

# The Limits of Outsourcing: Ethical Responsibilities of Federal Government Attorneys Advising Executive Branch Officials

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*“Unnecessary, overbroad discussions in some of these memos that address abstract legal theories, or discussions subject to misinterpretation, but not relied upon by decision-makers are under review.”*

— White House Counsel Judge Alberto Gonzales<sup>1</sup>

*“In the initial development of these Secretary of Defense policies, the legal resources of the Services’ Judge Advocates General and General Counsels were not utilized to their full potential.”*

— Former Secretary of Defense James Schlesinger<sup>2</sup>

## I. INTRODUCTION

Matthew is the general counsel for the Department of Defense (DoD). Amidst piles of papers, he has just received a request for a legal opinion whether applying certain types of physical force during prisoner interrogation will violate domestic<sup>3</sup> and international laws such as the Geneva Convention.<sup>4</sup> To advance his career, Matthew knows he needs to

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<sup>1</sup> Press Briefing, Judge Alberto Gonzales, White House Counsel (June 22, 2004), available at <http://whitehouse.gov/news/releases/2004/06/20040622-14.html>. See also Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics is Disavowed*, WASH. POST, June 23, 2004, at A01, available at LEXIS, News Library, WPOST File.

<sup>2</sup> JAMES R. SCHLESINGER, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 8 (2004), <http://www.globalsecurity.org/military/library/report/2004/d20040824finalreport.pdf>.

<sup>3</sup> For example, the War Crimes Act of 1996, 18 U.S.C. § 2441(a) (2000), provides for criminal penalties for grave breaches of the Geneva Conventions; and the Torture Victim Protection Act, 28 U.S.C. § 1350 (Supp. 2001), proscribes torture committed by state officials or under the color of law.

<sup>4</sup> The Geneva Conventions and their Additional Protocols are designed to protect non-combatants (i.e. civilians, medics, chaplains, aid workers), as well as those who can no longer fight (i.e. wounded troops and prisoners of war). Over 190 States adhere to the Geneva Conventions. See, e.g., Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 816 (2005); Manuel E. F. Supervielle, *Islam, the Law of War, and the U.S. Soldier*, 21 AM. U. INT’L L. REV. 191 (2005); The Geneva Conventions: the core of international humanitarian law, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions> (last visited Nov. 26, 2006).

win the favor of his superiors and their bosses, most of whom are politically appointed members of the administration. Clearly the current administration wants to implement the proposed policy, or it would not have sought a legal opinion on the matter. Matthew agrees with the administration's policies, which is why it appointed him. However, Matthew is not a policymaker; he is a lawyer. His role is to opine on the legality, not the morality or utility, of policies.

The administration knows the proposed policy would be controversial if revealed publicly. Policymakers rarely requested legal guidance from Matthew on routine policy decisions. Here he knew the request for a legal opinion stemmed from one of two origins. Optimistically, Matthew was asked for a legal opinion because the administration wants to ensure all of its policies are compatible with the law. Pessimistically, the request for a legal opinion was intended to shield the policymakers from subsequent criticism, or at least deflect the scrutiny for an unpopular decision onto the General Counsel's office. While Matthew does not relish public scrutiny of his work, he also understands that staying in the graces of the administration might lead to an appointment to a new, more powerful job<sup>5</sup> before the scrutiny ever occurs<sup>6</sup>—especially if he can keep his legal opinion secret under the guise of national security.<sup>7</sup> Matthew shares many of the administration's goals and wants to help.<sup>8</sup>

Watching the latest news about hostages in Iraq on the evening news, Matthew is reminded of the potential impact of the Geneva Convention. American soldiers, sailors, and airmen rely on compliance with the Geneva Convention for their own safety if they are captured during the war. The Geneva Convention depends on mutuality for its enforcement; therefore,

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<sup>5</sup> See, e.g., Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 499–500 (1993). Lund notes that

the President, the Attorney General, and even the White House staff hold the keys to some of the most desirable appointments to which lawyers aspire. In recent decades, for example, those who have headed OLC have been rewarded with seats on the Supreme Court at a higher rate than people serving in any other position in government, including even the more prestigious and powerful positions of Attorney General and Solicitor General.

*Id.*

<sup>6</sup> See, e.g., Adam Liptak, *Author of '02 Memo on Torture: 'Gentle' Soul for a Harsh Topic*, N.Y. TIMES, June 24, 2004, at A1 (noting the successful nomination of Jay Bybee to the Ninth Circuit before his involvement in drafting the OLC torture memoranda became public knowledge). See also Editorial, *Abu Ghraib Rewarded*, N.Y. TIMES, July 17, 2006, at A16 (noting the nomination of William Haynes II, General Counsel for the Department of Defense, for a federal judgeship despite being “closely involved in shaping some of the Bush administration's most legally and morally objectionable policies, notably on the use of torture.”).

<sup>7</sup> See, e.g., the Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. app.) (restricting the use of classified materials in criminal trials).

<sup>8</sup> See Mitchell Rogovin, *Reorganizing Politics Out of the Department of Justice*, 64 A.B.A. J. 855, 856 (1978) (quoting then Assistant Attorney General Rehnquist's observation that “any President, and any attorney general wants his immediate underlings to be . . . politically and philosophically attuned to the policies of the administration.”).

undercutting its enforcement by the United States could trigger reduced adherence by other nations that may one day hold Americans captive as prisoners of war.<sup>9</sup> A news story about Saddam Hussein's torture chambers reminded Matthew of how the broader public might react to the use of questionable techniques by the United States.<sup>10</sup>

Earlier in his career, Matthew practiced intellectual property law. From this experience he knew the importance of not appearing to willfully violate the law.<sup>11</sup> Just like shopping for a legal opinion that declares that a patent does not infringe, Matthew knows that, if he looks hard enough, he can find an attorney to write an opinion that the administration's proposed policy does not infringe the law. Such an opinion would help the administration justify its policies, but what about the soldiers and the general public's concern about torture? In private practice Matthew knew the code of ethics for lawyers called for him to zealously represent his client's interests above all else.<sup>12</sup> But who was his client in this situation? Was it the President, the Secretary of Defense, the Department of Defense, the troops on the ground, or perhaps some broader public interest? Where could Matthew look for an ethical role model?

In litigation opposing counsel would expose any shortcomings in Matthew's legal analysis. Yet this was not litigation. What control mechanisms existed to counter a wayward legal opinion given to policymakers?

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<sup>9</sup> Kenneth J. Keith, *Remarks: Rights and Responsibilities: Protecting the Victims of Armed Conflict*, 48 DUKE L.J. 1081, 1105 (1999)

The parties to the Geneva Conventions deny themselves the freedom to vary their obligations by mutual agreement in so far as any agreement would adversely affect the rights of those protected by the Convention or Protocol. . . . It prohibits a state from terminating or suspending, by reason of a material breach by another party, the operation of those treaty provisions "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

*Id.* (citations omitted). See also John McCain, *In Praise of Do-Gooders*, WALL ST. J., June 1, 2004, at A16, available at LEXIS, News Library, WSJNL File ("America's observance of the Geneva Conventions and our support for the ICRC in part determines the willingness of other nations to do the same."); Vanessa Blum, *Don't Go There*, CORP. COUNS., Oct. 2005, at 91 ("Army judge advocate general Thomas Romig argued that the [interrogation methods] approved by the Department of Justice 'could adversely impact' Pentagon interests by sparking international criticism, and could lead to retaliatory abusive treatment of American troops captured by the enemy.").

<sup>10</sup> See, e.g., Thanassis Cambanis, *Rebuilding Iraq: Accounts of Torture Strengthen Influence of Shi'ite Clergy*, BOSTON GLOBE Apr. 27, 2003, at A24, available at LEXIS, News Library, BGLOBE File.

<sup>11</sup> See, e.g., Imron T. Aly, Note, *Encouraging Unprofessionalism: The Magic Wand of the Patent Infringement Opinion*, 12 GEO. J. LEGAL ETHICS 593, 596-97 (1999) (noting that the most reliable and most significant defense against a claim of willful patent infringement is the reliance on the legal opinion of counsel stating that the allegedly infringed patent is invalid, unenforceable, or not infringed).

<sup>12</sup> MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980) (calling for the attorney to aspire to "represent his client zealously within the bounds of the law").

This article aims to answer these questions. Part I introduces dilemmas that occur for government lawyers as a result of political pressure. Part II discusses the relationship between the government attorney and his client. Part III explores the higher standards and responsibilities that apply to the government prosecutor and civil litigator. Part IV explains the rationale for placing special ethical requirements on government lawyers. Part V discusses why guidelines for government prosecutors and government civil litigators require adaptation before they can be applied to government lawyers who provide legal counsel to policymakers. Part VI explains why existing safeguards against incorrect legal advice by government attorneys are insufficient. Finally, Part VII proposes procedural and administrative guidelines for government lawyers advising policymakers that could have averted the perceived negative contribution of government attorneys to the Abu Ghraib prison scandal,<sup>13</sup> including an extension of the non-subdelegation doctrine.

## II. IDENTIFYING THE CLIENT

When most people think of a government attorney, they think of a prosecutor. Prosecutors do not have a singular client.<sup>14</sup> While prosecutors may take heed of the concerns of a crime victim, the victim is not the prosecutor's client.<sup>15</sup> Some crimes, such as the possession of a handgun by a felon,<sup>16</sup> do not even have an individual victim who might make demands on prosecutors. Law enforcement officers responsible for a defendant's arrest work closely with the prosecutor, yet they are not the prosecutor's client either.<sup>17</sup> Further, law enforcement officers generally cannot even maintain attorney-client privilege with prosecutors.<sup>18</sup>

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<sup>13</sup> See Bradley Graham, *Rumsfeld Takes Responsibility for Abuse*, WASH. POST, May 8, 2004, at A01, available at LEXIS, News Library, WPOST File (Secretary of Defense Rumsfeld explained to Congress that "[t]here are a lot more photographs and videos that exist. If these are released to the public, obviously it's going to make matters worse."); see also Mark Danner, *Torture and Truth*, New York Review of Books, <http://www.nybooks.com/articles/17150> (2005); Andrew Zajac, *Justice Nominee Gonzales Says Torture Unacceptable*, CHI. TRIB., Jan. 7, 2005, at C1, available at LEXIS, News Library, CHTRIB File; Michael Kilian, *Senators Blast Army Report on Prison Abuse*, CHI. TRIB., July 23, 2004, at C4, available at LEXIS, News Library, CHTRIB File.

<sup>14</sup> Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C.L. REV. 923, 931 (1996).

<sup>15</sup> *Id.* at 931–32.

<sup>16</sup> See 18 U.S.C.A. § 922(g)(1) (West 2000 & Supp. 2006).

<sup>17</sup> See *Town of Newton v. Rumery*, 480 U.S. 386, 395 n.5 (1987) ("There may be situations, of course, when a prosecutor is motivated to protect the interests of . . . officials or of police. But the constituency of an elected prosecutor is the public . . .").

<sup>18</sup> See Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C.L. REV. 625, 636–37 (1979); see also *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) (if the prosecutor were to receive potentially exculpatory information from law enforcement officers and keep it confidential, "that does not comport with standards of justice, even though . . . his action is not 'the result of guile' . . .").

As a government attorney, the prosecutor has special responsibilities.<sup>19</sup> The U.S. Supreme Court declared that prosecutors represent the sovereign, and their goal is not to “win a case, but that justice shall be done.”<sup>20</sup> “Justice,” however, is a broad term that requires interpretation.<sup>21</sup> Some scholars believe justice refers to a prosecutorial responsibility to ensure the defendant receives “procedural justice”<sup>22</sup> or at least the appearance thereof.<sup>23</sup>

Scholars have long debated who qualifies as the client of the government civil litigator. Some argue the government civil litigator should treat her agency or department as her sole client (the Agency-Dominant Model);<sup>24</sup> while others suggest the client is the broader public interest (the Public Interest Model), extending beyond the loyalty owed to any particular person, party, or government department.<sup>25</sup> Still other scholars have suggested a dynamic compromise-oriented model whereby the interaction between the agency and the attorney reshapes both the attorney’s and the agency’s shared understanding of the Public Interest.<sup>26</sup>

Critics of the Public Interest Model say it is impossible to define and implement the “public interest” because “it is impossible to represent a community which is always divided.”<sup>27</sup> Further, allowing government

<sup>19</sup> See MODEL RULES OF PROF’L CONDUCT R. 3.8 (2006).

<sup>20</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935). This case has been cited over 200 times by federal courts. See also *Brady*, 373 U.S. at 87 (“My client’s [the U.S. government’s] chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.” (quoting past Solicitor General Simon E. Sobeloff)).

<sup>21</sup> See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2006) (referring to prosecutors as “ministers of justice”). For a brief overview of definitions of “justice” through the ages, see 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5026 (2d. ed. 2005).

<sup>22</sup> Amie N. Ely, Note, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum’s Curtailment of the Prosecutor’s Duty to “Seek Justice”*, 90 CORNELL L. REV. 237, 248 (2004).

<sup>23</sup> See Mark D. Villaverde, Note, *Structuring the Prosecutor’s Duty to Search the Intelligence Community for Brady Material*, 88 CORNELL L. REV. 1471, 1542 (2003) (suggesting the court may be just as concerned about the appearance of a fair trial system and public confidence in the criminal justice system as they are about the system’s fairness itself).

<sup>24</sup> See generally Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

<sup>25</sup> Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 270 n.3 (1999) (“[T]he goals of . . . the government lawyer necessarily include pursuit of the public interest . . . .”); see also Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 794–95 (2000) (“government lawyers represent not only the government entity, but also the public. . . .”) (quoting Jack B. Weinstein & Gay A. Crosthwaite, *Some Reflections on Conflicts Between Government Lawyers and Clients*, 1 TOURO L. REV. 1, 4–5 (1985)).

<sup>26</sup> Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1182–85 (2002).

<sup>27</sup> William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539, 564 (1986) (declaring the “public interest” is a “vague and meaningless abstraction.”) (quoting Sale, *The City Attorney’s Relationship with Council*

attorneys to define the public interest runs counter to democratic principles because most government attorneys are not elected, nor even directly appointed; therefore they are less accountable to the electorate than their superiors who are appointed to run the department or agency.<sup>28</sup> Worse yet, if an attorney is a “loose cannon” with a vastly different perception of the public interest than his superiors and colleagues, he may be difficult to manage within his own workplace,<sup>29</sup> and his agency will behave inconsistently and unpredictably as a result.<sup>30</sup> Other critics of the Public Interest Model point out that those litigating against a government agency are not restrained in their own advocacy efforts, thus the agency’s attorneys should not be held back in their own litigation tactics on behalf of the agency.<sup>31</sup> Unless the agency’s attorneys are unrestrained in their advocacy of the agency’s position, the agency will be unable to withstand the zealous advocacy of its opponent. The underlying philosophy of the Agency Model is that the ends of the agency can justify the means it uses, even if such means impinge on the public interest.<sup>32</sup>

Supporters of the Public Interest Model and critics of the Agency-Dominant Model counter that there are sufficient existing definitions of public interest to guide government attorneys so they do not become ‘loose cannons.’<sup>33</sup> Public values are inferable from traditional legal materials

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*and Staff: Determining Who is the Client in Day-to-Day Affairs*, 11 CURRENT MUN. PROBS. 10, 11 (1984)).

<sup>28</sup> *Id.* at 565.

<sup>29</sup> The Federal Bar Association seems concerned about agency management, and so it supports the Agency-Dominant Model in its ethical guidelines. See Federal Bar Ass’n Federal Ethical Considerations (1973), in C. Normand Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A. J. 1541, 1542–44 (1974) (the government lawyer’s client “is the agency where he is employed . . .”). The Federal Bar Association extended this viewpoint in its Federal Ethical Considerations. *Id.*; MODEL RULES OF PROF’L CONDUCT FOR FEDERAL LAWYERS R. 5.1 (1990).

<sup>30</sup> See Josephson & Pearce, *supra* note 27, at 564 (“Inevitably, the lawyer who decides for herself which conflicting point of view to represent decides what the public interest is. Such a lawyer is not a lawyer representing a client but a lawyer representing herself.”); see also Villaverde, *supra* note 23, at 1480–81.

<sup>31</sup> Berenson, *supra* note 25, at 790–91.

<sup>32</sup> Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 985 (1991).

The ethical codes therefore do not impose a duty on the government lawyer to behave differently than a private lawyer. . . . Indeed, requiring the government lawyer to do otherwise would be inconsistent with the articulated justification for the adversary system. The central principle that purportedly underlies the adversary system is that ‘justice’ can best be achieved by the battle of two zealous advocates before a neutral decision maker.

*Id.*

<sup>33</sup> See Berenson, *supra* note 25, at 817 (“[A]ttempts by an attorney to identify . . . the public good in legal decision making are based on the familiar tools of legal practice, such as interpreting and applying judicial decisions, statutory and constitutional interpretation, and understanding and applying the broader norms of legal culture.”). But see Robert J. Marchant, *Representing Representatives: Ethical Considerations for the Legislature’s Attorneys*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 439, 456 (2002) (“[I]t is reasonable to expect that legislative attorneys will inaccurately assess the public

including statutes, judicial opinions, and regulations.<sup>34</sup> Further, given the deep hierarchy of modern government, the link between the attorney's policymaking supervisor and the general public may become so attenuated that the supervisor is no more electorally accountable than the attorney herself.<sup>35</sup> Sometimes the attorney may know more about the law than her policymaking superior. Thus, while the attorney may have a less direct connection to the electorate than the policymaker, the attorney's unique professional competence may still make her better suited than the policymaker to extract the meaning of the "public interest" from a law or statute than those chosen to oversee her agency.<sup>36</sup>

### III. THE SPECIAL RESPONSIBILITIES OF THE GOVERNMENT LAWYER

Much has been written about the special ethical responsibilities of the prosecutor,<sup>37</sup> and some has been written about the ethical responsibilities of the government civil litigator.<sup>38</sup> However, there is a paucity of advice about the ethical responsibilities of the government attorney working as a legal advisor (attorney-advisor) to policymakers in the Executive Branch.<sup>39</sup> By evaluating the principles that undergird the ethical responsibilities of prosecutors and government civil litigators, one can infer guidelines applicable to government attorney-advisors.

#### A. *Government Attorneys Have a Higher Threshold to Make a Legal Claim Colorable*

While private attorneys may pursue any claim that is legally colorable,<sup>40</sup> prosecutors are expected to refrain from prosecuting charges

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interest. Although it is unfortunate, attorneys are not perfect. For instance . . . the courts may be ready to ignore or distinguish the relevant precedents, and the public may be ready for a change.").

<sup>34</sup> Note, *supra* note 26, at 1177.

<sup>35</sup> The Agency Theory of statutory interpretation holds that statutes should be interpreted by those least attenuated from the electorate. However some organizations involve so many layers of management that a lawyer's superior may already be ten or more levels removed from the electorate, such that one more layer of removal—to the lawyer himself—makes only a marginal difference in electoral accountability. For an explanation of the Agency Theory vis-à-vis branches of government, see Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 437–41 (1989) ("where there is neither interpretive doubt nor constitutional objection, the judgment of the electorally accountable branch should prevail").

<sup>36</sup> Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 743–44 (2004) (noting that one reason for deference is superior policy expertise (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984))).

<sup>37</sup> See, e.g., Lanctot, *supra* note 32, at 955–57 nn.11–15 (1991).

<sup>38</sup> See generally Berenson, *supra* note 25.

<sup>39</sup> See, e.g., Jonathan R. Macey, *Lawyers in Agencies: Economics, Social Psychology, and Process*, 61 LAW & CONTEMP. PROBS. 109, 124 (1998) ("[T]he role of lawyers in an agency process characterized by rulemaking is far from clear.").

<sup>40</sup> Cf. David J. Webster, Note, *Rule 11: Has the Objective Standard Transgressed the Adversary System?*, 38 CASE W. RES. L. REV. 279, 306 (1987).

not supported by probable cause.<sup>41</sup> Analogously, a study of judicial opinions involving governmental civil litigation<sup>42</sup> suggests that government civil litigators are often expected to meet a higher pleading threshold when bringing a civil claim.<sup>43</sup> Courts have stated that government attorneys possess vastly more power and resources than most private litigants; therefore, the presence of a higher pleading threshold is necessary to ensure that they do not employ such power frivolously.<sup>44</sup> As a guideline, one court suggested government attorneys should ask of each civil claim, “Is opposing this claim just, is it fair, is there a reasonable basis for believing that the government can prevail on both the law and facts?”<sup>45</sup>

As a sanction intended to deter unreasonable government litigation, Congress passed the Equal Access to Justice Act (EAJA)<sup>46</sup> to ensure that individuals are not “deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved,” and “to encourage government agencies to act in an equitable and responsible manner toward citizens and refrain from unreasonable and vexatious litigation.”<sup>47</sup> The EAJA tries to embolden citizens with valid claims against the government to pursue them by awarding payment of attorney’s fees to private parties who resist unjustifiable government conduct in litigation.<sup>48</sup> However, this Act is not a complete *ex ante* deterrent to unwarranted government litigation because individual government employees who order such litigation are not personally financially responsible for an EAJA loss. Also, the private individual first needs to finance her lawsuit against the government before being reimbursed, which can deter many individuals with meager finances or insufficient access to attorneys willing to accept a contingency-fee arrangement.

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In reality, the definition of a colorable claim is a fluid concept—turning on the assessment of many criteria in particular factual contexts—not readily or usefully reduced to a neat set of legal rules. Furthermore, because the horizons of the law are in the process of continual expansion, an expansion that is certainly consummated along the frontier, the line of demarcation between a frivolous and non-frivolous claim is constantly shifting.

*Id.*

<sup>41</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2006).

<sup>42</sup> See generally Steven K. Berenson, *The Duty Defined: Specific Obligations That Follow from Civil Government Lawyers’ General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13 (2003).

<sup>43</sup> *Id.* at 23.

<sup>44</sup> *Id.* at 23–24.

<sup>45</sup> *Id.* at 26 (quoting *Zimmerman v. Schweiker*, 575 F. Supp. 1436, 1440 (E.D.N.Y. 1983)).

<sup>46</sup> 28 U.S.C. § 2412 (2000).

<sup>47</sup> *Taylor v. Heckler*, 778 F.2d 674, 676 (11th Cir. 1985).

<sup>48</sup> See Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney’s Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217, 220–21 (1994).



In the rulemaking setting, judicial deference to agency administrative decisions<sup>49</sup> does not mean there is a lower threshold for government to make a legal claim. Rather, the judiciary's deference to government agencies is not due to a lower standard for deciding whether government attorneys correctly interpreted the agency's jurisdiction, but a reliance on the agency's scientific subject matter and policy expertise. According to one commentator, agency deference actually "represents an explicit rejection of the proposition that . . . lawyers in particular add value to the decision-making process within administrative agencies."<sup>50</sup> However, this commentator appears to overlook the need for continued legal analysis of whether a proposed policy falls within the agency's jurisdiction.<sup>51</sup>

*B. Government Attorneys Should Make a Greater Exploration of Opposing Side's Arguments and Claims*

Prosecutors have a disclosure responsibility. They must produce all evidence negating the defendant's guilt or mitigating the offense at trial, and all unprivileged mitigating information to both the court and defense counsel at sentencing.<sup>52</sup> Unlike private attorneys, the "prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused."<sup>53</sup>

Courts have noted that government civil litigators also have a greater duty than the private lawyer to disclose information to both their opponent and the court. For example, in a condemnation proceeding, a city attorney was criticized by the court for a failure to present the government's true need for the land, knowledge of which would have affected the value of the property.<sup>54</sup> Similarly, the court in *United States v. Sumitomo Marine &*

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<sup>49</sup> See the hallmark case of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court . . . .'" (citations omitted).

<sup>50</sup> Macey, *supra* note 39, at 123 (assuming that lawyers primary usefulness is to advance adjudicatory proceedings, the author notes that a decrease in such proceedings is tied to a de-emphasis on lawyers).

<sup>51</sup> See *Chevron*, 467 U.S. at 865–66. (noting that deference to agency decisions still required the court to analyze whether the administrative decision being challenged was within the agency's jurisdiction).

<sup>52</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2006). See also *Brady v. Maryland*, 373 U.S. 83, 87 (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"); Villaverde, *supra* note 23, at 1480–81 n.36 (2003) (discussing the extent to which the prosecutor must check for exculpatory evidence held by other government departments and branches).

<sup>53</sup> MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980).

<sup>54</sup> *City of Los Angeles v. Decker*, 558 P.2d 545, 551 (Cal. 1977) (It was misconduct for the city to "improperly argue[] to the jury that there was no need for . . . airport parking" when there really was a public need for it.).

*Fire Insurance*,<sup>55</sup> held that government attorneys should “set the example” in court-ordered disclosure.<sup>56</sup> The court reasoned in *Sumitomo* that the government should have an investment in the litigation process itself in addition to the substantive outcome it is seeking.<sup>57</sup>

As a corollary to expectations of broader disclosure, government civil litigators also have tighter limits on what information they can keep confidential.<sup>58</sup> The Federal Freedom of Information Act requires production of a wide range of non-privileged documents upon public request.<sup>59</sup> Similarly, state open meeting laws, such as California’s Brown Act,<sup>60</sup> require disclosure of records of all legislative meetings, including those related to litigation as long as it is not directly pending.<sup>61</sup>

### C. Government Counsel Should Ensure All Sides Are Properly Represented

The prosecutor should make sure the accused knows about her right to counsel and has an opportunity to exercise it,<sup>62</sup> while private attorneys have no such responsibility. This prosecutorial responsibility stems from the government attorney’s special requirement to see that justice is achieved through a process that is sufficiently adversarial for the neutral factfinder to discern the truth.<sup>63</sup>

Similarly, government civil litigators are encouraged to ensure that unrepresented opponents receive the benefit of proper representation, even if they are opposing the government.<sup>64</sup> This principle was illustrated by former county attorney (and subsequent federal judge) Jack Weinstein. Weinstein was representing the government in a condemnation proceeding

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<sup>55</sup> 617 F.2d 1365, 1367, 1371 (9th Cir. 1980) (where a government attorney was sanctioned for not providing timely answers to an interrogatory).

<sup>56</sup> *Id.* at 1370.

<sup>57</sup> *Id.* (“The public interest requires not only that Court orders be obeyed but further that Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders.”) (quoting *Perry v. Golub*, 74 F.R.D. 360, 366 (N.D. Ala. 1976)).

<sup>58</sup> See Berenson, *supra* note 42, at 31–32. For example, information not available through discovery can be obtained from the government, even when it cannot be obtained from private litigants.

<sup>59</sup> 5 U.S.C.A. § 552 (West 1996 & Supp. 2006).

<sup>60</sup> CAL. CODE § 54950 (Deering, LEXIS through 2006 Sess.).

<sup>61</sup> CAL. CODE § 54957.5 (Deering, LEXIS through 2006 Sess.) (Materials provided to a majority of a body which are not exempt from disclosure under the Public Records Act must be provided, upon request, to members of the public without delay.).

<sup>62</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8(b) (2006).

<sup>63</sup> Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 60 (1991) (arguing that prosecutors should assure “adequate adversarial process” in criminal trials).

<sup>64</sup> Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 252–53 (2000) (discussing a state bar association’s decision that a lawyer defending the government in civil litigation should be more forthcoming than a lawyer for a private client by advising an unrepresented civil claimant, who faces related criminal charges, that his testimony at a hearing carries a risk of self-incrimination and that the claimant may therefore benefit from an attorney’s advice.).

when he realized the owners of the property had grossly underestimated its value and were not represented by counsel.<sup>65</sup> Contrary to the financial interest of the government, Weinstein worked to convince the landowners of the higher value of their property.<sup>66</sup> If Weinstein were a private attorney in a private land transaction, he would have been “violating both his duty of loyalty and his duty of confidentiality to his client”<sup>67</sup> by such aid to the opposing side. However, because Weinstein represented the public interest, he also perceived a duty to ensure a fair process for all parties.

The government attorney should also take third parties into account by aspiring to “avoid the infliction of needless harm” and treat “with consideration all persons involved in the legal process,”<sup>68</sup> whereas private attorneys need only concern themselves with their own client’s interests.

#### *D. Government Attorneys Face Greater Restraint in Using Discretionary Powers*

The prosecutor should use restraint when exercising his discretionary powers<sup>69</sup> and “refrain from instituting or continuing litigation that is obviously unfair.”<sup>70</sup> All government litigators and prosecutors should “develop a full and fair record, and . . . not use [their] position or the economic power of the government to harass parties, or to bring about unjust settlements or results.”<sup>71</sup> Even if he has no discretionary power himself to halt unfair litigation, a prosecutor should recommend that his superiors cease any unfair litigation.<sup>72</sup> State courts have echoed the sentiment that the government lawyer’s duty of neutrality requires that parties are not harassed, and unjust results are not reached.<sup>73</sup>

#### *E. Procedural Safeguards Prevent Abuses by Government Attorneys*

The United States has a long tradition of imposing new procedural rules in response to abuses of power. A recent example is the Sarbanes-Oxley Act of 2002,<sup>74</sup> which requires new auditing and control measures by corporate directors, and officers.<sup>75</sup> Likewise, decades earlier, the

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<sup>65</sup> Berenson, *supra* note 25, at, 844–45 (citing Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155 (1966)).

<sup>66</sup> *Id.* at 845.

<sup>67</sup> *Id.*

<sup>68</sup> MODEL CODE OF PROF’L RESPONSIBILITY EC 7-10 (1980).

<sup>69</sup> MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1980).

<sup>70</sup> MODEL CODE OF PROF’L RESPONSIBILITY EC 7-14 (1980).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 350 (Cal. 1985).

<sup>74</sup> Pub. L. No. 107-204, 116 Stat. 745.

<sup>75</sup> See generally Larry Catá Backer, *The Sarbanes-Oxley Act: Federalizing Norms for Officer, Lawyer, and Accountant Behavior*, 76 ST. JOHN’S L. REV. 897 (2002); Lisa M. Fairfax, *The Sarbanes-*

Watergate scandal led to the codification of the special prosecutorial investigation process.<sup>76</sup>

The common thread among government attorney ethical responsibilities is that they all are procedural. Setting a higher threshold to make a legal claim colorable is a procedural directive. Exploring opposing positions is a procedural directive. Ensuring that all sides are properly represented is also a procedural directive, as is applying greater restraint in the use of discretionary powers.

The government litigator's procedural responsibilities extend to administrative rulemaking, serving as a procedural expert to ensure that regulatory agencies "turn square procedural corners" when exercising their powers over the individuals and private companies.<sup>77</sup> Just as the prosecutor and government civil litigator conduct a thorough exploration and consideration of opposing perspectives, the government attorney in the regulatory agency must "defin[e] the record . . . to ensure that no document is omitted that may be critical to a judicial assessment of the adequacy of the record . . . ."<sup>78</sup> Further, like government litigators who must ensure appropriate representation and information flow to opponents and third parties, attorneys in regulatory agencies must ensure adequate notice and comment opportunities for all parties.<sup>79</sup>

The interpretation and implementation of certain government rules, however, does not allow for public notice or comment.<sup>80</sup> Our government lawyer, Matthew, was faced with just such a situation when interpreting the legal definition of torture. The implementation of government policies is only open to public participation if a member of the public: 1) discovers the policy; 2) has standing to sue based on the policy;<sup>81</sup> and 3) is able to access a court of competent jurisdiction.<sup>82</sup> Given the hurdles the public must overcome to contest policy implementation, it is essential that government attorney-advisors evaluate all relevant perspectives as a proxy

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*Oxley Act as Confirmation of Recent Trends in Director and Officer Fiduciary Obligations*, 76 ST. JOHN'S L. REV. 953 (2002).

<sup>76</sup> See generally Richard Ben-Veniste, *Reflections on the Legacy of Watergate*, 51 HASTINGS L.J. 759 (2000).

<sup>77</sup> Thomas O. McGarity, *The Role of Government Attorneys in Regulatory Agency Rulemaking*, 61 LAW & CONTEMP. PROBS. 19, 24 (1998).

<sup>78</sup> *Id.* at 25.

<sup>79</sup> *Id.*

<sup>80</sup> See *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) ("Interpretive rules do not require notice and comment . . . ."). See also Omer Ze'ev Bekerman, *Torture—The Absolute Prohibition of a Relative Term: Does Everyone Know What is in Room 101?*, 53 AM. J. COMP. L. 743, 776 (2005) (noting that the 2002 memo interpreting the boundaries of torture was "obviously not" intended to be released to the public.).

<sup>81</sup> See *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "One element of the case-or-controversy requirement is that appellees, based on their complaint, must establish that they have standing to sue." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

<sup>82</sup> See FED. R. CIV. P. 12(b) (allowing for lack of personal or subject matter jurisdiction as grounds for a motion to dismiss).

for public participation in the policy implementation process. Further, if the public is able to sue regarding a particular policy implementation, the government lawyer's more thorough evaluation of opposing perspectives at the time of implementation will help the policy withstand judicial scrutiny.

#### IV. WHY THERE ARE SPECIAL ETHICAL RESPONSIBILITIES FOR GOVERNMENT ATTORNEYS

##### A. *Practical Political Reasons*

Special responsibilities are thrust on government attorneys because they wield far more power than their adversaries. As representatives of the sovereign, they have both superior financial and human resources, such as access to police departments and investigative agencies.<sup>83</sup> As a counterpoint, private stakeholders may be "among society's most powerless," and may even be indigent.<sup>84</sup> Additionally, in the criminal context, prosecutors wield power because they determine who is charged with a crime and the severity of the offense claimed.<sup>85</sup>

Justice is the government attorney's client. Yet justice is not embodied in any single individual. Instead, the government attorney has multiple clients, some of whom may have conflicting interests with each other. In a striking example of this situation, Solicitor General Archibald Cox argued both sides of a case before the Supreme Court.<sup>86</sup> This prospective conflict of interests among the government attorney's multiple potential clients is one reason the special responsibilities exist for the government attorney.

The government lawyer's power is derived, in part, from the power of the justice system itself.<sup>87</sup> Thus, the government lawyer has a special responsibility to preserve the justice system<sup>88</sup> in order to preserve his own role in society. While all lawyers may be deemed "officers of the court,"<sup>89</sup> government counsel has a greater responsibility than private attorneys to foster a belief in the apparent rule of law by developing "a full and fair

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<sup>83</sup> Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 *FORDHAM URB. L.J.* 607, 626 (1999).

<sup>84</sup> *Id.*

<sup>85</sup> See *United States v. Bland*, 472 F.2d 1329, 1337 (D.C. Cir. 1972) ("We cannot accept the hitherto unaccepted argument that due process requires an adversary hearing before the prosecutor can exercise his age-old function of deciding what charge to bring against whom. Grave consequences have always flowed from this, but never has a hearing been required.")

<sup>86</sup> *Lancot*, *supra* note 32, at 999 n.202.

<sup>87</sup> Other sources of power for the government attorney include the power of investigation and enforcement through government agencies, such as the FBI.

<sup>88</sup> *Jones v. Heckler*, 583 F. Supp. 1250, 1256-57 n.7 (N.D. Ill. 1984) (the legal "counsel for the United States has a special responsibility to the justice system").

<sup>89</sup> Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 *VAND. L. REV.* 39, 39 (1989).

record.”<sup>90</sup> This necessity of bolstering the judicial system is another reason the government attorney has special responsibilities.

### *B. Rational Decision-making Reasons*

The special responsibility to consider opposing viewpoints should foster more rational decision-making by government attorneys. Social psychologist Irving Janis discovered that in-group pressures can cause “a deterioration of mental efficiency, reality testing, and moral judgment . . . .”<sup>91</sup> Solely contemplating one’s own viewpoint and one’s own argument often leads to feelings of invulnerability and insufficient appreciation of alternative viewpoints.<sup>92</sup> Janis contrasted the failure of the Bay of Pigs invasion with the successful handling of the Cuban Missile Crisis noting that a key differentiating cause was that the team in the Cuban Missile Crisis was careful to consider every alternative by putting themselves in their opponent’s (Khrushchev’s) shoes.<sup>93</sup> This contrast led Janis to conclude that important analyses should have a critical evaluator (a.k.a. “Devil’s Advocate”) appointed to ensure that all reasonable perspectives are considered before a recommendation is made.<sup>94</sup>

Legal analysis, like foreign policy analysis, is subject to biases that harm accurate decision-making. By heeding their special responsibility to include alternative perspectives in their legal analysis, government attorneys can avoid the trap that befell Kennedy’s foreign policy team. The government attorney can play the role of the critical evaluator that presents and balances multiple legal interpretations for policymakers. Without an equally strong adversary present, it is balance; it is the presentation of multiple viewpoints by the government attorney-advisor, rather than zealous advocacy that leads to a well thought-out, defensible legal analysis.<sup>95</sup>

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<sup>90</sup> *Bulloch v. United States*, 763 F.2d 1115, 1125 (10th Cir. 1985) (McKay, J., dissenting) (citation omitted).

<sup>91</sup> IRVING L. JANIS, *VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES* 9 (1982). *See also* PAUL’T HART, *GROUPTHINK IN GOVERNMENT: A STUDY OF SMALL GROUPS AND POLICY FAILURE* (1990) (summarizing and building on previous research on groupthink).

<sup>92</sup> *See generally* JANIS, *supra* note 91.

<sup>93</sup> IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 268 (1983).

<sup>94</sup> JANIS, *supra* note 91, at 262. *See also* Barbara Ehrenreich, Editorial, *All Droids Together; Groupthink Is as American as Apple Pie and Prisoner Abuse*, *PITTSBURGH POST-GAZETTE*, July 17, 2004, at A-11, available at LEXIS, News Library, PSTGAZ File (arguing that Groupthink has beset President George W. Bush’s foreign policy team).

<sup>95</sup> This gibes with an observation by Professor Steven Yeazell that many appellate cases lacking a strong dissent suffer in the rigor of their analyses.

## V. WHY PROVIDING LEGAL OPINIONS TO POLICYMAKERS CARRIES A SPECIAL ETHICAL RESPONSIBILITY

### A. *The Missing Adversary*

Government lawyers advising policymakers have a special responsibility to be more inclusive in their legal analysis because there is no legal adversary to offer an alternative viewpoint and interpretation. The Agency-Dominant Model is based on the idea that the government attorney's sole client is the government agency that employs him.<sup>96</sup> The underlying assumption of the Agency-Dominant Model is that the adversarial system provides an appropriate counterbalance to the government lawyer's single-minded advocacy for that agency.<sup>97</sup> Through the dueling zealotry of the agency and its opponent, the neutral fact-finder will receive the most information and thus make the best decision. In criminal cases,<sup>98</sup> the benefits of the Agency-Dominant Model may work because there is a true adversarial system where all defendants have the opportunity to receive their own legal counsel, regardless of their economic condition.<sup>99</sup>

In civil litigation, however, there is no guaranteed right to counsel to ensure both sides have equal resources in the adversarial proceeding.<sup>100</sup> Some theorize that civil lawsuits will only take place between adversaries with equal resources because there is scant economic incentive to sue individuals with few or no resources.<sup>101</sup> This theory has many shortcomings. For example, many plaintiffs do not know the size of the

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<sup>96</sup> Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1, 6 (2006) (The Agency Model "proceeds from the proposition that the government lawyer's employing agency is the client and emphasizes the three related duties of loyalty, zeal and confidentiality that are applied to lawyers in private practice.").

<sup>97</sup> Lanctot, *supra* note 32, at 958 ("If the bar truly believes its own rhetoric that zealous advocacy on behalf of a client serves the highest purposes of the American justice system, and if the bar expects government lawyers to 'seek justice,' then logically the bar should demand of government lawyers that they be at least as zealous as their private counterparts, if not more so.").

<sup>98</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963).

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have construed this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.

*Id.*

<sup>99</sup> This assumes that publicly appointed counsel defending the poor is sufficiently matched in terms of resources and skills with the resources and skills of the prosecution.

<sup>100</sup> David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83, 91 (David Luban, ed., 1983) (noting that the impact on society of civil suits may be greater than criminal suits, which makes the lack of adversarial proceedings to counterbalance zealous representation even more problematic).

<sup>101</sup> Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 22 (1996) ("In an ideal and abstracted form, the adversary system clearly contemplates adversaries of equal skill and economic support . . .").

defendant's assets before filing a suit. Further, some plaintiffs are seeking to set a judicial precedent or secure specific injunctive relief, rather than financial assets. In short, there are circumstances in civil litigation where an imbalance of power between the litigants can occur. This imbalance weakens the fairness of the adversarial system. Without a sufficiently balanced adversarial system, the Agency-Dominant Model of zealous advocacy by the government attorney creates the risk of an abuse of government power.

Certain types of conflicts are less amenable to resolution through an adversarial proceeding, and thus inappropriate for an Agency-Dominant approach by the government lawyer. Unlike scientists refuting each other's arguments to eventually arrive at a next-generation explanatory theory, the legal system often encourages as much obfuscation as it does forthright refutation and explication.<sup>102</sup> Ideally, scientists are interested only in the truth, while trial lawyers are heavily invested in their side ultimately prevailing,<sup>103</sup> which means they are unlikely to reveal "bad facts" essential to identifying the truth. Client protection against self-incrimination<sup>104</sup> may result in the nondisclosure of additional highly probative facts from the adversary proceeding, rendering it even less likely that the truth is revealed.

Legal advisors to policymakers should not zealously advocate because it is unlikely that an equally zealous adversary will arise to oppose them.<sup>105</sup> In a policymaking setting there is often no adversary to counterbalance the government attorney's advocacy with a contrary viewpoint that provides grist for the neutral third party (i.e. the policymaker) to weigh the arguments and discover the truth.<sup>106</sup> Potential zealous adversaries to government attorney-advisors may exist outside the government. However, these adversaries cannot act if they are unaware of the policy issue to be litigated. Government secrecy rules give government attorneys

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<sup>102</sup> Luban, *supra* note 100, at 94 (citing Irving Younger's missive to trial lawyers to only ask questions in court to which they already know the answer—and thus not revealing any new truths).

<sup>103</sup> *Id.* at 96.

<sup>104</sup> U.S. CONST. amend. V.

<sup>105</sup> *Cf.* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-5 (1980) (The lawyer as advisor should tell his client what he believes will be the ultimate opinion of the court, rather than merely advancing the client's cause).

<sup>106</sup> Note, *supra* note 26, at 1180 ("No less than in the advisory context, government lawyers exercise considerable discretion in implementing agency policy. . . . Because agency lawyers are the only agency actors with genuine expertise in administrative procedure, agencies often give great discretion to the lawyers implementing those procedures."); Marchant, *supra* note 33, at 456-57.

A lack of accountability . . . is uniquely important in the context of legislative attorneys. Unlike most executive branch lawyers, [at least] legislative attorneys work very closely with elected officials, who are directly accountable to the voters. . . . [Yet] the legislative attorney will not be held accountable at election time for the attorney's assessment of the public interest.

*Id.*



a significant advantage by shielding their work from potential adversaries.<sup>107</sup> For example, after his death, it was discovered that FBI Director J. Edgar Hoover had eavesdropped on and recorded the activities of Martin Luther King, Jr. and other civil rights leaders.<sup>108</sup> Because the FBI characterized these spying activities as essential to state security, there was no possibility of an adversary becoming aware of them and seeking redress through the courts or other means.<sup>109</sup>

### B. Proactive Guidance Requires Multiple Viewpoints

Attorney-advisors have a special responsibility to consider opposing viewpoints in their legal analysis because their work is proactive rather than reactive. Attorneys in an advisory capacity have a different mission than litigators. Attorney-advisors' "primary interest [is] in keeping the client's milk in the glass and not cleaning it up or reporting it after it has been spilled."<sup>110</sup> Balance is what prevents mishaps like spilt milk. Similarly, a balanced legal analysis is essential to withstand objective scrutiny. Due to the proactive nature of their work, government attorney-advisors have a special responsibility to more carefully consider opposing arguments and perspectives than government litigators.

## VI. EXISTING REMEDIES FOR UNSOUND LEGAL OPINIONS

There are several alternatives to the typical adversarial process designed to keep policymakers and their attorney-advisors in compliance with the law. Most of these remedies function *ex post facto*, and thus cannot prevent the immediate negative consequences of unbalanced legal advice to policymakers.

### A. Leaks to the Press

The uproar over the Pentagon Papers, leaked by Daniel Ellsberg to the *New York Times*, illustrates how exposing a flawed and improper analysis to the general public can contribute to a public and legislative outcry for

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<sup>107</sup> See 26 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5653 (2d. ed. 2005) (1992) for a history of government secrecy rules.

<sup>108</sup> As *Surveillance Powers Grow Accountability Languishes*, USA TODAY, May 12, 2003, at 11A, available at LEXIS, News Library, USATDY File.

<sup>109</sup> Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 202 (2003). "[A]buses of the past in which the FBI under J. Edgar Hoover conducted completely unregulated 'black bag' operations on people whom the government viewed as suspicious based on 'national security grounds,' such as the civil rights leader Dr. Martin Luther King, Jr." *Id.* (citing S. REP. NO. 95-604(II), at 28 (1978), as reprinted in 1978 U.S.C.C.A.N. 3970, 3997).

<sup>110</sup> Symposium, *The Evolving Legal and Ethical Role of the Corporate Attorney After the Sarbanes-Oxley Act of 2002*, 52 AM. U. L. REV. 655, 670 (2003).

correction.<sup>111</sup> More recently, the leak of Department of Justice (DOJ) memos regarding the definition of torture and the interpretation of certain War Crimes statutes has drawn similar attention and public criticism from across the political spectrum,<sup>112</sup> as well as official condemnation from Congress.<sup>113</sup> The resulting embarrassment for the administration and for the nation ultimately triggered departmental “reform” through the release of a new legal interpretation that effectively disavowed the previous one.<sup>114</sup>

While leaks to the press may ultimately trigger agency self-censure and change, there are several reasons why press leaks are an insufficient remedy to unbalanced legal advice. First, a lawyer may be in violation of her confidentiality obligations by providing secret information to the press.<sup>115</sup> The American Bar Association (ABA) Model Code of Professional Responsibility requires attorneys to preserve privileged “confidences” as well as unprivileged “secrets.”<sup>116</sup> Second, a lawyer who leaks information may become a professional outcast. Former U.S. Department of Justice ethics adviser Jesselyn Radack is an example of how such blacklisting can occur. While working at the DOJ, Radack advised FBI agents not to directly question American Taliban member John Walker Lindh without Lindh’s attorney present.<sup>117</sup> The FBI declined to heed her advice. After leaving the DOJ to avoid a negative performance review, Radack joined a private law firm. Subsequently, Radack discovered that her legal advice to the FBI agents was not given to the judge in the Lindh case, and her DOJ emails about the case had disappeared. In order to ensure her prior correspondence was made available to the court, Radack

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<sup>111</sup> See generally JOHN PRADOS & MARGARET PRATT PORTER, *INSIDE THE PENTAGON PAPERS* (2004). Commercial marketers have also found that one-sided advertisements are ineffective when selling to an educated audience. See, e.g., Robert B. Cialdini, *Influence: Science and Practice*, in *NEGOTIATION THEORY AND STRATEGY* 185, 186–87 (Russell Korobkin ed., 2002).

<sup>112</sup> Lincoln Caplan, Editorial, *Lawyers’ Standards in Free Fall*, L.A. TIMES, July 20, 2004, at B13, available at LEXIS, News Library, LAT File (noting that both liberals and conservatives have condemned the torture memoranda).

<sup>113</sup> Pauline Jelinek, *Senate Reaffirms U.S. Opposition to Use of Torture*, HOUS. CHRON., June 24, 2004, at A3, available at [http://www.chron.com/CDA/archives/archive.mpl?id=2004\\_3773289](http://www.chron.com/CDA/archives/archive.mpl?id=2004_3773289) (The Senate affirmed that “the United States shall not engage in torture or cruel, inhuman or degrading treatment . . .”).

<sup>114</sup> R. Jeffrey Smith & Dan Eggen, *Justice Expands ‘Torture’ Definition*, WASH. POST, Dec. 31, 2004 at A01, available at LEXIS, News Library, WPOST File.

<sup>115</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 18 (2006) (“The duty of confidentiality continues after the client-lawyer relationship has terminated.”); and Kristina Hammond, *Plugging the Leaks: Applying the Model Rules to Leaks Made by Government Lawyers*, 18 GEO. J. LEGAL ETHICS 783, 794 (2005) (“If it is an unauthorized disclosure contrary to client wishes, the attorney has violated Rule 1.6 [of the Model Rules of Professional Conduct] and thus violated Rule 8.4(a).”).

<sup>116</sup> MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101 (1980). See also *id.* EC 4-4 (providing that an attorney’s duty of confidentiality “exists without regard to the nature or source of the information or the fact that others share the knowledge”).

<sup>117</sup> Jonathan F. Lenzner, Note, *From a Pakistani Stationhouse to the Federal Courthouse: A Confession’s Uncertain Journey in the U.S.-Led War on Terror*, 12 CARDOZO J. INT’L & COMP. L. 297, 327 n.155 (2004).

leaked details to the press. Shortly thereafter, a special agent for the Justice Department's Office of Inspector General called Radack's subsequent employer and announced she was under criminal investigation.<sup>118</sup> As a result, the firm put her on leave without pay, effectively firing her, and she has since been unable to secure employment.<sup>119</sup>

### B. *Blowing the Whistle*

Whistleblower protection statutes help trigger an alert about improper, one-sided legal analysis in situations when there is otherwise no adversary.<sup>120</sup> Whistleblower protection contributes to these alerts by creating a safe environment for individuals who call for heightened scrutiny of internal government activities, including legal interpretations, when there is apparent impropriety. Because lawyers can "blow the whistle" by informing others in government of potential wrongdoing, in lieu of notifying the media,<sup>121</sup> any sensitive or classified material can still remain confidential during the whistleblowing process. One court has suggested that even private lawyers deserve special whistleblower protection from wrongful discharge.<sup>122</sup> Several other courts have recognized that whistleblower protections "are especially important and appropriate in the public sector, where public service motivates participation and ought to guide conduct," and thus motivate employees to alert others of wrongdoing.<sup>123</sup> Nonetheless, several courts have refused to apply whistleblower protection rules to government attorneys.<sup>124</sup>

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<sup>118</sup> Jane Mayer, *Lost in the Jihad: Why Did the Government's Case Against John Walker Lindh Collapse?*, NEW YORKER, Mar. 10, 2003, at 50 ("When she declined to speak at length, Justice Department officials informed managing partners at her new law firm that she was the target of a 'criminal investigation.' Her firm placed her on administrative leave.")

<sup>119</sup> Douglas McCollam, *The Trials of Jesselyn Radack*, AM. LAW., July 1, 2003, at 21.

<sup>120</sup> See, e.g., Civil Service Reform Act, 5 U.S.C.A. §§ 1206-08, 2302, 7121 (West 1996 & Supp. 2006).

<sup>121</sup> Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L. REV. 615, 615 (1982).

<sup>122</sup> *Wieder v. Skala*, 609 N.E.2d 105, 108 (N.Y. 1992) (holding that ethical standards made it inappropriate to fire a law firm associate when he persisted in informing the firm's partners that a fellow associate had committed perjury).

<sup>123</sup> Ralph Nader & Alan Hirsch, *A Proposed Right of Conscience for Government Attorneys*, 55 HASTINGS L.J. 311, 320 (2003).

<sup>124</sup> Thomas A. Kuczajda, *Self-Regulation, Socialization, and the Role of Model Rule 5.1*, 12 GEO. J. LEGAL ETHICS 119, 138 n.136 (1998) (citing cases where the court refused to apply the public policy exception to lawyers).

### C. Public Interest Litigation

Another remedy for improper legal advice is public interest litigation.<sup>125</sup> To successfully counterbalance one-sided advocacy, public interest litigation must overcome many hurdles. First, public interest litigants must establish they have standing to bring suit on behalf of specific unrepresented parties.<sup>126</sup> Second, the claims must be filed in a court that has proper jurisdiction, which may be inconvenient or infeasible for the interested party. Third, those injured may not have a connection to a public interest group that has the funds and expertise to litigate on their behalf. Fourth, the public interest litigants need to discover the issues before litigating them. Discovering the issues has proven challenging in matters of national security and in situations where the policies based on improper legal analysis are only visible abroad.<sup>127</sup>

### D. Congressional Oversight

A potential substitute for adversarial proceedings in the policymaking process is Congressional oversight. Congress wields the purse-strings for the government and can refuse to appropriate funds for activities that arise from policies it considers inappropriate.<sup>128</sup> Congress' ability to hold hearings and censure is powerful because it is accountable to local constituencies, and thus able to trigger popular support or revilement of certain policies.<sup>129</sup>

Congress also can use its appropriations authority to enforce any investigative demands it places on executive branch agencies.<sup>130</sup> For example, when Congress was investigating the Environmental Protection

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<sup>125</sup> See, e.g., *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1038 (C.D. Cal. 2002) (a coalition of clergy, lawyers, and professors seeking a writ of habeas corpus on behalf of detainees held at Guantanamo Naval Air Base and allegedly deprived of their liberty without due process of law), *aff'd in part and vacated in part*, *Coalition of Clergy, Lawyers and Professors v. Bush*, 310 F.3d 1153 (9th Cir. 2002).

<sup>126</sup> *Id.* at 1040 (the court applied the "next friend" test to limit the standing of public interest litigants by putting the burden on them to clearly establish their direct connection to a party in interest).

<sup>127</sup> See, e.g., Neil A. Lewis, *In Rising Numbers, Lawyers Head for Guantanamo Bay*, N.Y. TIMES, May 30, 2005, at A10, available at LEXIS, News Library, NYT File (discussing the security clearance and other difficulties for U.S. attorneys in representing clients imprisoned in Guantanamo).

<sup>128</sup> For example, Congress recently passed an emergency budget bill that forbade "subject[ing] anyone in American custody to torture or 'cruel, inhuman or degrading treatment' that is forbidden by the Constitution." Eric Lichtblau, *Congress Adopts Restriction on Treatment of Detainees*, N.Y. TIMES, May 11, 2005, at A16, available at LEXIS, News Library, NYT File.

<sup>129</sup> Louis Fisher, *How to Avoid Iran-Contra*, 76 CAL. L. REV. 939, 941 (1988) (reviewing THE PRESIDENT, THE CONGRESS AND FOREIGN POLICY (Edmund S. Muskie et al. eds., 1986)).

<sup>130</sup> Dominique Custos, *Section IV: Constitutional and Administrative Law: The Rulemaking Power of Independent Regulatory Agencies*, 54 AM. J. COMP. L. 615, 632 (2006) ("[O]rdinarily, authorization, appropriation, regulatory review and investigation furnish the means of formal congressional oversight.").

Agency's (EPA) compliance with Superfund laws, Congress could have refused to appropriate any more funds to the EPA until the President divulged the Superfund enforcement materials sought by Congress.<sup>131</sup> This strict oversight approach, however, requires so much day-to-day management of a myriad of details by Congress that it is infeasible in most instances.

Some policies and their supporting legal opinions are not directly tied to specific agency expenditures. These policies are less easily monitored by Congress through the budget appropriations and oversight process.<sup>132</sup> Congress may create reporting requirements for a federal agency that reveal, and open for broader review, any improper legal opinions that support agency policies.<sup>133</sup> However, a court may negate any statutory reporting requirements if the reporting documents are encompassed by the executive branch's interest in protecting "pre-decisional" advice and documents.<sup>134</sup>

Congressional oversight of executive branch departments is not absolute. Congress is frequently in a tug-of-war with the President for the control of each agency. One area where this power struggle plays out is in determining whether a particular agency is able to independently litigate issues within its jurisdiction, or whether the agency must rely on the Department of Justice for its litigation.<sup>135</sup> To maintain its own power, Congress prefers to limit the amount of litigation under control of the Department of Justice, which can use the threat of confessing error during litigation as a means of exerting executive branch control of the agency's litigation agenda.<sup>136</sup> Historically, executive branch agencies and

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<sup>131</sup> Cf. Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71, 90 (1986).

<sup>132</sup> Cf. Jonathan G. Pray, Comment, *Congressional Reporting Requirements: Testing the Limits of the Oversight Power*, 76 U. COLO. L. REV. 297, 315–16 (2005).

<sup>133</sup> Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 99 (2006).

Congress formally controls the execution of the laws through more general statutory provisions. . . . Included in this category are also numerous reporting requirements which provide Congress with some of the information it needs to supervise the execution of the laws both formally and informally. With these and other statutes, Congress controls agency decisionmaking . . . .

*Id.*

<sup>134</sup> See, e.g., *Wolfe v. Dep't of Health & Human Serv.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc) (Exemption 5 of the Freedom of Information Act, 5 U.S.C.A. § 552 (West 1996 & Supp. 2006), enables the executive branch to restrict access to pre-decisional materials of regulatory actions because "the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl."). *Id.* (citation omitted).

<sup>135</sup> Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS. 205, 207–08 (1998).

<sup>136</sup> James R. Harvey III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1608 (1996).

[A] president with an aggressive attorney general can control bureaucratic action and steer policy through government litigation, filtering out unworthy cases for

departments had independent litigation authority.<sup>137</sup> However, this has decreased substantially since the New Deal.<sup>138</sup>

#### *E. Why Existing Remedies Are Insufficient*

None of the above remedies are sufficient to deter improper legal advice to policymakers. Congressional oversight is often limited to fiscal matters. Public interest groups have limited funds to litigate so they concentrate their efforts on just a handful of issues. Government attorneys are sometimes unable to secure whistleblower protection. Individuals who leak information to the press often suffer negative career side effects.

Collectively, the most significant problem with the aforementioned safeguards against policymaking based on unbalanced legal advice is that the safeguards only address policies already promulgated on the basis of unbalanced advice, rather than preventing the formulation and issuance of such policies. Correcting policy illegalities after the fact is more difficult and more embarrassing. The Iran-Contra scandal is one of many instances where this axiom applies. By the time hearings and inquiries occurred, it was too late to reclaim the weapons from Iran and reverse the damage caused by the erroneous interpretation of the legality of such a policy.<sup>139</sup>

#### *F. Why Legal Advice on National Security Matters Requires Heightened Scrutiny*

In national security matters, it is unlikely that potential adversaries will hear of a new policy, let alone have the opportunity to protest against it. Legal opinions related to national security are sometimes classified, and courts are often reluctant to breach such security.<sup>140</sup> In discussing the rationale for maintaining secrecy in legal matters related to terrorism, Senator Orrin Hatch noted:

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the lower courts just as the solicitor general does for the Supreme Court.

Through its close political role, DOJ can serve the president as a watchdog against legislation and regulation that would dilute executive policies or power.

*Id.* for an abbreviated history of “[t]he executive and legislative skirmishes over DOJ loyalty . . .” see *id.* at 1577–87.

<sup>137</sup> See generally Lawrence Lessig, *Readings by Our Unitary Executive*, 15 CARDOZO L. REV. 175, 192–99 (1993).

<sup>138</sup> Prior to the commencement of the New Deal, nine separate government agencies or departments had independent litigation authority. CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 75 (1992).

<sup>139</sup> See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1258 (1988).

<sup>140</sup> See *Halperin v. Central Intelligence Agency*, 629 F.2d 144, 148 (D.C. Cir. 1980) (courts “lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case”).

It is of the utmost importance that no information be permitted to reach the enemy on any of these matters. How the terrorists were so swiftly apprehended; how our intelligence services are equipped to work against them; what sources of information we have inside al Qaeda; who are the witnesses against the terrorists; how much we have learned about al Qaeda terrorist methods, plans, programs and the identity of other terrorists who might be or have been sent to this country; how much we have learned about al Qaeda weapons, intelligence methods, munitions plants and morale.<sup>141</sup>

Mechanisms such as the Classified Information Procedures Act (CIPA)<sup>142</sup> are one of the many reasons that legal opinions related to national security policy may go unchecked.<sup>143</sup> CIPA was enacted in 1980 to counter a defendant's threat to expose classified intelligence through lawful procedural means during trial.<sup>144</sup> Additionally, attorney-client privilege claims by the government can also shield disclosure of legal opinions related to national security matters.<sup>145</sup>

CIPA defines classified information as "any information or material that has been determined by the United States Government pursuant to an Executive Order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security . . .", while

<sup>141</sup> Villaverde, *supra* note 23, at 1476 (quoting *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm on the Judiciary*, 107th Cong. 363-64 (2001) (statement of Sen. Orrin G. Hatch)).

<sup>142</sup> Classified Information Procedures Act, 18 U.S.C.A. app. 3 §§ 1-16 (West 2000 & Supp. 2006).

<sup>143</sup> See, e.g., Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUM. L. REV. 1651, 1653 (1991).

<sup>144</sup> *Id.* at 1652-53 (1991).

The Classified Information Procedures Act ("CIPA") was enacted in 1980 to "permit the trial judge to rule on questions of admissibility involving classified information before the introduction of the evidence in open court." In order to ensure that the graymail tactic would not routinely bar prosecution, CIPA enabled the government to "ascertain the potential damage to national security of proceeding with a given prosecution before trial."

*Id.* (citing SENATE JUDICIARY COMM., CLASSIFIED INFORMATION PROCEDURES ACT, S. REP. NO. 96-823 (2d Sess. 1980), as reprinted in 1980 U.S.C.C.A.N. 4294, 4294).

<sup>145</sup> *In re Lindsey*, 158 F.3d 1263, 1269 (D.C. Cir. 1998).

[T]he attorney-client privilege has a proper role to play in exemption [of information from public disclosure]. . . . In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the attorney-client privilege assures him that confidential communications to his attorney will not be disclosed without his consent. There is no reason why this same protection should not be extended to an agency's communications with its attorneys under exemption five.

*Id.* (citation omitted).

national security is defined as “the national defense and foreign relations of the United States.”<sup>146</sup> These terms are broad, and thus quite limiting to private litigants; yet they have not been held to be unconstitutionally vague.<sup>147</sup>

While CIPA is “not aimed at allowing prosecutors (or defendants) any form of advantage in the criminal trial,”<sup>148</sup> it does allow liberal protective orders<sup>149</sup> and interlocutory appeals<sup>150</sup> by the government to enable it to do its utmost to keep the information confidential. It also allows the court to redact or delete classified items not relevant to specific defenses and permits the government to substitute a summary of the classified information.<sup>151</sup> The private party must also meet a higher *prima facie* showing standard as part of the discovery process to receive classified information.<sup>152</sup> Mere theoretical relevance is insufficient to overcome the government’s classified information privilege.<sup>153</sup>

In summary, matters that the government says fall within the ambit of “national security” are often shielded from sufficient scrutiny to counteract any improper legal advice provided to the policymakers involved. One proposed solution to the lack of transparency on national security policy is that “governmental decisions regarding foreign affairs must transpire within a sphere of concurrent authority, under presidential management, but bounded by the checks provided by congressional consultation and judicial review.”<sup>154</sup> No steps have been taken to implement such a solution. In the meantime, it is the responsibility of the government attorney-advisor to ensure that balanced legal analysis and restraint is employed in the national security policymaking process.

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<sup>146</sup> 18 U.S.C. app 3 § 1 (Supp. 2001).

<sup>147</sup> Joshua E. Kastenberg, *Analyzing the Constitutional Tensions and Applicability of Military Rule of Evidence 505 in Courts-Martial Over United States Service Members: Secrecy in the Shadow of Lonetree*, 55 A.F. L. REV. 233, 238 (2004) (citing *United States v. Wilson*, 571 F. Supp. 1422 (S.D.N.Y. 1983); *United States v. Joliff*, 548 F. Supp 229 (D. Md. 1981)).

<sup>148</sup> *United States v. La Rouche Campaign*, 695 F. Supp 1282, 1285 (D. Mass. 1988).

<sup>149</sup> 18 U.S.C. app. 3 § 1 (2000).

<sup>150</sup> *Id.* at § 7.

<sup>151</sup> *Id.* at § 3.

<sup>152</sup> *Id.* §§ 2–8 (the defendant must show not only that the information sought will be “helpful to the defense of the accused,” but also that any substitute unclassified evidence offered by the government is insufficient).

<sup>153</sup> *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (citation omitted) (holding that “the threshold for discovery in this context further requires that a defendant seeking classified information, like a defendant seeking [an] informant’s identity . . . is entitled only to information that is at least ‘helpful to the defense of [the] accused’”).

<sup>154</sup> HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 69 (1990).



## VII. A CASE STUDY: THE TORTURE MEMOS

“The [Department of Defense] Working Group . . . produced a document which, except for one centrally [sic] flawed assumption, is sophisticated, well wrought and legally supportable. That flawed assumption is the validity of the Presidential determination that the detainees were facially uncovered by the Third Geneva Convention.”<sup>155</sup>

Shortly after the United States invaded Afghanistan, a prison facility was set up at the U.S. naval base in Guantanamo, Cuba<sup>156</sup> to house prisoners who were thought to possess valuable intelligence information. In November 2002 the commander of the prisoner interrogation facility at Guantanamo was charged with increasing the intelligence yield drawn from the prisoners at the base. The commander decided to increase the pressure on the detainees to make this happen, rather than try to build rapport and trust with the detainees.<sup>157</sup> The commander’s decision to use “harsher tactics relied on the foundation established by lawyers in President Bush’s Justice Department and his Department of Defense. These lawyers crafted arguments that approved the use of interrogation tactics including the use of stress positions and dogs which had formerly been out of bounds.”<sup>158</sup> These harsher interrogation tactics from Guantanamo, through personnel transfers, then migrated to the Abu Ghraib

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<sup>155</sup> Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and Al Qaeda and the Mistreatment of Prisoners in Abu Ghraib*, 36 CASE W. RES. J. INT’L L. 541, 584–85 (2005) (explaining how specific interrogation procedures approved by the Secretary of Defense were premised on the OLC legal interpretation sought by and provided to White House Counsel Alberto Gonzalez).

<sup>156</sup> Katharine Q. Seelye, *A Nation Challenged: The Detention Camp*, N.Y. TIMES, Dec. 28, 2001, at B6, available at LEXIS, News Library, NYT File.

<sup>157</sup> Demetri Sevastopulo, *FBI Agents ‘Warned Military on Techniques’ Guantanamo Bay*, FIN. TIMES, Feb. 24, 2006, § The Americas, at 4, available at LEXIS, News Library, FINTME File.

Federal Bureau of Investigation agents at Guantanamo Bay warned military interrogators that some aggressive interrogation techniques were illegal, according to documents released yesterday

. . . . Major General Geoffrey Miller, overall commander of the prison from late 2002, who was later sent to Abu Ghraib to improve the flow of intelligence from interrogations, “favoured” the more aggressive techniques “despite FBI assertions that such methods could easily result in the elicitation of unreliable and legally inadmissible information.”

*Id.*; R. Jeffrey Smith, *General is Said to Have Urged Use of Dogs*, WASH. POST., May 26, 2004, at A01, available at LEXIS, News Library, WPOST File (“A U.S. Army general dispatched by senior Pentagon officials to bolster the collection of intelligence from prisoners in Iraq last fall inspired and promoted the use of guard dogs there to frighten the [detainees], according to sworn testimony by the top U.S. intelligence officer at the Abu Ghraib prison.”).

<sup>158</sup> Emily Bazelon, Phillip Carter & Dahlia Lithwick, *What is Torture?*, SLATE, May 26, 2005, <http://slate.msn.com/features/whatistorture/introduction.html>.

prison in Iraq,<sup>159</sup> where the United States was holding prisoners of war who were classified as outlaw militants.<sup>160</sup>

On April 28, 2004, CBS News first showed pictures from Abu Ghraib, detailing

abuses by American soldiers at Baghdad's Abu Ghraib prison. There were images of a man standing hooded on a box with wires attached to his hands; of guards leering as they forced naked men to simulate sexual acts; of a man led around on a leash by a female soldier; of a dead Iraqi detainee, packed in ice; and more.<sup>161</sup>

Public release of photographs of the abuses at Abu Ghraib sparked outrage on nearly all sides of the political spectrum.<sup>162</sup> Military and civilian investigations further documented incidents of prisoner abuse,<sup>163</sup> producing “thousands of documents, witness interviews, military orders, emails, and PowerPoint briefings.”<sup>164</sup> Ultimately, President Bush himself

<sup>159</sup> SCHLESINGER, *supra* note 2, at 14 (“augmented” interrogation techniques approved for Guantanamo detainees “migrated to Afghanistan and Iraq where they were neither limited nor safeguarded”). See also Edward Alden, *FBI Saw Abu Ghraib-Style Tactics in Guantanamo Bay Jail Two Years Ago*, FIN. TIMES, Dec. 7, 2004, at 2, available at LEXIS, News Library, FINTIME File (“The [prisoner abuse] incidents occurred in late 2002, when the [Guantanamo] prison was under the authority of Major General Geoffrey Miller, later sent to oversee intelligence gathering from Iraqi detainees at the Abu Ghraib.”).

<sup>160</sup> A RAND analyst has noted that “many of the detainees were not soldiers and should have had their cases reviewed much faster. . . . Many of them are innocent civilians swept up.” Edward Wong, *American Jails in Iraq Bursting with Detainees*, N.Y. TIMES, Mar. 4, 2005, at A1.

<sup>161</sup> Phillip Carter, *The Road to Abu Ghraib: The Biggest Scandal of the Bush Administration Began at the Top*, WASH. MONTHLY, Nov. 1, 2004, at 20.

<sup>162</sup> See Editorial, *Enough is Enough: U.S. Must Stop Tolerating Abuse of Prisoners*, THE SAN DIEGO UNION-TRIBUNE, Oct. 10, 2005, at B6.

The 90-9 vote to require that U.S. troops use only specific, Army-authorized interrogation techniques on prisoners—tacked onto a \$440 billion military spending bill despite a veto warning from the White House—reflected a bipartisan consensus that the abuses seen at Guantanamo Bay and in Iraq can no longer be tolerated.

*Id.*; Editorial, *Taking the High Ground: Senate Right to Ban Cruelty to Terrorism Detainees*, COLUMBUS DISPATCH (OHIO), Oct. 8, 2005, at 08A.

This amendment to the overall defense bill was prompted in part by the nauseating photos of prisoner abuse at Abu Ghraib in Iraq, and it's overdue. The Senate spoke boldly; 90 senators in favor and just nine opposed. The bipartisan majority included Ohio's GOP Sens. Mike DeWine and George V. Voinovich.

*Id.*; Lisa Hajjar, *In the Penal Colony*, THE NATION, Feb. 7, 2005, § 5, at 23 (the “expose [on Abu Ghraib] jolted Congress into bipartisan—if short-lived—action”).

<sup>163</sup> Eric Schmitt, *Abuse Inquiry Says Officials Exercised Little Oversight*, N.Y. TIMES, Dec. 4, 2004, at A10.

<sup>164</sup> Carter, *supra* note 161, at 20.

apologized for the Abu Ghraib abuses,<sup>165</sup> and a brigadier general and several other soldiers were reprimanded.<sup>166</sup>

Before the prisoner abuse began, the Department of Justice Office of Legal Counsel (OLC), Department of Defense Office of General Counsel, and White House Counsel all wrote memoranda providing guidance to the interrogators about how much mental and physical force they were allowed to use under U.S. law.<sup>167</sup> These are collectively known as the Torture Memos.

The leaked and then subsequently released Department of Justice Office of Legal Counsel, Department of Defense, and White House Counsel memoranda, defining the limits of interrogation techniques suitable for employment in Guantanamo, Afghanistan, and Iraq, have drawn widespread publicity and criticism.<sup>168</sup> In response to the memos, the Senate declared that the United States “shall not engage in torture or cruel, inhuman or degrading treatment.”<sup>169</sup> Ultimately, the memos were disavowed by the administration as “unnecessary [and] overbroad” and not relied upon.<sup>170</sup>

Despite the administration’s description of the memos as not relied upon, these memos may have a direct causal link to the “numerous incidents of sadistic, blatant, and wanton criminal abuses . . . inflicted on several detainees [at Abu Ghraib].”<sup>171</sup> The independent committee investigating the abuses determined that “the abuses were not just the failure of some individuals to follow known standards, and they [we]re more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels.”<sup>172</sup>

An examination of how the Torture Memos were developed suggests that several procedural shortcomings led to such a controversial outcome. The government attorneys preparing the memos may have failed to meet their ethical responsibility requirement to explore alternative perspectives

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<sup>165</sup> Frances Williams, *Global Outcry at US Treatment of Prisoners Fails to Stamp out Abuse*, FIN. TIMES, Dec. 22, 2004, at 9, available at LEXIS, News Library, FINTME File.

<sup>166</sup> Richard A. Serrano & Mark Mazzetti, *General Demoted Over Prison Scandal*, L.A. TIMES, May 6, 2005, at A20, available at LEXIS, News Library, LAT File.

<sup>167</sup> This includes treaties signed by the United States because they are part of the “supreme Law of the Land.” U.S. CONST. art. VI, cl. 2.

<sup>168</sup> See Anthony Lewis, *Making Torture Legal*, N.Y. REV. OF BOOKS, July 15, 2004, <http://www.nybooks.com/articles/17230>; R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos: Most Scholars Reject Broad View of Executive’s Power*, WASH. POST, July 4, 2004, at A12, available at LEXIS, News Library, WPOST File; Carter, *supra* note 161, at 20; Caplan, *supra* note 112.

<sup>169</sup> Jelinek, *supra* note 113.

<sup>170</sup> Press Briefing, Judge Alberto Gonzales, White House Counsel (June 22, 2004), available at <http://whitehouse.gov/news/releases/2004/06/20040622-14.html>.

<sup>171</sup> ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16 (May 4, 2004), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf).

<sup>172</sup> SCHLESINGER, *supra* note 2, at 5.

and to ensure such perspectives were represented during the policymaking process.

#### A. A Non-Subdelegation Ethical Guideline for Government Attorneys

There are limits on Congress' ability to enact excessively broad or discretionary grants of statutory authority to the executive branch or others.<sup>173</sup> Additionally, there are executive duties the President may only delegate selectively.<sup>174</sup> The Subdelegation Act<sup>175</sup> has been read by some commentators as limiting presidential delegations to high government officials.<sup>176</sup> Similarly, legal counsel for government agencies and departments should be limited in their delegation of their legal counsel responsibilities.

As the branch of the government entrusted with waging war, the Department of Defense has primary operational and doctrinal responsibility for prisoners of war.<sup>177</sup> In a memorandum to the general counsel of the Department of Defense, Secretary Rumsfeld ordered the creation of a working group within the DoD to assess the legal, policy, and operational issues relating to the interrogation of detainees.<sup>178</sup>

##### 1. Responsibilities of DoD General Counsel

The DoD general counsel is appointed as the Chief Legal Officer of the Department of Defense by the President—not by the Secretary of Defense—with the advice and consent of the Senate.<sup>179</sup> The general

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<sup>173</sup> See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 155–56 (1993); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 270 (2001); and Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–37 (2002). But see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (arguing that the nondelegation doctrine does not exist because “a statutory grant of authority to the executive branch or other agents can never amount to a delegation of legislative power.”).

<sup>174</sup> See Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 425 (2006) (noting the President cannot merely turn over all his powers to the Vice President and the Secretary of Defense cannot outsource his decision-making to a think-tank like the Rand Corporation).

<sup>175</sup> 3 U.S.C. §§301–302 (Supp. 2001). The Act permits the President to delegate to any official appointed by and with the advice and consent of the Senate, except where expressly prohibited by Congress.

<sup>176</sup> Verkuil, *supra* note 174, at 427.

<sup>177</sup> Most recently, Congress gave a general authorization to the Department of Defense to pay for detaining “prisoners of war” and “similar” persons. 10 U.S.C. § 956 (5) (Supp. 2001).

<sup>178</sup> See Memorandum from Donald Rumsfeld, Sec’y of Def., to the Gen. Counsel of the Dep’t of Def., *Detainee Interrogations* (Jan. 15, 2003), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc6.pdf>.

<sup>179</sup> See 10 U.S.C. § 140 (Supp. 2001) (establishing the authority of the General Counsel as the Department’s Chief Legal Officer). See also DoD Office of the General Counsel, <http://www.defenselink.mil/dodgc/> (last visited Nov. 27, 2006) (describing the statutory authority and responsibilities of the DoD General Counsel).

counsel is responsible for “providing advice to the Secretary and Deputy Secretary of Defense regarding all legal matters and services performed within, or involving, the Department of Defense, [and] establish[ing] DoD policy on general legal issues, determin[ing] the DoD positions on specific legal problems, and resolv[ing] disagreements within the DoD on such matters.”<sup>180</sup>

The DoD general counsel is also responsible for providing guidance on and coordinating “significant legal issues in international law, including those presented by military operations,”<sup>181</sup> and overseeing the DoD Law of War Program, which “encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.”<sup>182</sup> The DoD Law of War Program includes a

program to ensure implementation of the international law of war, both customary and codified, about EPOW [Enemy Prisoners of War], to include the enemy sick or wounded, retained personnel, civilian internees (CIs), and other detained personnel (detainees). Detainees include, but are not limited to, those persons held during operations other than war.<sup>183</sup>

The DoD general counsel was responsible for establishing the government’s legal position with regard to the treatment of war prisoners and detainees. Accordingly, the DoD general counsel and his staff should have been the primary interpreters of the Laws of War related to prisoner interrogation.

## 2. *The Case of the Torture Memos*

The DoD Working Group, under the direction of the DoD general counsel, “relied heavily on the OLC.”<sup>184</sup> The Working Group did not create its own independent analysis of what would constitute torture. A detailed textual analysis of the Working Group’s final report shows it was designed to augment the OLC legal memorandum by assuming that the detainees were not covered by the Geneva Convention, rather than conducting an independent inquiry into the proper interpretation of the

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<sup>180</sup> 10 U.S.C. § 140.

<sup>181</sup> DEP’T OF DEFENSE, DIRECTIVE 5145.1 §§ 3.1–3.10 (May 2, 2001).

<sup>182</sup> DEP’T OF DEFENSE, DIRECTIVE 2310.01E § 3.1 (May 9, 2006).

<sup>183</sup> DEP’T OF DEFENSE, DIRECTIVE 2310.01 § 1.1 (Aug. 18, 1994).

<sup>184</sup> SCHLESINGER, *supra* note 2, at 8.

relevant statutes that contributed to a definition of torture.<sup>185</sup> The Washington Post noted that the Working Group report “incorporated much, but not all, of the legal thinking from the OLC memo.”<sup>186</sup> Meanwhile, Alberto Gonzales, White House Counsel and future United States Attorney General, described the OLC memos as “[u]nnecessary, overbroad discussions . . . that address abstract legal theories, or discussions subject to misinterpretation, but not relied upon by decision-makers are under review . . . .”<sup>187</sup>

Legal advice by government attorneys should have a basis in independent inquiry.<sup>188</sup> As far back as 1855, Attorney General Caleb Cushing wrote that

in the Constitution or in the general statutes of departmental organization . . . where advice or an opinion is to be given[,] [t]hat advice or opinion must of course embody the individual thought of the officer giving it. Thus, when the President calls on any of the Heads of Department for ‘advice,’ either in writing or verbal, such advice must, in the nature of things, be their act, not his.<sup>189</sup>

The Torture Memos published by the Department of Defense, by contrast, do not appear to offer any individual analysis by attorneys in the DoD Law of War Working Group.

### 3. *Who is the DoD General Counsel’s Client?*

The original understanding of the Constitution is that the executive branch is not a unitary structure where the President exercises a plenary power to supervise and direct the interpretation and administration of the law.<sup>190</sup> Instead, the system contains intermingled checks and balances. For

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<sup>185</sup> See Wallach, *supra* note 155, at 596 n.220 (conducting an in-depth textual analysis of the DoD Working Group memorandum and ascertaining that the Working Group relied on the OLC Memorandum for the key assumption that the detainees were not covered by the Third Geneva Convention).

<sup>186</sup> Dana Priest, *Justice Dept. Memo Says Torture ‘May Be Justified’*, WASH. POST ONLINE, June 13, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html>.

<sup>187</sup> Press Briefing, Judge Alberto Gonzales, White House Counsel (June 22, 2004), *available at* <http://whitehouse.gov/news/releases/2004/06/20040622-14.html>. See also Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics is Disavowed*, WASH. POST, June 23, 2004, at A01, *available at* LEXIS, News Library, WPOST File.

<sup>188</sup> This is similar to Federal Rule of Civil Procedure 11, which requires each attorney to make an independent inquiry into the facts and legal theories of the case. FED. R. CIV. P. 11.

<sup>189</sup> 7 Op. Att’y Gen. 453, 463 (1855), *available at* 1855 WL 2328 (emphasis added).

<sup>190</sup> Lessig, *supra* note 137, at 196–97. See also, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 41 (1994) (“We believe that the framers wanted to constitutionalize just some of the array of power a constitution-maker must allocate, and as for the rest, the framers intended Congress (and posterity) to control as it saw fit.”). *But see* David B.

example, historically, the President did not have full direct control over the prosecution function of the government.<sup>191</sup> Further, for some departments within the executive branch, Congress imposed the entire organizational structure, and other departments received subsequent structural guidance.<sup>192</sup> Because the President does not unilaterally control all executive branch departments, perhaps the President should not impose a unitary legal interpretation on all departments of the executive branch.<sup>193</sup>

The heads of virtually all executive branch departments and agencies are provided with their own departmental legal advisors and complete legal staffs.<sup>194</sup> These advisors have no formal obligation to submit even the most difficult legal questions to the Department of Justice.<sup>195</sup> The department general counsel's interests will "ordinarily be fairly closely aligned with those of the head of the agency, [and he] can be expected to provide legal advice that reflects a calculation close to the one that his superior would make if he had the time and expertise to perform the legal analysis."<sup>196</sup>

Each agency general counsel is responsible not just to the head of the agency and to the President, but also to Congress.<sup>197</sup> E. Donald Elliott, the

Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 ADMIN. L.J. AM. U. 309, 310 (1993) (arguing that the President has constitutional authority to direct how agency heads regulate).

<sup>191</sup> Lessig & Sunstein, *supra* note 190, at 19–20.

<sup>192</sup> *Id.* at 30.

<sup>193</sup> *But see* John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 379 (1993) ("the structure of Article II suggests that the President is ultimately responsible for the legal interpretation of his administration"); Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 CARDOZO L. REV. 313, 319–20 (1993) (if originalism is structural and textual then there may be a unitary executive); and Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 CARDOZO L. REV. 201, 217–18 (1993) (from an instrumental interpretation of the law, unified theory is necessary to run the government, particularly in matters like foreign affairs). With regard to foreign affairs, this view is refuted by Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309 (2006).

<sup>194</sup> Lund, *supra* note 5, at 488.

<sup>195</sup> *Id.* See also Michael Herz, *The Attorney Particular: Government Role of The Agency General Counsel*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 143, 147 (Cornell W. Clayton ed., 1995) ("Congress never repealed the provision, dating back to the Judiciary Act of 1789, allowing (but not requiring) agency heads to obtain legal advice from the attorney general.")

<sup>196</sup> Lund, *supra* note 5, at 493–94.

<sup>197</sup> Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 650–51 (1989).

Congress has historically based its ability to insulate and direct subordinate executive branch officials . . . on its view that the executive power is not hierarchical in nature or uniquely vested in the President alone . . . . Article II has been seen as clearly anticipating the creation of an administrative bureaucracy by its mention of "Heads of Departments," and the Necessary and Proper Clause of Article I makes it certain that it would be Congress alone that would do the creating. In this scheme, Congress can assign a "Head of Department" any executive power not textually reserved to the President in

former general counsel of the EPA, described his role, “I view myself in some sense as the vicar of Congress.”<sup>198</sup> It is Congress that creates the power and reach of each federal agency through enabling statutes.<sup>199</sup> The job of the general counsel of each agency is to serve as the agency’s Chief Legal Officer regarding all legal matters involving the agency, including assurance that the department is adhering to its enabling statutes.<sup>200</sup> As the organization must heed its enabling statute, so should the organization’s general counsel. Thus, if an organization’s enabling statute charges it with the primary responsibility for national defense, then it should serve as the primary executive branch interpreter of laws related to national defense.

Sometimes the executive branch seeks input from the Department of Justice Office of Legal Counsel when interpreting statutes that are outside its core area of expertise.<sup>201</sup> The OLC, however, believes that it should only provide outside legal advice to another agency after it is told, in writing, the requesting agency’s “own best legal views.”<sup>202</sup> In the case of the Torture Memos, the record shows no Department of Defense “best legal analysis” whatsoever prior to requesting an opinion from OLC on the matter.

Despite the views of other executive branch departments, each agency still bears ultimate responsibility for its mission. This responsibility is spelled out in the agency’s enabling statute and cannot be waived or transferred without Congressional alteration of the enabling statute itself.<sup>203</sup>

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Article II. . . . A literal reading of the “take care” clause confirms the President’s duty to ensure that officials obey Congress’s instructions . . . . In the words of the Supreme Court, where a valid duty is imposed upon an executive official by Congress, “the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president.”

*Id.* (citing *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838)). *See also id.* at 656 (“lower courts and the Supreme Court in *Kendall*, confirmed that Congress could prescribe duties for officers to perform independent of the President’s will”); *and id.* at 671 (“Congress’s authority to impose direct reporting requirements on agency officials . . . also rests independently on Congress’s constitutional prerogative to inform itself in aid of its legislative functions.”).

<sup>198</sup> Herz, *supra* note 195, at 152.

<sup>199</sup> *Id.* at 163.

<sup>200</sup> *Id.* at 158–59. ([T]he department general counsel “was perceived to care most about the rule’s surviving judicial review . . . and second most about the rule’s fidelity to the statute.”).

<sup>201</sup> Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 228 (1993) (“An agency does not *have* to turn to DOJ for legal guidance; whether to do so is left entirely to its discretion. If it does, the Attorney General provides merely an ‘opinion,’” which are respected for, among other reasons, DOJ’s expertise.)

<sup>202</sup> *See* DELLINGER, ET AL., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL 4 (Dec. 21, 2004), [available at](http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf) [http://www.acslaw.org/files/2004%20programs\\_OLC%20principles\\_white%20paper.pdf](http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf).

<sup>203</sup> Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1108–09 (1988).

Major shifts in agency law or policy that appear to be at odds with an agency’s enabling act can raise statutory and, on occasion, constitutional problems as well. . . . If new legislative bargains need to be struck, Congress, rather than an agency or any other single branch of government, should strike them.



This means that, even if outside legal advice is sought on a topic, the general counsel for each department must ultimately make his or her own inquiry into whether the department's operations are consonant with its enabling statutes, and give his own recommendation about legal issues that are core to his agency's mission.

If an agency's enabling statute gives it primary control over a particular domain, such as the conduct of war, then it is likely that the agency will employ some of the leading legal experts in that domain. For example, one would expect that the Department of Defense, given its primary mission to prosecute the war, would have the most legal experts on the Law of War.

#### *4. The Exclusion of Military Lawyers from Decision-making*

While implementing the DoD Law of War Program, the general counsel should follow pre-existing DoD internal directives. These directives call for close cooperation between the DoD general counsel and military lawyers. Specifically,

the Judge Advocate General of the Army, in coordination with the Army general counsel and the general counsel of the Department of Defense, [would] provide legal guidance within the Department of Defense about the DoD EPOW [Enemy Prisoner of War] Detainee Program, to include review of plans and policies developed in connection with the program, and coordination of special legislative proposals and other legal matters with other Federal Departments, Agencies, or Components.<sup>204</sup>

The Law of War Working Group overseen by the DoD general counsel is supposed to include representatives from

the General Counsel of each Military Department; the Counsel to the Commandant of the Marine Corps; the Judge Advocate General of each Military Department, the Staff Judge Advocate to the Commandant of the Marine Corps; and the Legal Counsel to the Chairman of the Joint Chiefs of Staff.<sup>205</sup>

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*Id.*

<sup>204</sup> DEP'T OF DEFENSE, DIRECTIVE 2310.01 § 4.2.7 (Aug. 18, 1994).

<sup>205</sup> DEP'T OF DEFENSE, DIRECTIVE 2310.01E § 5.1.3 (May 9, 2006).

The Group was supposed to “develop and coordinate law of war initiatives and issues, manage other law of war matters as they arise, and provide advice to the General Counsel on legal matters . . . .”<sup>206</sup>

In preparing the DoD Working Group Report<sup>207</sup> on interrogation methods, the DoD general counsel ignored the rest of the DoD legal community<sup>208</sup> and sought an opinion about the relevant laws from the OLC without querying his own staff.<sup>209</sup> The DoD general counsel staff is the largest source of institutional knowledge on the Law of War in the United States, yet the DoD general counsel did not consult this group.<sup>210</sup> The DoD general counsel also violated the traditions of the OLC, which requires departments to conduct their own legal inquiry before asking the OLC for an opinion.<sup>211</sup> The military lawyers have far more experience with the relevant law than anyone at OLC.<sup>212</sup>

Former Secretary of Defense James Schlesinger chaired an independent investigation into the abuses at Abu Ghraib and the lack of institutional controls to prevent them.<sup>213</sup> The report concluded that:

<sup>206</sup> *Id.*

<sup>207</sup> WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY AND OPERATIONAL CONSIDERATIONS (Mar. 6, 2003), available at <http://www.cdi.org/news/law/pentagon-torture-memo.pdf>.

<sup>208</sup> See Wallach, *supra* note 155, at 585 n.172 (“[T]he JAG lawyers say[] political appointees at the Pentagon ignored their warnings, setting the stage for the Abu Ghraib abuses.”) (quoting *ABC World News Tonight: Prisoner Abuse Lawyers Jumping in the Fray* (ABC television broadcast, Sat., May 15, 2004) (transcribed by the author)); and Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 843 (2005) (“The Judge Advocate Generals of the Armed Services and other military lawyers had protested efforts by the DOD Working Group and others to authorize such illegal interrogation tactics . . .”).

<sup>209</sup> Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SECURITY L. & POL’Y 455, 470 (2005) (“DOD General Counsel William Haynes and Department of the Air Force General Counsel Mary Walker read the final [DOJ OLC] Bybee Memorandum and insisted that it become the basis of Defense Department interrogation policy, despite the glaring legal inaccuracies apparent on its face.”) (citing Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn’t Bind Bush*, N.Y. TIMES, June 8, 2004, at A1).

<sup>210</sup> David Kaye, *The Legal Bureaucracy and the Law of War*, 38 GEO. WASH. INT’L L. REV. 589, 591 (2006).

The law of armed conflict . . . is a dense body of law that informs the actions of the U.S. government at all levels during peacetime and war. . . . For many of the day-to-day operations of the military, military lawyers in the Judge Advocate Generals Corps of the military services and civilian lawyers in the Department of Defense Office of General Counsel may provide legal advice without seeking the concurrence of other agencies of the executive branch. This is largely because routine matters—and even matters of high importance, such as the legality of attacking a particular target or using a particular weapon—are governed by rules for which there is general agreement across the government.

*Id.*

<sup>211</sup> See DELLINGER, ET AL., *supra* note 202, at 4.

<sup>212</sup> Lund, *supra* note 5, at 492.

<sup>213</sup> SCHLESINGER, *supra* note 2.

In the initial development of these Secretary of Defense policies, the legal resources of the Services' Judge Advocates and General Counsels were not utilized to their full potential. Had the Secretary of Defense had a wider range of legal opinions and a more robust debate regarding detainee policies and operations, his policy of April 16, 2003 might well have been developed and issued in early December 2002. This would have avoided the policy changes which characterized the Dec 02, 2002 to April 16, 2003 period[,] [which allowed for stronger interrogation techniques].<sup>214</sup>

Meanwhile, Rear Admiral Don Guter, former Navy Judge Advocate General, told ABC News, “[i]f we—‘we’ being the uniformed lawyers—had been listened to, and what we said put into practice, then these abuses would not have occurred.”<sup>215</sup> While military lawyers “were being shut out of the process, . . . civilian political lawyers, not the military lawyers, were writing [the] new rules of engagement.”<sup>216</sup>

##### 5. *Undue Reliance on OLC for Statutory Interpretation*

Another problem in outsourcing legal review of the Torture Memos to OLC is that OLC may have a bias. “Like all accommodating lawyers, OLC is eager to please its clients so that it can both maximize its own business and ‘stay in the loop.’”<sup>217</sup> There is a significant risk that, to maintain its role as a legal advice provider to the executive branch, the OLC will solely heed the current President, rather than the institution of the presidency as a whole, or broader national interests.<sup>218</sup> Because the OLC “has virtually no institutionalized power to monopolize the provision of legal advice . . . , [it] must compete for influence as an advisor with agency counsel and other legal officers within the government, especially the Counsel to the President.”<sup>219</sup> In its competitive zeal to maintain a key

<sup>214</sup> *Id.* at 8.

<sup>215</sup> Jim Lobe, *Pentagon's Feith in the Eye of Another Storm*, ASIA TIMES ONLINE, May 21, 2004, [http://www.atimes.com/atimes/Front\\_Page/FE21Aa02.html](http://www.atimes.com/atimes/Front_Page/FE21Aa02.html).

<sup>216</sup> Ken Silverstein, *U.S. Military Lawyers Felt 'Shut Out' of Prison Policy*, L.A. TIMES, May 14, 2004, at A10, available at LEXIS, News Library, LAT File.

<sup>217</sup> Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 515–16 (1993) (noting how OLC had regularly reversed its own prior opinions in several international legal matters when the administration requested legal backstopping for actions to which it was already committed).

<sup>218</sup> See Blum, *supra* note 9, at 92 (Marine Corps brigadier general noting that DOJ does not represent the military so “understandably, concern for service members is not reflected in their opinion.”).

<sup>219</sup> Lund, *supra* note 5, at 504. Lund notes that “there is very little that actually must be done by OLC, and that the head of OLC therefore has very little to do *except* find ways to make himself useful

role in the administration, some believe “the Justice Department has become the primary and most effective weapon in the quest to aggrandize presidential power . . . .”<sup>220</sup> As a result, Congress, the courts, and the press often regard OLC’s legal advice as highly colored by the interests of its client—akin to a private lawyer’s lack of neutrality.<sup>221</sup>

With very few exceptions, no government agency or department is required to seek the OLC’s advice.<sup>222</sup> If agencies do request legal opinions from the OLC, they must first submit their own views before the OLC will decide the question.<sup>223</sup> This requirement may be designed to prevent “blame-shifting by requiring the agency head or the agency’s general counsel to state his own opinion of the matter in writing.”<sup>224</sup> Accordingly, a government department seeking an unpopular opinion must show its concurrence through its own opinion prior to submitting the question to OLC, thereby reducing the extent the department can blame OLC for the resulting opinion.<sup>225</sup>

However, because the OLC is prohibited from disclosing the views of the agency by confidentiality rules,<sup>226</sup> there is still little likelihood that the department’s own legal opinion will draw much attention. Further, the agency or department is not required to provide elaborate or candid explanations for its stated view.<sup>227</sup> Requiring the agency or department to state its own legal opinion before consulting OLC is less effective if the department does not provide the reasoning and assumptions behind its own opinion.

Because the White House may consult the OLC before the OLC provides advice to other agencies, the direction of OLC’s subsequent advice may have a more political bent. This fact is well known within the government.<sup>228</sup>

### *B. The Importance of Incorporating Third Party Viewpoints*

As a non-adversarial process, government attorney-advisors must take special care to explore third party viewpoints. Former OLC officials recommend that government attorneys advising policymakers should 1)

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to the President and those who can influence the President’s promotion decisions.” *Id.* at 500. The OLC’s involvement in judicial nominations and selection is an example of the OLC’s attempt to make itself useful—even in areas beyond its official role of “providing legal advice to the President and the heads of agencies.” *Id.* at 500 n.151.

<sup>220</sup> *Id.* at 446 n.19.

<sup>221</sup> *Id.* at 486.

<sup>222</sup> *Id.* at 489. *See also* Herz, *supra* note 169, at 162.

<sup>223</sup> Lund, *supra* note 5, at 493.

<sup>224</sup> *Id.* at 493. *See also* DELLINGER, ET AL, *supra* note 202, at 4.

<sup>225</sup> Lund, *supra* note 5, at 493.

<sup>226</sup> *Id.* at 493 n.136.

<sup>227</sup> *See generally* McGinnis, *supra* note 193, at 426–30.

<sup>228</sup> Lund, *supra* note 5, at 499.

respect Congressional power allocation; 2) let each agency do its part; and 3) seek outside views by leveraging outside expertise, and previewing many angles/perspectives.<sup>229</sup>

The creation of the Torture Memos did not involve many agencies outside of DoD and the OLC. This section examines the merits of including the State Department and criminal prosecutors in the interpretation of the laws governing enemy prisoner of war interrogation.

### *1. The State Department*

It is the responsibility of the Secretary of State to ensure proposed international agreements of the United States are consistent with United States foreign policy objectives.<sup>230</sup> Interpretation of the Geneva Conventions, for example, is likely a function that should involve input from the Secretary of State and the State Department Legal Adviser. Yet there is no record of DoD's Working Group on the Law of War consulting the Secretary of State or the State Department Office of Legal Adviser regarding interpretation and application of the Geneva Conventions. Instead, the State Department was only able to provide input to the DoD Law of War Working Group by contacting White House Counsel and presenting its argument that failure to apply the Geneva POW Convention to the Taliban would reverse long-standing U.S. policy and adversely affect the nation's standing in the international arena.<sup>231</sup>

The State Department was systematically excluded from treaty interpretation and policymaking on the topic of torture, as highlighted by Senator Edward Kennedy's remarks to Alberto Gonzales: "Now, without consulting military and State Department experts—they were not consulted. They were not invited to important meetings that might have been important to some. We know of what Secretary Taft has said about his exclusion from these."<sup>232</sup>

Only after DoD received and relied on the legal advice from the OLC was a National Security Council meeting called on the issue.<sup>233</sup>

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<sup>229</sup> See generally DELLINGER, ET AL., *supra* note 202.

<sup>230</sup> 22 C.F.R. §181.4 (2006).

<sup>231</sup> Memorandum from Colin Powell, Sec'y of State to Alberto Gonzalez, Counsel to the President 2 (Jan. 26, 2002), available at <http://msnbc.msn.com/id/4999363>.

<sup>232</sup> *Nomination of Alberto Gonzales for U.S. Attorney General: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Sen. Edward Kennedy, Member, S. Comm. on the Judiciary), available at <http://www.washingtonpost.com/wp-dyn/articles/A53883-2005Jan6.html>.

<sup>233</sup> Harold Hongju Koh, *Friedmann Award Essay: A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 655–56 (2005) ("the [DOJ OLC] Bybee Opinion was apparently transmitted to the Department of Defense, where its key conclusions appear to run through the Defense Department's April 4, 2003 Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations."). See also *Powell Aide: Torture 'Guidance' From VP*, CNN.COM, Nov. 20, 2005, available at <http://www.cnn.com/2005/US/11/20/torture>. Colin Powell's former chief of staff stated he regularly

Reportedly, at that meeting, “the Department of State, the Department of Defense, and the Chairman of the Joint Chiefs of Staff were in agreement that all detainees would get the treatment they are (or would be) entitled to under the Geneva Conventions.”<sup>234</sup>

## 2. *The Criminal Prosecutors*

In the event that the government ultimately wishes to prosecute detainees under the U.S. legal system, it should take the viewpoint of prosecutors into account when structuring detainee interrogation sessions. Prosecutors will undoubtedly want interrogation guidelines to conform to commonly accepted criminal procedure rules. Otherwise, there is a risk that detainee interrogation utilizes a method that violates the Constitution and the resulting evidence is deemed inadmissible in court. Ultimately, if too much evidence is inadmissible because it was extracted inappropriately, the prosecution will not be able to build a case against a suspect and he will be set free. “By holding detainees indefinitely, without counsel. . . under circumstances that could . . . ‘shock the conscience’ of a court, the Administration [] jeopardized its chances of convicting hundreds of suspected terrorists, or even of using them as witnesses in almost any court in the world.”<sup>235</sup>

## C. *The Limits of Legal Analysis: Morality*

Many attorneys insist their analysis is purely legal, rather than moral. John Yoo, a drafter of the OLC memoranda defining torture, described his work as purely “an abstract analysis of the meaning of a treaty and a statute.”<sup>236</sup> Yoo identified a significant “difference between law and moral choice,” and claims he chose to solely analyze the legal choice in his memoranda.<sup>237</sup> Many lawyers are like Yoo in eschewing morality as a

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attended National Security Council meetings, but only received insight into the detainee policy and the resulting abuses

in April or March of 2004 [when he was asked by Powell to] get everything I could get my hands on with regard to the detainee abuse issue—ICRC [International Committee of the Red Cross] reporting, memoranda, open-source information and so forth—so that I could build some kind of story, some kind of audit trail so we could understand the chronology and we can understand how it developed.

*Id.*

<sup>234</sup> SCHLESINGER, *supra* note 2, at 34.

<sup>235</sup> Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, THE NEW YORKER, Feb. 21, 2005, at 108.

<sup>236</sup> Edward Alden, *Dismay at Attempt to Find Legal Justification for Torture*, FIN. TIMES, June 10, 2004, at 7. See also R. Jeffrey Smith & Dan Eggen, *Justice Expands ‘Torture’ Definition*, WASH. POST, Dec. 31, 2004, at A01, available at LEXIS, News Library, WPOST File (where Yoo was quoted, explaining the result of his 2002 memorandum as “mak[ing] it harder to figure out how the torture statute applies to specific interrogation methods”).

<sup>237</sup> Alden, *supra* note 236, at 7.

possible criterion for analysis. They believe there is a “demarcation between the legality and morality of a proposed course of conduct, with lawyers providing information on the former, but leaving the latter untouched, to be resolved only at the client’s discretion.”<sup>238</sup> This matches the long-established view of the lawyer as an “amoral technician,”<sup>239</sup> who optimizes on client loyalty and obedience.<sup>240</sup>

While few legal theorists recommend the inclusion of moral analysis in legal opinions,<sup>241</sup> the ABA has authorized lawyers to refer to moral, political, economic, or social factors when counseling clients.<sup>242</sup> And attorney morals creep into the attorney-client advisory relationship regardless of whether they are formally acknowledged.<sup>243</sup>

One example is the defense of necessity. The evaluation of the necessity defense inherently requires a moral judgment about what is and is “not necessary” in a particular situation. A utilitarian might suggest that necessity is determined by deciding whether a significantly greater good was achieved by an otherwise wrongful action.<sup>244</sup> Meanwhile, a moralist would argue that moral wrongs cannot offset other societal benefits because committing the moral wrong damages society more than it saves society.<sup>245</sup> For example, analyzing the necessity defense to a torture claim by inquiring about the appropriateness of whether “the intentional killing of one person to save two others”<sup>246</sup> inherently relies on the lawyer’s “lens

<sup>238</sup> Robert K. Vischer, *Tortured Ethics: Abu Ghraib and the Moral Lawyer*, ST. JOHN’S LEGAL STUDIES RESEARCH PAPER, at 4 (Oct. 5, 2004), available at <http://ssm.com/abstract=601203>.

<sup>239</sup> Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 6 (1975) (“Provided that the end sought is not illegal, the lawyer is, in essence, an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established.”).

<sup>240</sup> James A. Cohen, *Lawyer Role, Agency Law, and the Characterization “Officer of the Court”*, 48 BUFF. L. REV. 349, 350–51 (2000) (arguing that lawyers’ fidelity to clients, rather than the court or their conscience, stems from the historical tradition of the lawyer as the client’s agent).

<sup>241</sup> See Dan M. Kahan, Deputy Dean & Elizabeth K. Dollard, Professor of Law, Yale Law Sch., Yale Law School Commencement Remarks (May 22, 2006), available at <http://www.law.yale.edu/documents/pdf/KAHANrevised.pdf> (criticizing John Yoo for failing to consider the moral implications of his legal opinions at the Office of Legal Counsel).

<sup>242</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 (2006).

<sup>243</sup> Vischer, *supra* note 238, at 6; see also Lund, *supra* note 5 at 461 (noting that “[i]f one assumes some kind of systematic coincidence between the President’s preferences . . . and ‘the greater social good,’ one can start to imagine the possibility of OLC’s developing a kind of hybrid jurisprudence in which the President’s policy preferences are openly incorporated into the [seemingly objective] legal analysis supplied by OLC lawyers.” (citing John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993))).

<sup>244</sup> See generally Adam Raviv, *Torture and Justification: Defending the Indefensible*, 13 GEO. MASON L. REV. 135, 140–44 (2004).

<sup>245</sup> See Wallach, *supra* note 155, at 542. “Always remember that when you gaze into the abyss, the abyss gazes back into you.” *Id.* (quoting FRIEDRICH NIETZSCHE, *JENSEITS VON GUT UND BOSE*, Part IV, at ¶ 146 (1964)).

<sup>246</sup> Memorandum from U.S. Dep’t of Justice Office of Legal Counsel to Alberto R. Gonzalez, Counsel to the President 40 (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

of utilitarian morality.”<sup>247</sup> Without explicitly mentioning the morality assumptions adopted by the drafting lawyer, a legal opinion may be “replete with normative assertions founded in unarticulated beliefs that have very little to do with law.”<sup>248</sup>

The result of a failure to highlight an attorney’s own moral viewpoint, or at least the attorney’s interpretation of the client’s moral viewpoint, is that moral considerations are “forced into the background, where [they are] not susceptible to exploration by the client.”<sup>249</sup> There is a grave risk that the client will equate legal justification for his policy as moral approval because the laws are created by society and many believe that legality equals morality because society would not enact morally unjust laws.<sup>250</sup> Applying the transitive property, policies that are not illegal must also not be immoral. The result is that the client erroneously thinks his legal approval must also convey moral approval for his policy. Meanwhile the lawyer believes he has recused himself from considering issues of morality—a grave disconnect.

Once the attorney-advisor’s own morals become an underlying assumption of the legal analysis, then her legal opinion itself is not just a direct translation of society’s mores. Instead, it is society’s mores filtered through the lawyer’s own moral compass. Even if the lawyer tries to substitute the client’s morality for his own, the lawyer should still surface the inherent morality in his analysis or else he cannot determine if he understood the client’s moral viewpoint correctly.

The risk of misrepresenting the client’s morality or surreptitiously impressing the lawyer’s morality upon the client is significant. Government attorney-advisors can reduce this risk by bringing their own morality and their assumptions about their client’s morality to consciousness within their legal opinions. Some former OLC staffers have recommended this as a guideline for OLC attorneys.<sup>251</sup> While it may be impossible for all parties to an issue to have the same moral viewpoint, at least they can know consciously that their viewpoint is properly

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<sup>247</sup> Vischer, *supra* note 238, at 11.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 6.

<sup>250</sup> See, e.g., Susan R. Martyn, *Rhode’s Reforms: A Review of In the Interests of Justice*, 15 GEO. J. LEGAL ETHICS 143, 146 (2001) (reviewing DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000)).

[T]he assumption that any client is entitled to whatever the law permits confuses legal and moral right. . . . In actuality, most lawyers make a virtue out of necessity by claiming the right to advocate for the interests of those that pay, regardless of whether or not the goal sought is just. The real question should be what justifies this professional escape from the fundamental moral responsibility of individuals.

*Id.*

<sup>251</sup> See DELLINGER, ET AL., *supra* note 202.



represented.<sup>252</sup> Policymakers reviewing the Torture Memos, for example, should have been made aware of the memo drafters' own utilitarian point-of-view, rather than risk that the policymakers assumed a more absolutist morality was inherent in the torture statutes.

#### VIII. CONCLUSION

While the government attorney-advisor has a different job than government litigators and prosecutors, the attorney-advisor has similar ethical responsibility requirements. Our aforementioned Matthew and other government attorneys have a responsibility to ensure that alternative viewpoints are adequately represented when interpreting and implementing statutes. To compensate for the lack of an adversary in the policy interpretation process, the attorney-advisor must represent the entire public interest rather than just his particular agency's viewpoint. Furthermore, government attorney-advisors should ensure the department charged with interpreting a particular statute actually does so, rather than seeking an outside opinion from a department with less expertise in that legal area. Lastly, government attorney-advisors need to express their moral assumptions explicitly in their legal opinions so policymakers are not offered moral advice under the guise of legal advice. These ethical responsibility requirements, if acted upon, would have likely deterred the scandal stemming from the government Torture Memos.

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<sup>252</sup> *Id.*