUDICIAL REQUESTS FOR LEGAL ADVICE FROM NONPARTIES

What then of judicial requests for legal opinions? If the courts cannot force the executive, Congress, or members of the public to supply them with legal advice, perhaps judges can request that guidance. The separation of powers concerns articulated in Part I seem less salient here. In the face of judicial requests, Congress and the executive ostensibly remain independent and need only supply the courts with legal opinions that serve their institutional interests. Indeed, congressional offices as well as the Department of Justice frequently file amicus briefs on their own initiative. So why would it be problematic for federal courts to request legal advice from these branches, or for that matter, the general public?

Below we explain why judicial requests for legal opinions from nonparties are generally impermissible.[72] Specifically, Article III does not authorize federal judges to request the legal opinions of Congress, the executive, or private interests. Article III does not replicate the civil law inquisitorial system or empower courts to act as if they were congressional committees. We agree that federal judges may accord more weight to the filings of the solicitor general or top Supreme Court advocates—expertise has its advantages.[73] Yet such possibilities

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71 See text accompanying notes 64–65.

72 Our claim in this Section solely concerns judicial requests for advice from nonparties on questions of federal law. We believe that the federal courts may solicit legal advice and argumentation from the parties to a case. Such requests can run the gamut from a mere plea for clarification of existing arguments to an appeal to address wholly new legal concerns that the courts believe might be relevant. As noted in Part I, however, any such requests for clarification or new argumentation are mere requests and are not constitutionally mandatory. See notes 57–65 and accompanying text. Courts, however, may appoint amici to advance arguments abandoned by the parties to a dispute. See text accompanying notes 116–119. See also note 12 (discussing federal court certification of state law issues to state courts).

73 See Richard J. Lazarus, Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar, 96 Georgetown L J 1487, 1493–1501 (2008) (discussing the success achieved by so-called Supreme Court experts at the bar); Lisa Sandstrom Simard, An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism, 27 Rev Litig 669, 697–98 (2008) (summarizing and explaining data indicating the high regard in which governmental amici are held).

hardly imply that federal judges have a generic power to request legal advice from nonparties.

We begin by briefly detailing Supreme Court practices governing requests for legal advice to give the reader a sense of the lay of the land. The Supreme Court routinely "calls for the views of the Solicitor General" (CVSG), a practice that has transformed the workload of the solicitor general and Court–executive branch relations.[74] We also consider whether such requests impermissibly favor the arguments of Court-anointed advocates. Finally, we suggest that under current practice nothing prevents the Court or its lower court counterparts from actively soliciting legal advice from anyone.

We then turn to our argument. First, we explain why requests for legal advice are anathema to the federal legal system. Unlike inquisitorial civil law systems or congressional committees, the federal courts generally lack the power to request legal advice. Second, we discuss the larger debate about whether courts, especially the Supreme Court, should simply resolve legal issues identified by the litigants or, instead, embrace a law-declaration model in which the judicial role in "saying what the law is" is paramount. Under the law declaration model (but not the dispute resolution model), courts can call sua sponte for briefing on issues they deem relevant to the resolution of a dispute[75] and appoint amici to make arguments that a court identifies as salient and which one or both parties are unwilling to pursue.[76] Whichever model (law declaration or dispute resolution) is superior, neither supports a judicial power to request advice when both parties respond to all issues deemed relevant by a court.

The only time a federal court may request legal advice from nonparties is when a party to a case is unwilling to address an argument that the court deems relevant to a legal dispute properly before it. In cases where a party refuses to argue a particular point ("orphaned argument") or refuses to defend the case entirely ("orphaned case"), the federal courts may appoint an amicus to argue the point or the case in order to ensure that the courts receive adversarial arguments on matters properly before them. Even as we take aim at the federal courts' general power to request legal advice from nonparties, we do not take issue with these narrow practices.

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74 **[Proposed Citation]**Stefanie A. Lepore, The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General, 35 J S Ct Hist 35, 37–39, 47 (2010) (explaining the practice of calling for the views of the solicitor general and the certiorari process generally).

75 See Monaghan, 112 Colum L Rev at 689–91 (cited in note 16) (emphasizing the law declaration model's focus on law pronouncements).

76 See notes 116–119, 135 and accompanying text.

The end result is the surprising (but we think correct) conclusion that a current and routine practice, the CVSG, is unconstitutional because the federal courts generally lack the power to request legal advice of nonparties. Although Congress might be able to authorize such requests via its Article I powers,[77] Article III's adversarial system never authorizes the federal courts to act as if they had the powers of a civil law inquisitorial court or a congressional investigation committee.

A. Supreme Court Requests for Legal Advice

For at least sixty years, the Supreme Court has sought legal advice from the solicitor general of the United States in cases in which the government is not a party.[78] Sometimes the Court calls for an amicus merits brief from the solicitor general (as it did in Brown v Board of Education[79] and other landmark Warren Court rulings).[80] These requests, however, are quite rare (usually no more than one or two a year).[81] More typically (especially in recent years), the Court calls for the views of the solicitor general on whether it should grant certiorari in a case.[82] In about twenty-three cases a year, the solicitor general submits a filing in response to a CVSG certiorari request.[83]

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77 See notes 101, 137.

78 See Stefanie A. Lepore, The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General, 35 J S Ct Hist 35, 37–39 (2010) (documenting the close relationship between the Court and the solicitor general). We focus on the Supreme Court because we are unaware of any statistics compiled about the nature and frequency of lower court requests for legal advice.

79 347 US 483 (1954) (holding that the Fourteenth Amendment prohibited "separate-but-equal" public schools); 349 US 294 (1955) (discussing the amici's position that significant work had already been done to achieve desegregation of schools, and that courts will need considerable discretion to execute the Brown ruling).

80 See Lincoln Caplan, The Tenth Justice: The Solicitor General and the Rule of Law 26–32 (Alfred A. Knopf, Inc 1987) (relating the story of the events surrounding the solicitor general's brief in Brown).

81 See Timothy R. Johnson, The Supreme Court, the Solicitor General, and the Separation of Powers, 31 Am Polit Rsrch 426, 427 (2003) (noting average of 2.15 requests per year from 1953–1986). Over the past five years, we could locate only two such requests. See Email from Fred Dingledy, Reference Librarian at William and Mary School of Law, to Neal Devins, Professor at William & Mary Law School (July 30, 2012) (on file with authors). In understanding why there are next to no merits brief requests today, we suspect that the Court sees no need to reach out to the solicitor general, for the solicitor general, on its own initiative, submits merits briefs in most cases. See note 87.

82 See notes 83–88 and accompanying text. See also Ryan C. Black and Ryan J. Owens, The Solicitor General and the United States Supreme Court: Executive Branch Influence and Judicial Decisions 49–71 (Cambridge 2012) (discussing the Supreme Court's process for granting certiorari and arguing that the Office of the Solicitor General can exercise considerable influence over this process); David C. Thompson and Melanie F. Wachtell, An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and Call for the Views of the Solicitor

CVSGs significantly impact the Office of the Solicitor General and help define the relationship between the solicitor general and other parts of the executive branch and the Court. To start, even though CVSGs technically are requests, the solicitor general "regards participation as mandatory; the office invariably files an amicus brief in response, and then generally continues to participate as an amicus at the merits stage if the Court grants the case."[84] Executive branch compliance with CVSGs is so routine and complete that some suggest that the solicitor general has come to resemble a "judicial officer."[85] Such habitual compliance with CVSGs constrains the solicitor general's ability to advance the President's agenda before the Court. Indeed, when one compares the number of cases in which the solicitor general responds to CVSGs—approximately twenty-three cases per year—with the number of cases where the solicitor general seeks certiorari on its own initiative—about sixteen cases per year[86]—it is remarkable how

General, 16 Geo Mason L Rev 237, 278–87 (2009) (describing the types of cases that prompt justices to invoke a CVSG and the frequency with which the Court invites CVSGs).

83 See Memorandum from Fred Dingledy, Reference Librarian at William & Mary Law School, to Neal Devins, Professor at William & Mary Law School (July 13, 2012) (on file with authors). CVSG requests have spiked up over the past four terms; the number of requests was around fourteen per year the prior four terms. See Thompson and Wachtell, 16 Geo Mason L Rev at 284 (cited in note 82) (sharing results from the data collected).

84 Margaret Meriwether Cordray and Richard Cordray, The Solicitor General's Changing Role in Supreme Court Litigation, 51 BC L Rev 1323, 1354 (2010) (discussing the Court's control over the solicitor general's involvement as an amicus). See also Black and Owens, Solicitor General at 51 (cited in note 82) (referring to CVSG as "order" and "command"); Michael J. Bailey and Forrest Maltzman, Inter-branch Communication: When Does the Court Solicit Executive Branch Views *3 (unpublished manuscript, 2005), online at http://home.gwu.edu/~forrest/fmcvsg.pdf (visited Nov 3, 2012) (characterizing CVSGs as invitations "you don't turn down"). The solicitor general invariably complies because doing so cultivates her relationship with the Court, thereby enhancing both the status of her office and her ability to advance the president's legal policy agenda before the Supreme Court. See Neal Devins and Saikrishna Prakash, The Indefensible Duty to Defend, 112 Colum L Rev 507, 537–45 (2012) (arguing that the Office of the Solicitor General is motivated by strengthening its relationship with the Supreme Court, enhancing its credibility, and maintaining its independence).

85 For Justice Ginsburg, the solicitor general is a "true friend of the Court" when responding to CVSG requests; for former Solicitor General Drew Days, the solicitor general operates, not as an advocate, but as an "officer of that court" through the CVSG process. See Thompson and Wachtell, 16 Geo Mason L Rev at 270–71 (cited in note 82) (quoting Ginsburg and Days). For an alternative account of why the Court makes CVSG requests, see Bailey and Maltzmann, Inter-branch Communication at *7–10 (cited in note 84) (arguing that the justices seek out the views of the executive branch for strategic reasons, including an assessment of potential executive branch resistance to their decision-making).

86 See Cordray and Cordray, 51 BC L Rev at 1348 (cited in note 84) (communicating historical trends connected to certiorari petitions). See also Adam D. Chandler, The Solicitor General of the United States: Tenth Justice or Zealous Advocate?, 121 Yale L J 725, 728 (2011) (tracing the decline in the number of certiorari petitions filed by the solicitor general as well as the steady 70 percent success rate of its petitions).

much today's solicitor general operates at the Court's beck and call.[87] Rather than shaping the number and types of case through its own certiorari filings, the modern solicitor general is largely reactive, taking her direction from the Court. By responding to CVSGs, solicitors general act as "extra law clerks for the Court," pitching in "when times get busy" and otherwise.[88]

While the vast majority of the Supreme Court's requests for legal advice are addressed to the solicitor general, the Supreme Court has sought nonparty advice from Congress, the state attorneys general, and private parties. Requests for the advice of the chambers of Congress date back to at least Myers v United States,[89] where the Court actively sought the advice of the Congress on whether the President had constitutional power to unilaterally remove a postmaster in the face of a statute that required the Senate's concurrence.[90] The practice of seeking the advice of state officials is "extremely rare" with "only a handful of examples in the past few decades."[91] The most recent example was in 2009 when the Court called for the views of the solicitor general of Texas on whether it should grant certiorari in a right-to-counsel case.[92] Requests for legal opinions from private parties typi-

87 Changes in the solicitor general's practice of filing amicus briefs also call attention to how today's Office of the Solicitor General operates in the Court's shadow. Today, the solicitor general files amicus briefs in most cases in which the government does not appear as a party. See Cordray and Cordray, 51 BC L Rev at 1353–55 (cited in note 84) (noting that the solicitor general has participated in more than 75 percent of Supreme Court cases since 1994 through CVSGs and amicus briefs). By way of comparison, the solicitor general filed around fifty certiorari petitions per year during the 1980s and filed amicus briefs in around one-third of cases in which the government was not a party. See id at 1348–55 (providing historical information on petitions).

88 See Bailey and Maltzmann, Inter-branch Communication: When Does the Court Solicit Executive Branch Views at *5 (cited in note 84) (quoting various sources which describe Solicitor General as an extra clerk on CVSG matters). For a provocative argument that links the Court's shrinking docket to the Solicitor General's growing hesitancy to file certiorari petitions, see Cordray and Cordray, 51 BC L Rev at 1366–69 (cited in note 84) (proposing that the solicitor general might be ceding control to the Court). See also Chandler, 121 Yale L J at 729–32 (cited in note 86) (arguing that the solicitor general is abdicating his responsibility to be an advocate).

89 272 US 52 (1926).

90 See Saikrishna Prakash, The Story of Myers and its Wayward Successors: Going Postal on the Removal Power, in Christopher H. Schroeder and Curtis A. Bradley, eds, Presidential Power Stories 165, 171 (Foundation 2009) (mentioning that the Court invited Senator George Wharton Pepper to argue in favor of the relevant statute on "behalf of Congress").

91 Amy Howe, More on CVSG-Texas in Rhine v. Deaton, SCOTUSblog (Oct 5, 2009), online at http://www.scotusblog.com/2009/10/more-on-cvsg-texas-in-rhine-v-deaton/ (visited Nov 3, 2012) (contextualizing the request made by the Court).

92 See Order List, *5 (S Ct filed Oct 5, 2009) (available at http://www.supremecourt.gov/orders/courtorders/100509zor.pdf) (requesting Texas Solicitor General to weigh in on certiorari petition for 08-1596); Amy Howe, More on CVSG-Texas in Rhine v. Deaton (cited in note 91). See also Memorandum from Fred Dingledy, Research Librarian at William & Law School, to Neal Devins, Professor at William & Mary Law School (Aug 1,

cally take place after the Court has granted certiorari and one of the parties to a dispute is unwilling to argue an issue that the Court deems relevant.[93] In these cases (usually one per year), the Court may request that an attorney appear as amicus to advance the abandoned argument.[94]

To our knowledge, the Supreme Court has never revealed the source of its generic power to request opinions. Whatever its source, the power appears to be without limit. Under current practice, the Court might request opinions of trade groups (the Chamber of Commerce), associations dedicated to individual rights (the NAACP Legal Defense Fund and the National Rifle Association), academic groups (the American Society for Legal History and the American Law and Economics Association), law professors (Pam Karlan, Michael McConnell, and Neal Katyal), and elite members of the Supreme Court bar (Maureen Mahoney and Carter Phillips).[95] The Supreme Court might even find an advisory panel composed of former solicitors general especially helpful in deciding whether to grant certiorari and how to dispose of cases on the merits, even more useful than receiving advice from the current solicitor general. There is often wisdom in the views culled from many expert minds.[96]

Some may find these possibilities troubling because they believe that it is improper either to call for the views of an advocate for only one side of an issue or to elevate particular interest groups or lawyers. Such judicial requests may undermine the sense that a case is considered on the merits and not because of judicial favoritism. Put another way, some may conclude that the systematic use of favored judicial

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2012) (identifying Rhine as only case in which Court sought out views of a state solicitor general since 2006).

93 Of course, the Court first asks the parties to the dispute to address the relevant legal claims. For example, in cases where one party has filed a petition for certiorari and the other party has not responded to that petition, the Court sometimes "request[s] a response to the petition [from the winner below] . . . and will defer action on the case until the views and arguments of the respondent[s] have been made known." Eugene Gressman, et al, Supreme Court Practice 508 (BNA 9th ed 2007) (detailing the practices for opposing certiorari). For an empirical study of so-called Calls for Responses (CFRs), see Thompson and Wachtell, 16 Geo Mason L Rev at 245–70 (cited in note 82) (documenting that parties treat CFRs as orders)**[AP]**. Where the party fails to respond, the Court may appoint amici to take on the orphaned case. See Goldman, Note, 63 Stan L Rev at 933–39 (cited in note 17) (summarizing the reasons that a party might fail to respond and an amicus must take his place).

94 See Adam Liptak, For Some Orphaned Arguments, Court-Appointed Guardians, NY Times A16 (Dec 13, 2010). For additional discussion, see notes 61–62, 135.

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96 Ian McLean and Fiona Hewitt, Condorcet: Foundations of Social Choice and Political Theory 34–40 (Elgar 1994) (explaining Condorcet's insight that the accuracy of group decisions can be increased by increasing the probability that a given member is correct or by increasing the absolute size of the majority in the group).

"counselors" undermines faith in the rule of law—suggesting that law is not the ultimate touchstone and, instead, the views of the chosen few are controlling.[97]

Of course the same critique applies with equal force to the Supreme Court's current reliance on the solicitor general. Empirical studies and the justices' own comments make clear that solicitor general filings are read with special care.[98] Indeed, when the justices call for the views of the solicitor general on whether to grant certiorari, they typically follow her recommendation.[99]

We do not think that concerns about judicial favoritism, standing alone, are persuasive. The solicitor general and other top advocates deserve the deference that comes from a history of top-notch briefs and oral arguments. Expertise has its rightful advantages. Still we are mindful that others would find the anointing of the Chamber of Commerce in business cases or the ACLU in First Amendment cases troubling in a constitutional sense. If that is the case, they should be equally troubled by the obvious and outsized influence that the solicitor general wields upon the Court.[100]

We find current practice troubling because it suggests no limiting principle, with the courts able to seek out legal advice from anyone. We do not think that the judicial power of Article III extends so far. Equally troubling is that the federal courts have pointed neither to Article III nor some congressional statute to justify the practice of soliciting argument; instead, they have simply assumed this sweeping power.[101]

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97 **[Proposed Citation]**Consider Richard J. Lazarus, 96 Georgetown L J at 1521–22 (cited in note 73) (describing the emergence of an elite group of attorneys who routinely argue in front of the Supreme Court and the how this group might influence the Court).

98 See note 73. See also Black and Owens, Solicitor General at 70–71 (cited in note 82) (analyzing the influence of the solicitor general in the certiorari process and finding that even the "justices who are least likely to follow the [solicitor general due to policy disagreements] still do so 36 percent of the time").

99 See Black and Owens, Solicitor General at 58–70 (cited in note 82) (using empirical evidence to examine the effect that the solicitor general's recommendations have on the justices); Thompson and Wachtell, 16 Geo Mason L Rev at 275–77 (cited in note 82) (commenting that the data shows that the Court follows the solicitor general with respect to certiorari in the majority of cases but that decisions on the merits are uncorrelated to the position of the solicitor general).

100 The solicitor general typically advances the policy views of the president and, more generally, advocates for executive branch power. Sai/Aaron: We need not embellish, but I can put together a longer footnote with sources. Also, this footnote sentence could go in the text with some sources in the footnote.

101 For instance, the landmark Judges Bill of 1925 provided the Supreme Court with authority to decide which cases to take and, in so doing, transformed the Court from an institution that had no choice but to exercise judicial power to one in which the Court decides what legal issues it wants to address. See Judiciary Act of 1925 § 237, Pub L No 68-415, 43 Stat 936, 937–38 (1925), codified in various sections of Title28. For an excellent treatment of tension between

B. Judicial Requests for Advice and the Federal Legal System

Despite being a fixture of recent Supreme Court practice, Article III never authorizes judicial requests for legal advice from nonparties. The federal legal system, unlike civil law systems, is adversarial, not inquisitorial. And while the boundaries of what constitutes an adversarial system are subject to debate,[102] there is no question that "[p]arties, rather than officers of the state, control[ ] case preparation."[103] Indeed, "party presentation is cited as the major distinction" between the federal system and the inquisitorial systems of continental Europe.[104] More than that, by separating the prosecutorial and adjudicatory functions, the adversarial system limits executive branch control over the judiciary and, in so doing, comports with the constitutional ideal of an independent judiciary performing distinctively judicial acts.[105] Correspondingly, the case or controversy requirement mitigates the risk of the judiciary overstepping its bounds and performing nonjudicial functions.[106] Specifically, by looking to adversarial parties and not state agents to present the facts and legal arguments, the case or controversy requirement "limit[s] the business of federal courts to . . . [matters] historically viewed as capable of resolution through the judicial process" and, in so doing, "assure[s] that the federal courts will not intrude into areas committed to the other branches of government."[107]

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discretionary certiorari power with traditional judicial review, see Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill, 100 Colum L Rev 1643, 1713–30 (2000) (arguing that the discretion granted to the Court through the certiorari process allows the justices to engage in policy-making). We believe that if the federal courts are to have power to seek legal advice from nonparties, they must be given that power by Congress, for the Constitution itself never conveys such power. Yet Congress has never granted such power to the federal courts. There is nothing in the Federal Rules of Evidence or any congressional law that authorizes federal judges to seek expert opinions on questions of federal law. For additional discussion, see notes 109–110 and accompanying text (discussing the appointment of expert witnesses).

102 As we will discuss in Part II.C, the two competing adjudicatory models utilized by American courts (dispute resolution and law declaration) both recognize that the American system is adversarial. See notes 133–136.

103 Judith Resnik, Managerial Judges, 96 Harv L Rev 374, 381 (1982) (asserting that the American legal system is 'more adversarial than most.' ").

104 Frost, 59 Duke L J at 449 (cited in note 16) (contrasting the American system in which the parties select the facts and legal arguments with the European system in which judges investigate and present the case).

105 See Resnik, 96 Harv L Rev at 381 (cited in note 103) (arguing that the adversarial model's focus on the parties is consistent with the Framers' desire to vest significant judicial power in the public through juries, public trials, and limits on court power).

106 **[Proposed Citation]**US Const Art III, § 2, cl 1 (extending the judicial power to various types of "Cases" and "Controversies").

107 See Flast v Cohen, 392 US 83, 95 (1968) (utilizing these ideas behind justiciability in connection with questions related to standing in taxpayer suits).

Without question, Article III's embrace of the adversarial model is core to the judicial function "both in how the facts [and legal arguments] are presented and in which court is responsible for finding them."[108] Indeed, even when the federal system allows for departures from a purely adversarial system, those departures often highlight the dominance of that model. For example, while federal judges are authorized to appoint expert witnesses (typically in cases that deal with technical issues of fact),[109] judges rarely do so for fear that such appointments might "inappropriately deprive the parties of control over the presentation of a case."[110]

In sharp contrast, "civil-law systems give judges the leading role in deciding which facts need to be ascertained and bringing them out (thus seeking directly to determine the truth)."[111] Civil law systems use trials that involve "hearings and consultations for the presentation and consideration of evidence".[112] While the focus of the inquisitorial model is judicial fact-finding, the "active role" of the judge sometimes extends to matters of law.[113] In Germany, for example, the federal Constitutional Court can "call for specialized opinions from third parties and appoint experts to report on specific legal issues."[114]

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[108] See Gorod, 61 Duke L J at 25 (cited in note 16) (suggesting that the American system's commitment to the adversarial system relies on the adverse parties to rigorously test the facts of their case and inspires "complacency").

[109] See Anne-Marie C. Carstens, Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases, 86 Minn L Rev 625, 684 (2002) (remarking that the Federal Rule of Evidence § 706 power to appoint experts is rarely invoked). And while there is nothing prohibiting the appointment of expert witnesses to provide information on legal questions, we are unaware of any instance in which a federal judge appointed an expert witness to provide a legal opinion on the meaning of federal law. To our knowledge, the only instances in which federal courts have asked experts to provide information on legal questions involved foreign court interpretations of foreign law (and we are aware of only a few cases in which court-appointed experts provided information on foreign law). See Matthew J. Wilson, Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding, 46 Wake Forest L Rev 887, 927–30 (2011) (asserting the value of court-appointed foreign law experts and noting that the practice is used rarely).

[110] Stephen Breyer, The Interdependence of Science and Law, 280 Science 537, 538 (1998) (commenting that appointment of experts raises questions about process and results). See also Joe S. Cecil and Thomas E. Willging, Court-Appointed Experts: Defining the Role of Experts Appointed under Federal Rule of Evidence 706 4–5 (Federal Judicial Center 1993) (noting the fact that federal judges see party-controlled adversarial model as the baseline).

[111] See Rowe, 36 Sw U L Rev at 205 (cited in note 15) (suggesting that American judges are moving toward the civil-law model by expanding their managerial role).

[112] James G. Apple and Robert P. Deyling, A Primer on the Civil-Law System 37 (Federal Judicial Center 1995) (contrasting civil-law trials and common-law trials).

[113] John H. Langbein, The German Advantage in Civil Procedure, 52 U Chi L Rev 823, 843 n 71 (1985) (referring to the German law principle that judges apply general law without party prompting).

[114] Peter L. Murray and Rolf Stürner, German Civil Justice 416 (Carolina Academic 2004) (mentioning this practice in the context of "complex or portentous" legal issues).

Against this backdrop, there is little question that judicial requests for nonparty legal opinions adhere to the inquisitorial model of civil law countries, not the adversarial model embraced by the federal system. The power to seek out information on questions of law and fact is central to the inquisitorial model (which merges executive and judicial functions) and alien to the American model (which vests substantial power in the hands of the adversaries specifically to ensure the separation of the executive and judicial functions[115]).

Judicial requests for nonparty legal opinions are alien to the federal courts for a second, related reason. Such requests for legal advice have the look and feel of a legislative, not judicial, act. These requests mirror what congressional committees do through hearings and have little connection to an adversarial system in which parties and amici submit facts and legal arguments to courts. More to the point, while federal courts adjudicate particular "cases or controversies," legislatures exercise a general jurisdiction and can act affirmatively in assessing issues of facts and law. Given their sweeping authority, legislative committees are not confined by party pleadings or filings and can subpoena any and all witnesses who may assist Congress in sorting out the relevant facts and law.[116] By way of contrast (and reflecting fundamental differences between courts and legislatures under the American system), courts cannot call witnesses, must adhere to rules against ex parte communications, and must decide a particular case at a particular moment in time.[117] And while courts may consult amicus briefs and conduct their own research (now fueled by the Internet),[118]

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[115] **[Proposed Citation]**See Resnik, 96 Harv L Rev at 380–82 (cited in note 103) (discussing the history of the American adversarial system and the Framers' desire to maintain judicial independence from the executive).

[116] For an overview of the structural differences between courts and legislatures, including an assessment of whether Congress is better equipped than federal courts to gather and assess information, see Neal Devins, Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis, 50 Duke L J 1169, 1177–87 (2001) (comparing the fact finding capacities of the legislative and judicial branches and assessing the branches' relative strengths and weaknesses in this role). See also Jeffrey J. Rachlinski, Bottom-Up versus Top-Down Lawmaking, 73 U Chi L Rev 933, 937–63 (2006) (highlighting strengths and weaknesses of legislative and judicial decision-making).

[117] For this very reason, judicial minimalists argue that the Supreme Court should recognize the judiciary's institutional limits by issuing "narrow" and "shallow" decisions. See Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 10–14 (Harvard 1999) (explaining narrowness and shallowness in terms of the practical, functional world of the Court). See also Cass R. Sunstein and Adrian Vermeule, Interpretation and Institutions, 101 Mich L Rev 885, 948–50 (2003) (arguing that debates over legal interpretation should be informed by assessments of the judiciary's institutional capacity).

[118] For a critical assessment of the Supreme Court's use of Google searches, see Larsen, 98 Va L Rev at 1295–301 (cited in note 17) (submitting potential dangers created by factfinding in the digital age). For a critical assessment of the Supreme Court's use of amicus briefs, see Rebec-

the American system never anticipates that courts will seek legal opinions from nonparties because Article III never authorizes as much.[119]

We can think of but one exception, an exception that comports with Article III's commitment to the adversarial model.[120] The power of courts to "say what the law is" includes the power to ask the parties to a dispute to argue legal issues that the courts identify as relevant. When one or both parties are unwilling to make such arguments, a court may request amici to file briefs. In such circumstances, appointment of amici (a request for legal advice) helps ensure an adversarial presentation of all legal issues the court deems pertinent. When both sides to a legal dispute are willing to make arguments on all relevant legal issues, however, a court's solicitation of legal arguments transcends the bounds of federal judicial power. In these circumstances the court has no need for outsiders to present legal opinions to the court because the parties themselves fulfill that function. If the power to request opinions in these circumstances is tied to the perceived need for the court to hear both sides of an argument, as we believe it is, then there can be no power to request opinions when both sides to a case are ready, willing, and able to make their own arguments. In other words, when the parties are adversarial on all relevant points of law, the courts cannot solicit legal advice from nonparties in order to provide more or better adversarialness.

C. Law Declaration, Dispute Resolution, and Requests for Advice.

By generally leaving it to parties and not the state to frame legal disputes, the adversarial model insulates the courts from other parts of the government.[121] At the same time, party control sometimes constrains the judiciary's ability to "say what the law is." Parties may fail to raise issues germane to the resolution of disputes and may be un-

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ca Haw, Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal, 89 Tex L Rev 1247, 1267–70 (2011) (elaborating on the issues raised by the reliance on amicus briefs that contain the kind of detailed economic research required for antitrust decisions).

[119] In making this claim, we recognize that judicial adjuncts—most notably special masters—sometimes call nonparty witnesses in their fact-finding efforts. See Carstens, 86 Minn L Rev at 653–54 (cited in note 109) (describing the rules and practices employed in appointing special masters in the Supreme Court); James S. DeGraw, Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters, 66 NYU L Rev 800, 820–28 (1991) (discussing the extensive investigative power granted to special masters and the deference given to special masters by judges). Whether or not this practice is fundamentally at odds with the adversarial process, we are unaware of any instance in which a special master requested legal opinions from nonparty witnesses.

[120] See notes 133–136 and accompanying text.

[121] See text accompanying notes 105–107.

willing to pursue some legal arguments that would support their side of the case.[122] For some scholars (and increasingly the Supreme Court), the judiciary's responsibility to "say what the law is" sometimes trumps party control of the dispute. Others reject the law declaration model, urging the courts to adhere to the "formally dominant" dispute resolution model.[123]

We take no side in this dispute. Requests for legal advice have no place in either the law-declaration or dispute-resolution model when both parties to a legal dispute stand willing to argue all relevant legal issues (including those issues raised by the presiding court). Again, there may be a place for court-appointed amici when either party abandons or fails to pursue relevant legal arguments. But our analysis suggests that the Court should not otherwise solicit the views of nonparties, including the solicitor general, Congress, or members of the Supreme Court Bar.[124]

Under the dispute-resolution model, courts exist to "settle disputes" between parties and, consequently, should look solely to the law and facts submitted by the parties.[125] Correspondingly, "If the parties agree on a proposition, that proposition simply is not in dispute" and a court should neither raise issues sua sponte nor enlist amici to make legal arguments that one or the other party is unwilling to make.[126] Needless to say, under this model courts cannot order or solicit nonparty legal opinions.

The law-declaration model emphasizes that adjudication is about "articulating public norms as well as settling private disputes" and, relatedly, that "judges serve a dual role: they must resolve the concrete disputes before them, and . . . are also expected to make accurate statements about the meaning of the law that govern beyond the pa-

[122] See Frost, 59 Duke L J at 467–69 (cited in note 16) (collecting several major cases that show deviation from the norm of strict party presentation); Goldman, Note, 63 Stan L Rev at 939–50 (cited in note 17) (evaluating the decisions to invite amici with respect to the goals of the adversary system); Neal Devins, Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering Miranda, 149 U Pa L Rev 251, 258–69 (2000) (connecting courts' Article III duty to adhere to the law to decisions that go beyond what the parties argued legally).

[123] See Monaghan, 112 Colum L Rev at 668–69 (cited in note 16) (explaining that, while the dispute resolution model is "formally dominant," the Supreme Court increasingly adheres to the law-declaration model). For leading articles defending these two models, see note 16.

[124] See notes 78–88and accompanying text (discussing the Supreme Court's practice of "[c]alling for the [v]iews of the Solicitor General" in around two dozen cases a year).

[125] Lawson, 109 Mich L Rev at 1218 (cited in note 16) (relying on a functional and practical understanding of the reason for the existence of courts).

[126] Id at 1219 (defining disputes in terms of what the parties themselves dispute).

rameters of the parties and their dispute."[127] Litigants therefore do not control the record; judges can turn to amicus briefs and do independent research to supplement litigant filings.[128] Litigants, moreover, cannot dictate what issues or interpretive methodologies courts will use. For example, it is for the courts, not the litigants, to determine whether a court should invoke the avoidance canon.[129] Likewise, litigants cannot disregard a potentially controlling statute and compel a constitutional ruling when a case might be resolved on statutory grounds.[130] Furthermore, if the Supreme Court wants to revisit the continuing validity of its free speech, federalism, or choice of law doctrine, litigants cannot stop the Court.[131] In all these ways, the law declaration model speaks to the power of courts, especially the Supreme Court, to have both "the final say on any constitutional issue appropriate for judicial resolution" and "maximum freedom in agenda setting, quite irrespective of the litigants' wishes."[132]

Yet even as the law-declaration model limits litigant control in framing and presenting cases, it does not disavow or upend the "American adversarial legal system," including the central idea that—unlike the inquisitorial model—"parties [typically] present the facts

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[127] Robert G. Bone, Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation, 75 BU L Rev 1273, 1275 (1995) (contrasting the traditional dispute resolution model with Fuller's hybrid conception); Frost, 59 Duke L J at 452 (cited in note 16) (claiming that judicial issue creation helps judges produce better statements of law in certain categories of cases).

[128] See Gorod, 61 Duke L J at 25–37 (cited in note 16) (discussing extra-record fact-finding and potential tension between Supreme Court's use of amicus briefs and adversarial model)**[AP]**; Larsen, 98 Va L Rev at 1257–58 (cited in note 17) (discussing modern Court's use of internet searches to supplement party and amicus briefs).

[129] See Frost, 59 Duke L J at 510 (cited in note 16) (submitting that court usage of the avoidance doctrine is an important part of controlling interpretive methods and setting limits on judicial power).

[130] See Frost, 59 Duke L J at 509–11 (cited in note 16) (validating issue creation when it is used to preserve the integrity of statutes); Devins, 149 U Pa L Rev at 279–84 (cited in note 122) (arguing that the rule of law is supported when courts apply the proper law, including in this case statutes that supercede constitutional law).

[131] See Devins, 149 U Pa L Rev at 261–62 (cited in note 122) (discussing Court's reconsideration of federal common law doctrine in Erie notwithstanding party efforts to preserve then-existing doctrine of Swift v Tyson), citing Erie Railroad Co v Tomkins, 304 US 64 (1938) and Swift v Tyson, 41 US (16 Pet) 1 (1842). Other instances in which the Court called for supplemental briefing to consider overruling of existing doctrine include Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 536 (1985) (holding that states cannot claim immunity from federal regulations based on "traditional" governmental functions) and Citizens United v Federal Election Commission, 130 S Ct 876, 893 (2010) (ruling against the federal government with respect to political freedom of speech for corporations).

[132] See Monaghan, 112 Colum L Rev at 722 (cited in note 16) (announcing the victory of the law declaration model in the US Supreme Court despite some remaining premises from the dispute resolution model).

and legal arguments to an impartial and passive decisionmaker."[133] "Allowing judges to raise issues is not equivalent to transforming the judge into an advocate for one side or the other," for both parties are given an opportunity to address the issues.[134] And if one of the parties is unwilling to pursue a court-identified issue, the court may appoint an amicus to ensure an adversarial presentation of all issues deemed relevant by the court.[135] In other words, the law declaration model limits party control in ways that facilitate adversarial presentations of all legal issues deemed relevant by a court. Consequently, as we noted earlier, when both parties to a dispute stand ready to address all legal issues identified by a court, the law-declaration model does not suggest that the courts may order or request supplemental legal filings.[136]

Put another way, while it is possible that particular adherents of the law declaration model may believe that the federal courts should have the power to request legal opinions from nonparties, any such belief does not follow from the principles that underlie the law declaration model. After all, the law declaration model does not suppose that the courts must have any and all resources that facilitate judicial declaration of what the law is. For example, we do not know of any adherents of the law declaration model who believe that courts have a constitutional right to law clerks or a limited docket, both of which would be extremely useful in correctly declaring the law.

CONCLUSION

We think it clear that the federal courts lack constitutional authority to demand legal opinions from others, governmental actors or otherwise. The Constitution generally spells out when one branch owes a duty to supply advice to others. Yet there is no power granted to federal judges to demand opinions of other branches. Relatedly, neither of the political branches has any constitutional duty to comply with any demands for legal opinions that the federal courts might make. More generally, the federal judicial power is a power to decide

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[133] See Frost, 59 Duke L J at 449 (cited in note 16) (describing the distinction between the American adversarial legal system and the inquisitorial systems common in Europe).

[134] See id at 501 (arguing that the line between advocate and judge as framer of issues can be maintained by allowing both sides to address the issues).

[135] See id (noting the role of amici in keeping judges from becoming advocates). For a fuller discussion of this issue, see Goldman, Note, 63 Stan L Rev at 939–50 (cited in note 17) (considering the circumstances where court appointment of amicus is consistent with the underlying goals of the adversarial system).

[136] In making this point, we express no opinion on whether the law-declaration model extends to CVSGs and the decision to grant certiorari or, instead, is limited to those cases that the Court will decide.

cases. While that power includes authority over court proceedings—to compel the production of evidence and to control admission to practice—it does not encompass the different power to compel the production of legal advice. Indeed, we believe that the federal courts even lack the power to compel the parties to a case to supply legal advice. The parties are free to ignore judicial demands for legal argumentation.

Similarly, federal courts generally may not even request legal advice from nonparties. Federal courts are neither congressional committees nor civil law inquisitorial tribunals, both of which have free reign to seek legal advice. The only time that federal courts may request legal advice is when one or both parties to a dispute refuse to supply legal arguments regarding an issue the court deems relevant. Under these circumstances, the law declaration model suggests that the courts may request legal advice of third parties. In no other circumstances do either the law declaration or dispute resolution models suggest that the courts have power to request legal advice.

Our critique of federal judicial requests for legal advice means that CVSGs are beyond the scope of the judicial power conveyed by Article III. Put another way, unless and until Congress authorizes such requests, CVSGs are unconstitutional.[137] While CVSGs are a staple of recent practice, no one, not even the Supreme Court, has ever explained the source of the authority to request the legal opinions of nonparties. We are confident that when one begins that much belated inquiry, one will conclude that the federal courts lack the power to seek legal advice from any and all.[138]

At a minimum, judicial orders and requests for legal advice require justification of the sort that the courts have never offered.[139] Rather than assume a general, roving power to demand or request nonparty legal opinions, federal courts should justify such demands and requests by reference to Article III or some statute. Instead, courts, especially the Supreme Court, assume that they can give "homework assignments" to the Department of Justice and others. This judicial hubris is a function of the Supreme Court's eagerness to declare legal

[137] For identical reasons, the Supreme Court could not claim inherent power to control its docket through grants of certiorari. That power came through the Judges Bill of 1925. See note 103.**[Proposed Citation]** For history on the Judges' Bill, see generally Hartnett, 100 Colum L Rev (cited in note 101).

[138] We speak here of legal advice on questions of federal law. As noted earlier, the issue of federal court certification of state law issues to state courts is beyond the scope of this Essay. See note 12.

[139] See Monaghan, 112 Colum L Rev at 683–711 (cited in note 16) (noting failure of courts to formally articulate a theory defending its increasing embrace of the law declaration model).

principles rather than merely to resolve disputes.[140] Our Essay will be a success if it spurs courts and scholars to examine and justify this unexplored feature of federal court (especially Supreme Court) practice.

[140] See id (reviewing Supreme Court cases and finding an increasing interest in final say and agenda control).