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## The Role of the OLC in Providing Legal Advice to the Commander-In-Chief After September 11th: The Choices Made by the Bush Administration Office of Legal Counsel

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# **The Role of the OLC in Providing Legal Advice to the Commander-in-Chief After September 11th: The Choices Made by the Bush Administration Office of Legal Counsel**

**By Arthur H. Garrison\***

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*The first two roles of the U.S. Attorney General from its inception were to represent the interests of the United States before the U.S. Supreme Court and to advise the President on matters of the law. Despite the Attorney General delegating both roles, the former to the Solicitor General and the latter to the Office of Legal Counsel (OLC), the Attorney General and the Department of Justice are by statute and tradition looked upon to be the protectors of the rule of law within the Executive Branch. It is to the Attorney General, and by delegation to the OLC, to say to the strong seas of presidential power, this far and no farther will you come and here your proud waves must stop! The role of the OLC to provide dispositive opinions on the meaning of the law and to protect the rule of law requires that the OLC provide a specific type of advice that separates it from other types of legal advice from other quarters within the Executive Branch. After September 11th, the Bush Administration's OLC abandoned the Neutral Expositor of the best view of the law model and advanced a Private Lawyer model to advising the President. This article reviews the literature on the proper role of the OLC within the Executive Branch and places the torture memos within a broader context of the OLC's failure to maintain its proper role of a quasi-judicial advisor on the meaning of law.*

## I. INTRODUCTION

Under the Constitution, the President is required to faithfully execute the law, is authorized to seek advice from his department heads when making policy, and is the Commander-in-Chief of the Army and Navy.<sup>1</sup> After the events of September 11, 2001, President Bush sought the advice of the Department of Justice Office of Legal

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<sup>1</sup> See U.S. CONST. art. II, § 3; U.S. CONST. art. II, § 2, cl. 1; and U.S. CONST. art. II, § 1, cl. 1.

Counsel (OLC) for a binding legal opinion<sup>2</sup> on presidential authority to respond to the attacks of al Qaeda and its supporters.<sup>3</sup> It has been eleven years since the OLC issued a set of opinions that authorized the President to order enhanced interrogation techniques of captured enemy combatants as a result of the military actions in Afghanistan and later in Iraq. On August 1, 2002, the OLC issued two opinions regarding the President's power to designate captured individuals as enemy combatants and how they could be interrogated for information helpful in the war on terror. The first memo, *Memorandum for Alberto R. Gonzales Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* [hereinafter *August 2002 Memo*],<sup>4</sup> asserted that a set of proposed interrogation techniques were not a violation of federal law prohibiting torture<sup>5</sup> and international law.<sup>6</sup> The second memo, *Memorandum for John Rizzo Acting General Counsel of Central Intelligence Agency Re: Interrogation of al Qaeda Operative, August 1, 2002* [hereinafter *CIA Interrogation Memo*],<sup>7</sup> asserted that a list of ten specific techniques<sup>8</sup> used on specific captured terrorists did not

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<sup>2</sup> See Arthur H. Garrison, *The Opinions by the Attorney General and The Office of Legal Counsel: The How and Why They are Significant*, 76 ALB. L. REV. (forthcoming 2013) (discussing the historical development of the quasi-judicial authority of the Attorney General and later the OLC to issue binding opinions on the meaning of the law within the Executive Branch).

<sup>3</sup> Arthur H. Garrison, *The Office of Legal Counsel "Torture Memos": A Content Analysis of What the OLC Got Right and What They Got Wrong*, 49 CRIM. L. BULL. (forthcoming 2013).

<sup>4</sup> Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A [hereinafter *August 2002 Memo*].

<sup>5</sup> 18 U.S.C. § 2340 (2006).

<sup>6</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter *CAT*].

<sup>7</sup> Memorandum for John Rizzo Acting General Counsel of the Central Intelligence Agency, Re: Interrogation of al Qaeda Operative (Aug. 1, 2002) [hereinafter *CIA Interrogation Memo*].

<sup>8</sup> The memo concluded that the following ten techniques did not violate 18 U.S.C. § 2340A:

- (1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a

violate federal and international law. Together, the opinions asserted that (1) the interrogation techniques proposed by the Central Intelligence Agency (CIA) and the military did not violate federal or international law (2), even if the techniques did, neither federal or international law placed limits on the power of the President as Commander-in-Chief to act in the war on terror (3), and thus the application of Section 2340 (domestic law prohibiting torture by officials of the U.S. government) to the interrogation of detainees would be an unconstitutional violation under the separation of powers doctrine.<sup>9</sup> A third memo issued on March 14, 2003, *Memorandum for William J. Haynes II, General Counsel to the Department of Defense Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* [hereinafter *Military Interrogation Memo*],<sup>10</sup> asserted that enemy combatants held outside United States' territory did not enjoy protection from federal law prohibiting torture.

Much has been written on the OLC's memos. The scholarship on the memos have focused on the legal assertions made by the OLC<sup>11</sup> as well as focused on why the *August 2002*, the *CIA*

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confinement box, and (10) the waterboard . . . [All of which would] be used in some sort of escalating fashion, culminating with the waterboard, though not necessarily ending with this technique.

*CIA Interrogation Memo*, *supra* note 7, at 2.

<sup>9</sup> See Garrison, *supra* note 3; Arthur H. Garrison, *The Bush Administration and the Torture Memos: A Content Analysis of the Response of the Academic Legal Community*, 11 (1) CARDOZO PUB. L. POL'Y & ETHICS J. (forthcoming 2012).

<sup>10</sup> Memorandum for William J. Haynes II, General Counsel to the Department of Defense Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003) (on file with OLC) [hereinafter *Military Interrogation Memo*].

<sup>11</sup> See generally Arthur H. Garrison, *Hamdi, Padilla and Rasul: The War on Terrorism on the Judicial Front*, 27 AM. J. TRIAL ADVOC. 99 (2003); Arthur Garrison, *The Bush Administration and the War on Terrorism on the Judicial Front II: The Courts Strike Back*, 27 AM. J. TRIAL ADVOC. 473 (2004); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SEC. L. & POL'Y 409 (2005); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. & POL'Y 455 (2005); David J. Gottlieb, *How We Came to Torture*, 14 KAN. J.L. & PUB. POL'Y 449 (2005); Jordan

*Interrogation*, and *Military Interrogation* memos did not survive public scrutiny,<sup>12</sup> as well as, the OLC's subsequent withdrawal<sup>13</sup> of all its 9/11 opinions.<sup>14</sup> However, there has been less research focused on the proper role of the OLC when it provides legal advice to the President and how its advice differs from legal advice from other

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J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811 (2005); Johannes van Aggelen, *A Response to John C. Yoo, The Status of Soldiers and Terrorists Under The Geneva Conventions*, 4 CHINESE J. INT'L L. 167 (2005); Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT'L L. REV. 9 (2005); Arthur H. Garrison, *Hamdan v. Rumsfeld, Military Commissions, and Acts of Congress: A Summary*, 30 AM. J. TRIAL ADVOC. 339 (2006); JOHN YOO, *WAR BY OTHER MEANS* (2006); Arthur Garrison, *The Judiciary in Times of National Security Crisis and Terrorism: Ubi Inter Arma Enim Silent Leges, Quis Custodiet Ipso Custodiet?* 30 AM. J. TRIAL ADVOC. 165 (2006); Cornella Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297 (2006); Dawn Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints of Executive Power*, 54 UCLA L. REV. 1559 (2007); JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); Dawn Johnsen, *All the President's Lawyers: How to Avoid Another "Torture Opinion" Debacle*, AM. CONST. SOC'Y FOR L. & POL'Y (2007); Arthur Garrison, *Hamiltonian and Madisonian Democracy, the Rule of Law and Why the Courts Have a Role in the War on Terror*, 8 J. INST. JUST. & INT'L STUDIES 120 (2008); DAVID COLE, *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* (2009); Joseph Lavitt, *The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During the Bush Administration*, 62 ME. L. REV. 155 (2010); Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389 (2010); Janet Cooper Alexander, *John Yoo's War Powers: The Law Review and the World*, 100 CALIF. L. REV. 331 (2012).

<sup>12</sup> See Memorandum for James B. Comey, Deputy Attorney General Re: Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004) (on file with OLC) [hereinafter *December 2004 Memo*]; Garrison, *supra* note 3; Garrison, *supra* note 9.

<sup>13</sup> See *December 2004 Memo*, *supra* note 12.

<sup>14</sup> See David J. Barron, *Memorandum for the Attorney General Re: Withdrawal of Office of Legal Counsel CIA Interrogation Opinions* (Apr. 15, 2009) (on file with OLC) [hereinafter *April 2009 Memo*]; Memo for the Files: Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009) [hereinafter *January 2009 Memo*]. The *January 2009 Memo* together with the *April 2009 Memo* withdrew all of the controversial OLC post-9/11 opinions during the first two years of the Bush Administration. See Garrison, *supra* note 3 (discussing the *December 2004 Memo*, *January 2009 Memo*, and *April 2009 Memo*).

Executive Branch attorneys.<sup>15</sup> This article focuses on that question. Specifically, this article reviews the literature on executive legal opinion writing and asserts that during the first two years after the events of 9/11, the OLC under President Bush confused its role as a neutral expositor of the law with the role of legal policymaking. Part II of this article reviews the literature on the role of attorneys within the Executive Branch and the differences within those roles in

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<sup>15</sup> For example, see Professor Gibson who observed that:

Until recently, there was very little written about OLC whether popular press or scholarly work. Indeed, until the George W. Bush administration, with few exceptions, the scholars who researched OLC were OLC alums themselves . . . . Despite all of the attention by former OLC attorneys and the popular media, and the obvious attention to political scientists to the executive branch, laws, public policy and the like, there is very little about the Office of Legal Counsel written by political scientists.

Tobias T. Gibson, *Office of Legal Counsel: Inner Workings and Impact*, 18 LAW & COURTS 7, 7 (2008).

Research on the OLC is almost nonexistent in comparison to the research on the Department of Justice in general or specifically on the Attorney General. See *infra* note 35. Even the well cited Luther A. Huston only allocates one paragraph to the history and purpose of Office of Legal Counsel almost as an after thought. LUTHER A. HUSTON, *THE DEPARTMENT OF JUSTICE* (1967). See also Frank M. Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A. J. 33 (1971). See generally Symposium, *Government Lawyering*, 61 LAW & CONTEMP. PROBS. (1998) (a symposium of articles on the roles and duties of government lawyers). A search in the *ProQuest Dissertation and Theses* database reveals that there are only four graduate/doctoral level works that provide specific detailed review of the history, purpose, or operation of the OLC. See Arthur H. Garrison, *The Rule of Law and What the Law Rules: The History of Executive Branch Legal Opinions on the Commander-in-Chief Power and the Department of Justice Office of Legal Counsel Torture and Commander-in-Chief Opinions During the First Two Years of the Bush Administration after September 11* (2011) (unpublished doctoral thesis) (on file at Northeastern University); William O'Donnal Sass, *A Rhetorical History of the Office of Legal Counsel* (2010) (unpublished thesis, University of Nevada, Las Vegas) (on file with University of Nevada, Las Vegas); Tobias Tandy Gibson, *The Office of Legal Counsel and the Presidency: The Legal Strategy of Executive Orders* (2006) (unpublished Ph.D thesis, Washington University in St. Louis) (on file at Washington University in St. Louis); James Michael Strine, *The Office of Legal Counsel: Legal Professionals in a Political System* (1992) (unpublished dissertation) (on file at Johns Hopkins University).

determining the meaning of law and policy making. Part II also reviews opinions and articles on the role of the OLC, in comparison to other Executive Branch attorneys, by past Attorneys General and Assistant Attorneys General who served as heads of the OLC. Part III places the proper role of the OLC in context with the administrative and political dynamics of the Executive Branch and the differing types of legal analysis that is required by the President to assist him in fulfilling his responsibility to faithfully execute the law. Part III also provides a review of the administrative and political isolation by the Bush Administration of the State Department, Civilian Military Legal Advisors, and the Judge Advocates General's (JAGs) legal opinions on the applicability of the Geneva Convention to the issue of interrogation and the rejection of the OLC opinions. Specific attention is given to the legal opinions issued by the JAGs, as well as, the civilian military community to review the significance of OLC opinions upon executive branch policymaking. Part IV concludes with a critique of the OLC within the context of its proper role in inter-executive branch legal policy and decision-making, and provides an explanation of the torture memos as the result of the failure of the Bush Administration's OLC to maintain its institutional role as protector of the rule of law and the neutral expositor of what the law requires within the Executive Branch and the significance of that failure.<sup>16</sup>

## II. THE OLC AND THE MODELS OF ADVISING THE PRESIDENT

On November 15, 1992, Attorney General William Barr, who served as Attorney General (1991–1993), Deputy Attorney General (1990–1991) and as Assistant Attorney General of the OLC (1989–1990) under the first Bush Administration, provided remarks at the Cardozo School of Law symposium on the role of the Attorney General, and his remarks were published in a symposium journal special issue.<sup>17</sup> Under Article II, Section 3 of the Constitution, the President is authorized to ensure that the laws are faithfully executed.<sup>18</sup> Under the Judiciary Act of 1789, the Attorney General is

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<sup>16</sup> See Garrison, *supra* notes 3 and 9.

<sup>17</sup> William Barr, *Attorney General's Remarks, Benjamin N. Cardozo School of Law, November 15, 1992*, 15 CARDOZO L. REV. 31 (1993).

<sup>18</sup> U.S. CONST. art. II, § 3.



authorized to provide legal advice to the President when requested. And under Presidential Executive Orders, the OLC has the responsibility to provide binding opinions on all branches of the Executive Branch,<sup>19</sup> except the Office of the Solicitor General.<sup>20</sup>

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<sup>19</sup> Garrison, *supra* note 2; Tobias T. Gibson, *Office of Legal Counsel: Inner Workings and Impact*, 19 LAW & COURTS 7, 8 (2009); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000). See also John O. McGinnis, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993) (commenting on the OLC by past Assistant Attorneys Generals); Frank M. Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A. J. 33 (1971); Symposium, *Government Lawyering*, 61 LAW & CONTEMP. PROBS. (1998).

<sup>20</sup> In affirming the basic assertion of independence of the Office of the Solicitor General by Solicitor General Francis Biddle in his book, *In Brief Authority*, Assistant Attorney General John Harmon informed the Attorney General that:

[T]he Solicitor General has enjoyed two kinds of independence. First, he has enjoyed independence within the Department of Justice. It is he, of all the officers in the Department, who has been given the task of deciding what the Government's position should be in cases presented to the Supreme Court. The views of subordinate officers within the divisions of the Department are not binding upon him, and the Attorney General has made it a practice not to interfere. With respect to his relation to the Attorney General, we feel constrained to add, however, at the risk of repetition, that the Solicitor General's independent role has resulted from a convenient and necessary division of labor, not from a separation of powers required by law. Moreover, Francis Biddle may have overstated the case to some degree. Under the relevant statutes, as noted, the Attorney General retains the right to assume the Solicitor General's function himself, if he conceives it to be in the public interest to do so.

Secondly, the Solicitor General has enjoyed independence within the executive branch as a whole. He is not bound by the views of his "clients." He may confess error when he believes they are in error. He may rewrite their briefs. He may refuse to approve their requests to petition the Court for writs of *certiorari*. He may oppose (in whole or in part) the arguments that they may present to the Court in those instances where they have independent litigating authority.

....

General Barr asserted that the dual roles of the Attorney General, a counselor to the President (both in the political sense and the legal sense) and an arbiter of legal disputes within the Executive Branch, do not conflict because “the Attorney General’s ultimate allegiance must be to the rule of law. In my experience, there has not been any substantial tension between the role of upholding the rule of law and the role of the Attorney General as a policy subordinate of the President.”<sup>21</sup>

General Barr found that there was no conflict between the dual roles of the Attorney General because Barr viewed that the proper question posed to the Attorney General regarding the law will avoid conflicts. “Much depends on the question that is asked . . . what is the right answer. [W]hat is the legally right position?”<sup>22</sup> General Barr’s point is that the Attorney General should not be asked, and should not answer, the question “can you advance a reasonable argument to sustain a given action?”<sup>23</sup> Note the

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Substantive Considerations. Once the Solicitor General has taken a position with respect to a pending case, that position will, in most cases, become the Government’s position as a matter of course.

Memorandum for the Attorney General: The Role of the Solicitor General, 1 Op. O.L.C. 228, 230, 234 (Sept. 29, 1977); John M. Harmon, *Memorandum Opinion for the Attorney General—Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1089 (1988); FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1962). *See also infra* Part IV.

<sup>21</sup> Barr, *supra* note 17, at 34–35.

<sup>22</sup> *Id.* at 35 (emphasis deleted). General Bell similarly explained the Attorney General’s role in interpreting that law as follows:

The increased complexity of our society and the government’s relationship to it over the past several decades is reflected in the opinion-giving functions performed by the Attorney General and his subordinates. Today, the subject matter encompassed by that function is as broad as the activities of the government itself. It is not overstatement to say that, in this complex society, the need for sound legal advice in advance of governmental action has become particularly acute. There is no substitute for doing something right the first time.

Griffin B. Bell, *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1064–65 (1978).

<sup>23</sup> Barr, *supra* note 17, at 35.

difference. The former question, what is the right position or what is the right answer, is seeking to know what the law requires or the best view of the law while the latter question, can you advance an argument to sustain an action, is trying to get the law to support an action already taken or desired to be taken. The difference can also be viewed as that the former is about what the law says while the latter is a policy determination that is seeking legal support after the fact. The distinction is not an act of legal sophistry because it is the difference between the Attorney General acting as nothing more than a private counsel seeking to justify his clients' actions versus a quasi-judicial officer protecting the law and the rule of law within the Executive Branch. The difference is cognitive of the distinction between determining "what is 'legal' and what is 'arguably legal'" and avoiding "extra-legal biases when interpreting the law."<sup>24</sup> It is proposed in this article that this cognitive distinction was lost on the Bush Administration's OLC during the first two years after 9/11.<sup>25</sup>

General Barr asserted that the proper question posed to an Attorney General should be: "[W]hat is the right legal answer—not whether we can provide a veneer of justification for a given action."<sup>26</sup> General Barr reasoned that:

Ultimately, if you attempt to push too hard—even as a matter of litigation risks—and take legal positions that clearly will not be sustained, or that are not responsible and reasonable legal positions, you will lose ground . . . . Our view has been that if we go into court with untenable positions and lose, we ultimately weaken the office of the President.<sup>27</sup>

As General Barr correctly observed, the Executive Branch's legal assertions of Presidential power that push beyond the accepted boundaries of the law as understood by the other branches of government, especially the Judiciary, will result in legal and political losses. These losses will result in the weakening of the institutional

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<sup>24</sup> Michael Hatfield, *Fear, Legal Indeterminacy and the American Lawyering Culture*, 10 LEWIS & CLARK L. REV. 511, 511 (2006).

<sup>25</sup> See *infra* Parts III and IV.

<sup>26</sup> Barr, *supra* note 17, at 36.

<sup>27</sup> *Id.*

powers of the Presidency and the strengthening of the checks on the Presidency. This result is the opposite of what a President seeks to achieve. President Truman experienced this loss in the *Steel Seizure Case*,<sup>28</sup> as did President Bush in the unlawful combatant cases.<sup>29</sup>

As to advising the President, General Barr made clear that the Attorney General, while keeping in mind that his ultimate allegiance was to the rule of law, “the Attorney General, unlike a typical lawyer, must pay close attention to consistency and precedent, rather than simply to the immediate interests of his client. This necessary concern for continuity contributes to the Attorney General’s resistance to temporary political pressures.”<sup>30</sup> General Barr recognized that the Attorney General is a political subordinate to the President and that the President has a right to implement political goals, but that does not mean that the Attorney General must bend the law to meet those political goals, but rather the Attorney General must defend the law from the waves of political necessity. General Barr explained:

Some observers might argue, therefore, that if both [policy] positions [on a dispute between agencies] are arguably correct, the Attorney General should, as the President’s legal advisor, favor the approach most consistent with the administration’s overall program . . . . In the context of resolving legal disputes under the executive order, we reject this view. Furthering the administration’s policy goals is not our role in giving legal advice, and it is not our role in resolving disputes. The question in both contexts is, what is the right legal answer . . . . Policy disputes are resolved elsewhere within the executive branch. Any other arrangement would undermine the Attorney General’s credibility in rendering legal opinions. Hence, both

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<sup>28</sup> *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>29</sup> *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008). See also Arthur H. Garrison, *National Security and Presidential Power: Judicial Deference and Establishing Constitutional Boundaries in World War Two and the Korean War*, 39 CUMB. L. REV. 609 (2008-2009).

<sup>30</sup> Barr, *supra* note 17, at 36.

prudence and the President's delegation of authority require the Attorney General to consider, when resolving disputes, not the administration's policy objectives, but the rule of law.<sup>31</sup>

Attorney General Griffin Bell agreed with this approach, asserting that the interest of the Attorney General is to primarily provide legal advice and interpret the law, both of which are separate from political policy making.

[T]he Attorney General is removed from the policymaking and policy implementation processes of government, and this is especially true when he deals with legal questions that arise in the administration of departments other than his own. It makes sense to assign the task of making definitive legal judgments to an officer who is not required, as a general matter, to play a decisive role in the formulation of policy. Such an officer enjoys a comparative advantage over policymakers in the discharge of the lawgiving function.<sup>32</sup>

It is this distinction between legal assessment and public policy that supports the quasi-judicial role of the Attorney General.<sup>33</sup>

The *Barr Doctrine*<sup>34</sup> is clear regarding the role of the Attorney General and, by designation, the role of the OLC. The doctrine's clarity is apparent within the specific context of legal interpretation and the protection of the rule of law. It is in this context that makes the advice of the Attorney General and, by delegation, the OLC different than the advice provided by other lawyers within the Executive Branch.<sup>35</sup> It is a truism that the

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<sup>31</sup> *Id.* at 37.

<sup>32</sup> Bell, *supra* note 22, at 1068.

<sup>33</sup> Garrison, *supra* note 2.

<sup>34</sup> See *supra* text accompanying notes 17, 21–23, 26–27.

<sup>35</sup> Garrison, *supra* note 2. Steven G. Calabresi asserts that there are three types of government lawyers: administration legal advocates (political appointees who assert the legal philosophy of the current administration), court oriented conservatives (career civil service attorneys who advance legal principles in line

Attorney General and the Assistant Attorney General for the OLC are political appointees, appointed by the President and confirmed by the Senate. As such, both officers are selected and confirmed based on their congruency with the jurisprudential and political ideologies of the President and, to a lesser degree, the U.S. Senate. It is also a

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with judicial precedent), and peacemaking ambassadors (attorneys who represent the views of administration to the judiciary with the goal of finding common legal ground between the two branches), and each type has its own role and interests within the executive branch. Steven G. Calabresi, *The President, the Supreme Court, and the Constitution: A Brief Positive Account of the Role of Government Lawyers in the Development of Constitutional Law*, 61 LAW & CONTEMP. PROBS. 61 (1998). See also Griffin Bell, *Office of Attorney General's Client Relationship*, 36 BUS. LAW. 791, 791 (1980–1981) (“But the fact is, if you are on the White House staff, you are working for the president in a much different sense than if you hold a confirmed position.”).

Some Attorney Generals have defined their role as being separated from policy making and protecting the separation between those who make policy and those involved in litigation within the executive branch. See Bell, *supra* note 22, at 1069 (“I have played an important role as a buffer between our truly independent litigating lawyers in the Department of Justice, including the Solicitor General and his staff, and other government officials outside the Department of Justice.”).

For general histories on the Attorney General and the operation of the Department of Justice, see JAMES S. EASBY-SMITH, *THE DEPARTMENT OF JUSTICE: ITS HISTORY AND FUNCTIONS* (1904); HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* (1937); ALBERT LANGELOTTIG, *THE DEPARTMENT OF JUSTICE OF THE UNITED STATES* (1927); Frank Buckley, *The Department of Justice: Its Origin, Development and Present Day Organization*, 5 B.U. L. REV. 177 (1925); LUTHER A. HUSTON, *THE DEPARTMENT OF JUSTICE* (1967); LUTHER A. HUSTON ET AL., *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* (1968); GRIFFIN B. BELL & RONALD OSTROW, *TAKING CARE OF THE LAW* (1982); LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987); CHARLES FRIED, *ORDER & LAW: ARGUING THE REAGAN REVOLUTION – A FIRST HAND ACCOUNT* (1991); John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799 (1992); REBECCA M. SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* (1992); CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* (1992); DOUGLAS W. KMIEC, *THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT* (1992); NANCY BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990* (1992); JIM MCGEE & BRIAN DUFF, *MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATIONS CRIMINAL LAW AND GUARD ITS LIBERTIES* (1996); RAYMOND WOLTERS, *RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION AND BLACK CIVIL RIGHTS* (1996).

truism that the President will choose people with like-minded ideologies to help shape the operations of the Justice Department<sup>36</sup> as

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<sup>36</sup> For an example of how political ideology governs Justice Department policy, compare how President Truman's Attorney General explained the Administration's view of criminal justice to those of President Nixon's Attorney General:

[W]ritten on the walnut panels that mark the walls, is the phrase: "The government wins when justice is done." So long as I am the Attorney General, that shall be the motto of the Department of Justice. The government wins whether the defendant is found guilty or not, so long as he is given a fair trial. The government wins when justice is done. We represent both sides. As your Attorney General, I am the people's lawyer. I am not the lawyer to prosecute; I am the lawyer to represent all the people.

Tom Clark, *The Office of the Attorney General*, 19 TENN. L. REV. 150, 155 (1945).

Here we do encounter a basic difference in policy and in philosophical approach between the present Attorney General and his predecessor. Attorney General Clark's point of view, as indicated in Richard Harris' recent book entitled *Justice*, appears to have been that the role of the Department of Justice was analogous to a European "Ministry of Justice," where in effect the Department or Ministry is itself responsible for the end product that emerges from the administration of the system of criminal justice.

Attorney General Mitchell, on the other hand, has felt that the Department of Justice is but one of the several instrumentalities engaged in the process of administering criminal justice, and that under our adversary system the role of the Department is basically that of advocate for the prosecution .

...

I think a very strong case can be made for the fact that a serious and crippling imbalance in the system of dispensing criminal justice would result if the Department of Justice assumed for itself not only the role of prosecutor, but of neutral referee and ultimate supervisor as to the type of product that is to emerge from the judicial mill.

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... If the two-party system in this country is to offer the voters any real choice between programs, it is surely not unreasonable to expect that there will be some changes in administration policy when a President of one party succeeds a President of another.

a whole and the work of the OLC in particular. The Attorney General is part of the policy apparatus of a given President. Thus, the Attorney General is expected to support the political agenda of the President, when the issues posed to the Attorney General are political. But when the question posed involves the meaning and application of the law,<sup>37</sup> the Attorney General's job responsibilities shift and are no longer driven by the politics of a policy and the desire to support those policies in implementation. General Bell, in 1980, recounted the relationship between the Attorney General and the President and the White House staff when legal cases and determinations of how to handle such cases impacted and conflicted with the policy goals and objectives of the President. In one case, Bell decided not to prosecute a case, which President Carter wanted prosecuted.<sup>38</sup> General Bell concluded that the case came too close to double jeopardy. Needless to say, there were calls for General Bell's head. General Bell explained how the situation ended:

But the President got very upset with me because I would not prosecute the policeman. He thought that the facts were so bad that we should prosecute it. He told me that I had embarrassed him by refusing to prosecute the case.

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William W. Rehnquist, *The Old Order Changeth: The Department of Justice Under John Mitchell*, 12 ARIZ. L. REV. 251, 255–56 (1970).

Rehnquist, then Assistant Attorney General for the OLC, is correct. Elections have consequences and the resulting change in ideology from a liberal to conservative Administration is appropriate and with it changes in overall Administration policy on interpretation of the law. The only time this should not be true is when the Attorney General in a particular case advocates a particular political philosophy and goals contrary to the law or fails to give the best view of the law to questions posed by the President.

<sup>37</sup> General Bell defended the power of the Attorney General to control the legal arguments made before the Supreme Court in a situation in which President Carter ordered him to change the governments' position. General Bell went to see the President and "told him that we could not ethically change our position on this unless there had been a change in the law or the facts. I said that I did not understand who had given him the advice to tell me to do this—but be that as it may, I simply could not do it, I would be ruined as a lawyer. So he said, 'Well, just hold on. I don't want to ruin you as a lawyer. Just forget about the note I sent you.'" Bell, *supra* note 22, at 794.

<sup>38</sup> Bell, *supra* note 35.



While I was out of the country, some people in the White House staff asked Ben Civiletti, my deputy, to reconsider my position. Fortunately, Ben ruled in my favor. And that is where the matter ended. The President had a press conference and told the press a great thing. He said, "I appoint the attorney general. The prosecutorial discretion is vested in the attorney general. I can remove the attorney general, but I cannot tell him who to prosecute, I cannot tell him who not to prosecute. That is a great thing for this country." He said, "I can remove him. That is all I can do; and I am not prepared to remove the attorney general on account of this case." And that is the way the matter was left.<sup>39</sup>

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<sup>39</sup> *Id.* at 795–96. "I can remove the attorney general, but I cannot tell him who to prosecute." *Id.* The Office of the Attorney General has come a long way from President Andrew Jackson who, upon receiving an opinion from Attorney General Rodger Taney that the law did not authorize the President to remove U.S. funds from the national bank, curtly responded, "Sir, you must find a law authorizing the act or I will appoint an Attorney General who will." GRIFFIN B. BELL & RONALD OSTROW, *TAKING CARE OF THE LAW* 185 (1982) (quoting L. HUSTON, A. MILLER, S. KRISLOV & R. DIXON, *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 51 (1968)). General Taney's opinion feared little better than Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), to which President Jackson responded "Mr. Marshall has made his decision. Now let him enforce it!" See NICHOLAS JOHN CULL, DAVID HOLBROOK CULBERT, & DAVID WELCH, *PROPAGANDA AND MASS PERSUASION: A HISTORICAL ENCYCLOPEDIA, 1500 TO THE PRESENT* 4 (2003). Although this statement is famously attributed to President Jackson, it has been argued that he indeed never made it. See JOHN ALEXANDER WILLIAMS, *APPALACHIA: A HISTORY* 403–04 (2002); ROBERT V. REMINI, *THE LIFE OF ANDREW JACKSON* 216 (1988); and John Yoo, *Andrew Jackson and Presidential Power*, 2 *CHARLESTON L. REV.* 521, 534 (2008).

In another case, General Bell defended the power of the President to overrule an opinion issued by the Attorney General but also defended the ethical responsibility of the Attorney General, when the issue involves the appearance of the government before the judiciary with the revised legal position based on the President's decision, to so inform the court that the Attorney General had been overruled.

So I wrote him and told him that, under the Constitution, he had every right to overrule me. But, I added, he did not have the

As there is nothing new under the sun, the story told by General Bell is similar to the story that takes place a few decades later during the Bush Administration. When James Comey, Acting Attorney General, refused to sign the extension of the National Security Agency Terrorist Surveillance Program (TSP), Alberto Gonzales, the White House Counsel, and Andrew Card, the President's Chief of Staff, visited Attorney General John Ashcroft, while he was in the hospital for emergency surgery, to get him to overrule the decision by Comey.<sup>40</sup> Comey, along with FBI Director Bob Mueller, Assistant Attorney General Jerry Goldsmith, and Deputy Assistant Attorney General Patrick Philbin, headed to the hospital upon learning that Gonzalez and Card were seeking to get Ashcroft to overrule him. Comey, Philbin, and Goldsmith got to the hospital first and were sitting with Ashcroft and his wife when Gonzales and Card arrived with an envelope with a document authorizing the TSP extension.<sup>41</sup> Upon receiving the request to sign the reauthorization, Ashcroft pulled himself up from his bed and told the White House delegation that the TSP program was unconstitutional as constituted, that he would not approve it, and in any event he was not the Attorney General, Comey was.<sup>42</sup> After the

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right to control my ethical obligations under rule 11 of the Federal Rules of Civil Procedure, and I would have to make my own judgment about whether I could support his position in court. We resolved it by appearing and saying that we appeared at the direction of the Executive Department.

Bell, *supra* note 35, at 796.

<sup>40</sup> Senate Judiciary Committee, *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and firing of U.S. Attorneys*, Serial No. J-110-14 Testimony by James Comey [hereinafter Comey Testimony], at 215, 220–21, (May 15, 2007). See Office of Inspectors General, Departments of Defense, Justice, CIA, NSA, and Office of the Director of National Intelligence, *Unclassified Report on the President's Surveillance Program* (July 10, 2009) Report No. 2009-0013-AS at 19–30 (July 10, 2009) [hereinafter *OIG Report*] for overall discussion of dispute between the White House the Justice department over the TSP including a timeline of the hospital incident. The *OIG Report* refers to the TSP and the President's Surveillance Program (PSP). See also *infra* notes 117–118.

<sup>41</sup> Comey Testimony, *supra* note 40, at 216; See also *infra* notes 117–118.

<sup>42</sup> *Id.* See also HAROLD H. BRUFF, *BAD ADVICE: BUSH LAWYERS IN THE WAR ON TERROR* 152–53 (2009); see *infra* notes 117–118.

hospital meeting Card called Comey and ordered him to come to the White House to discuss the matter, to which Comey said he would only come if a witness was present and that he would bring Solicitor General Ted Olsen. Comey informed Card that the Justice Department could not provide a legal basis for the TSP program as currently constituted.<sup>43</sup> The TSP program was reauthorized without Justice Department approval<sup>44</sup> by President Bush on March 11th and Comey, along with Mueller and other key Justice Department officials including Ashcroft (according to his chief of staff), were prepared to resign.<sup>45</sup> On Friday March 12th, (the day after the

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<sup>43</sup> Comey Testimony, *supra* note 40, at 217–18.

<sup>44</sup> *Id.* at 218–19.

<sup>45</sup> *Id.* at 219. See also OIG Report, *supra* note 40, at 27–29; BARTON GELLMAN, ANGLER: THE CHANEY VICE PRESIDENCY 316 (2006). Comey testified:

The program was reauthorized without us, without a signature from the Department of Justice attesting as to its legality. And I prepared a letter of resignation intending to resign the next day, Friday, March the 12th . . . I believed that I couldn't—I couldn't stay if the administration was going to engage in conduct that the Department of Justice had said had no legal basis. I just simply couldn't stay.

Comey Testimony, *supra* note 40, at 218–19. According to the OIG Report, when Mueller was made aware of the Department of Justice concerns over the legality of the TAP, “Vice President Cheney suggested that ‘the President may have to reauthorize without [the] blessing of DOJ,’” to which Mueller responded, “I could have a problem with that,” and that the FBI would “have to review legality of continued participation in the program.” OIG Report, *supra* note 40, at 22. After the hospital incident and President Bush signed the reauthorization under his authority as Commander-in-Chief, Mueller prepared a letter of resignation:

At approximately 1:30 a.m. on March 12, 2004, FBI Director Mueller drafted by hand a letter stating, in part: “[A]fter reviewing the plain language of the FISA statute, and the order issued yesterday by the President . . . and in the absence of further clarification of the legality of the program from the Attorney General, I am forced to withdraw the FBI from participation in the program. Further, should the President order the continuation of the FBI's participation in the program, and in the absence of further legal advice from the AG, I would be constrained to resign as Director of the FBI.” Mueller told the DOJ OIG that he planned on having the letter typed and then

Madrid train bombings by an Al Qaeda cell in Spain) the President met with Comey and later with Mueller. Although Comey in his testimony before the Senate would not discuss the substance of the meeting, it is reported that after Comey told the President that in his opinion the law did not support the TSP, President Bush “told him sharply, ‘I decide what the law is for the executive branch.’ [To which] Comey responded, ‘That’s absolutely true, sir, you do. But I decide what the Justice Department can certify to and can’t certify to, and despite my absolute best efforts, I simply cannot in the circumstances.’”<sup>46</sup> After the exchange, the President met with Mueller; and, after meeting with him, Bush retreated and told Mueller to inform Comey “to do what we believed, what the Justice Department believed was necessary to put this matter on a footing where we could certify to its legality. And so we then set out to do that, and we did that.”<sup>47</sup> According to the Office of Inspector General report on the TSP, Comey decided on March 12th not to

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tendering it, but that based on subsequent events his resignation was not necessary.

*Id.* at 27. In written responses to Senator Charles Schumer following his testimony, Comey wrote that he believed that several senior DOJ officials, including Chuck Rosenberg, Daniel Levin, James Baker, David Ayres, and Deputy Chief of Staff to the Attorney General David Israelite, were also prepared to resign. Comey wrote that he believed that “a large portion” of his staff also would have resigned if he had. *Id.* at 27 n. 18.

<sup>46</sup> BRUFF, *supra* note 42, at 154 (2009) (citing BARTON GELLMAN, ANGLER: THE CHANEY VICE PRESIDENCY 318 (2008)). *See also* HOWARD BALL, BUSH, THE DETAINEES, AND THE CONSTITUTION: THE BATTLE OVER PRESIDENTIAL POWER IN THE WAR ON TERROR (2007); *see infra* notes 117–118.

<sup>47</sup> Comey Testimony, *supra* note 40, at 220, 223–24. Gellman writes that while Bush and Comey met alone, Comey informed Bush that Mueller was prepared to resign over the issue, as he was, and that Bush responded in part by saying he had wished Comey had brought his concerns up before. Gellman writes that Comey was surprised that Bush had not previously heard of the concerns that the Justice Department had and that if the President had been told otherwise he had been badly served by his staff. In any event, Bush, fearing a mass resignation by Department of Justice staff and respecting (both on a personal and professional level) the views of FBI Director Mueller, backed down and told Mueller to tell Comey to make whatever changes were necessary. GELLMAN, *supra* note 45, at 317–20. *See also* GRAFF, *infra* note 117, at 492. Bush revised his March 11 reauthorization to be subject to the approval of the Attorney General and Department of Justice. OIG Report, *supra* note 40, at 29.

order the FBI to discontinue participation with the National Security Agency (NSA). Subsequently, Goldsmith issued a memo to Comey stating the President's determination that the TSP was lawful, conclusive (due to his constitutional power as Commander-in-Chief and as the holder of the power to faithfully execute the laws), and final on the legality of the program as well as binding on the Executive Branch.<sup>48</sup> On March 16th, Comey informed the White House that the concerns of the Justice Department could not be rectified with the current operation of the TSP and recommended that it be discontinued, to which White House Counsel Gonzales responded:

Your memorandum appears to have been based on a misunderstanding of the President's expectations regarding the conduct of the Department of Justice. While the President was, and remains, interested in any thoughts the Department of Justice may have on alternative ways to achieve effectively the goals of the activities authorized by the Presidential Authorization of March 11, 2004, the President has addressed definitively for the Executive Branch in the Presidential Authorization the interpretation of the law.<sup>49</sup>

Notwithstanding Gonzales letter on March 17th, the President modified and discontinued the aspects of the TSP that the Department of Justice determined were legally unsupportable.<sup>50</sup>

President Bush dedicated two pages to this incident in his book *Decision Points*.<sup>51</sup> According to the President, when he was informed that the Justice Department would not reauthorize the TSP, he asked where Ashcroft was and, upon being informed he was in the hospital, called Ashcroft and told him he was sending Card and Gonzales to get his signature. The President writes that when he was

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<sup>48</sup> OIG Report, *supra* note 40, at 28.

<sup>49</sup> *Id.* at 28–29.

<sup>50</sup> *Id.* at 29. According to Gellman, the letter was disavowed by Gonzales personally. Gellman proposes that the letter was actually the work of David Addington. GELLMAN, *supra* note 45, at 321.

<sup>51</sup> GEORGE W. BUSH, *DECISION POINTS* 172–74 (2010).

informed Ashcroft did not sign it he did so himself as head of Executive Branch. The next day, Card told him that Comey was the Acting Attorney General and that he and other members of the Justice Department were going to resign. President Bush writes that he was surprised and did not know of the dissent within Justice over the TSP or that Comey was the Acting Attorney General when he sent Card and Gonzales to the hospital to see Ashcroft. When the President met with Comey he was informed that the dissent within the Justice Department was well known to his staff for weeks and that Comey and Mueller were prepared to resign. President Bush writes that there were voices within the Executive Branch that advocated that he stand his ground and reauthorize the TSP over the Justice Department objections:

I was willing to defend the powers of the Presidency under Article II. But not at any cost. I thought about the Saturday Night Massacre in October 1973 . . . . That was not a historical crisis I was eager to replicate. It wouldn't give me much satisfaction to know I was right on legal principle while my administration imploded and our key programs in the War on Terror were exposed in the media firestorm that would inevitably follow.<sup>52</sup>

When the President confirmed that Mueller would in fact resign, he ordered the Justice Department to adjust the program to meet its concerns.

When the story of the midnight hospital incident (March 10, 2004) came to light it only further added to the contempt that the Bush Administration had been receiving regarding its post 9/11 policies. Although visiting a sick Attorney General in his hospital bed, discussing classified policies in an open hospital room in front of his protesting wife, to get a reversal of a ruling by an Acting Attorney General is truly pushing well past the envelope, as General Bell's story clearly shows it was not unheard of to try to go around an opinion by an Attorney General once the Attorney General is temporarily indisposed. As both General Bell and Acting General

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<sup>52</sup> *Id.* at 173–74.

Comey demonstrated, in the context of the law, the Attorney General is expected to have fidelity to the law and not the mere policy desires of the President. The distinction between politics and policy versus the defense and authority of the law is why the daily duties of defining and defending the law within the Executive Branch have been delegated from the President to the Attorney General and the OLC. It is only in the context of defining, defending, and implementing the law does the *Barr Doctrine* take hold.

In describing the significance of the OLC, Theodore B. Olsen, Assistant Attorney General for the OLC from 1981 to 1984 explained that while “most other government officials have substantive programmatic responsibilities, the chief responsibility of the head of OLC is the preservation of the Constitution and the rule of law within an administration.”<sup>53</sup> But more importantly the OLC is looked upon as “the legal conscience of the Executive Branch” because “a popular but legally questionable course must be resisted because of legal standards, the head of OLC is sometimes the first, and almost always the last, line of resistance.”<sup>54</sup> James Comey, in a speech to a meeting of NSA attorneys,<sup>55</sup> reflected the views of Generals Olsen and Barr regarding conflicts between the law and policy and the role of government attorneys:

At the outset, we know that we are a nation of laws, not men. We have chosen a profession that internalizes that truth. We know that the rule of law sets this nation apart and is its foundation. We also know that we took an oath to support the constitution of the United States. We know that there may be agonizing collisions between our duty to protect and our duty to that constitution and the rule of law.

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We also know—at the risk of sounding parochial—that once we give our legal blessing, the individual policymakers, the operators—good people

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<sup>53</sup> Theodore B. Olsen, *Judge Wilkey and the Office of Legal Counsel*, 1985 BYU L. REV. 607, 609 (1985).

<sup>54</sup> *Id.*

<sup>55</sup> James Comey, *Intelligence Under the Law*, 10 GREEN BAG 439, 443 (2007).

though they may be—won't be there. In fact, if the stuff has really hit the fan, we know what will be said: "We never told the lawyer what to say." And: "We simply asked him/her what was permissible." But we also know that we won't be alone in that imaginary calm, well-lit room—blazingly lit by hindsight. With us will be the reputation of our great institutions, the institutions we love because they do so much good over so many years. We know that damage to the reputation of that institution will cause harm for years to come, as our institution recovers from scandal or allegations of abuse of authority . . . .

The lawyer is the custodian of so much. The custodian of our own personal reputations, surely. But more importantly, the custodian of our institutional reputations. And most importantly of all, the custodian of our constitution and the rule of law.

It is the job of a good lawyer to say "yes." It is as much the job of a good lawyer to say "no." "No" is much, much harder. "No" must be spoken into a storm of crisis, with loud voices all around, with lives hanging in the balance. "No" is often the undoing of a career. And often, "no" must be spoken in competition with the voices of other lawyers who do not have the courage to echo it.

For all those reasons, it takes far more than a sharp legal mind to say "no" when it matters most. It takes moral character. It takes an ability to see the future. It takes an appreciation of the damage that will flow from an unjustified "yes." It takes an understanding that, in the long-run, intelligence under law is the only sustainable intelligence in this country.<sup>56</sup>

Subservience to the rule of law and the law itself has consequences to policy and politics, and it is not uncommon for the law to stand in the way of popular policy determinations. As Comey

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<sup>56</sup> *Id.* at 443–44.



confirms, the rule of law matters when policy is made and political power is exercised because both have long and short-term political and institutional consequences. Policy and political power are not the same; but both, in times of crisis, can oppose the rule of law. The role of the Attorney General and the OLC is to defend the rule of law in times of crisis by taking the long-term institutional consequences into account when dealing with the hot short-term desires of the Executive Branch. As General Olsen observed, when the law demands a specific result, “the head of the OLC is [sometimes] a solitary voice when everyone around him, including those for whom he works, have powerful reasons for overriding or ignoring his judgment.”<sup>57</sup> In those situations, the OLC only has its institutional and moral standing to prevail over the powers of politics and policy. Part of that moral authority rises out of the institutional respect it commands for producing legal opinions that are unbiased and neutral in protecting the rule of law and correctly asserting what the law rules. As General Barr asserted, that is done, in part, by providing the best view of the law and, as Moss proposes, being a neutral expositor of the law.<sup>58</sup>

Randolph D. Moss approached Executive Branch interpretation of the law from the perspective of the OLC by advocating the *Neutral Expositor* model.<sup>59</sup> Writing in the *Administrative Law Review* while holding the position of Assistant Attorney General for the OLC in the Clinton Administration, Moss explained that as a fundamental matter the Executive Branch perpetually gives meaning to the law because it is responsible for executing the law, and this fact has significant legal ramifications because in the vast majority of cases “[E]xecutive [B]ranch interpretation is not subjected to judicial review [because] at times, no particular individuals are adversely affected by an [E]xecutive [B]ranch legal interpretation.”<sup>60</sup> It is a truism that all interpretation of the law involves some level of advocacy. This is true because the law is seldom so clear and unambiguous that only one possible view

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<sup>57</sup> Olsen, *supra* note 53, at 609.

<sup>58</sup> Barr, *supra* note 17; Comey, *supra* note 55; Moss, *infra* note 59.

<sup>59</sup> Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1303 (2000).

<sup>60</sup> *Id.* at 1304.

of the law is available. There is a difference between those attorneys whose role is to provide the best view of the law regardless of the policy preferences of the President and those attorneys in the government who have the responsibility to advocate the meaning of the law within the confines of whether the view of the law advocated by the President can be accepted in a court of law. For example, the Solicitor General approaches the law by determining if a particular view of the law will find traction with the court. Note that the question for the Solicitor General is not what is the best view of the law (a point to be discussed below) but is the view proposed viable. This approach, the *Court Advocacy* model, is distinguished from lawyers who have the responsibility to develop public policy that has some aspects of law, the *Public Legal Policy Advocacy* model.<sup>61</sup> Public legal policy advocacy operates within the realm of politics. While Court advocacy focuses on whether a court will find a legal interpretation viable, public legal policy advocacy focuses on whether the court of public opinion will find a legal policy viable.<sup>62</sup> For example, a President is elected who believes that the death penalty is constitutional and that the federal government should support its implementation through appropriate legislation. He informs the Attorney General to work with Congress to pass appropriate legislation. The legal issues involved in drafting and supporting such legislation is public legal policy advocacy. In the context of court advocacy and public legal policy advocacy, it is not the role of the Attorney General, the White House General Counsel, or the staff of the Office of Legal Policy to ask what the best view of the law is, but to secure the policy that the President supports. In this example, the law is being made in the political sense, and it is totally appropriate for the Attorney General and others to make the law or change the law to suit their needs and desires. Notice that the OLC is not included in the list of government attorneys who deal in court advocacy and public legal policy advocacy.<sup>63</sup> The OLC addresses

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<sup>61</sup> Calabresi, *supra* note 35, at 70, 73; Wendel, *infra* note 84, at 1341–49; Harris, *infra* note 86, at 422–27; Note, *infra* note 95; Clement, *infra* note 187.

<sup>62</sup> Clement, *infra* note 187; Lund, *infra* note 83; Wendel, *infra* note 84; Clark, *supra* note 11.

<sup>63</sup> Clement, *infra* note 187. See also *supra* notes 61–62 and Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993).

the question that Moss and Barr address, what is the best view of the law?

Moss explains that, when the context is focused on “the legality of a proposed Executive Branch action,” the opinion provided should seek the “best view of the law;” and like “a judge, the lawyer shuns consideration of his client’s desired policy goals and acts instead with complete impartiality.”<sup>64</sup> In other words under the *Neutral Expositor* model when the issue is one regarding the meaning of the law, the lawyer should:

[S]eek ways to further the legal and policy goals of the administration [but] do so, however, within the framework of the *best* view of the law and, in that sense should take the obligation neutrally to interpret the law as seriously as a court. This is particularly so for the Attorney General, and by delegation, the Office of Legal Counsel.”<sup>65</sup>

As discussed above, General Barr came to the same conclusion<sup>66</sup> that, when the question involves the meaning of the law, the role of the Attorney General and the OLC is to ask “what is the right answer”<sup>67</sup> leaving to the Solicitor General the question “can you advance a

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<sup>64</sup> Moss, *supra* note 59, at 1305–06.

<sup>65</sup> *Id.* at 1306.

<sup>66</sup> General Barr wrote regarding the interaction between the Constitution and the rule of law in relation to the role of the Attorney General as follows:

The unique position of the Attorney General raises special considerations. The Attorney General’s oath to uphold the Constitution raises questions whether his duty lies ultimately with the President who appointed him or more abstractly with the rule of law. I said in my confirmation hearings, and have said several times since, that the Attorney General’s ultimate allegiance must be to the rule of law . . . . As with any lawyer, the Attorney General best serves his client by providing unvarnished, straight-from-the-shoulder legal advice as to what the attorney General thinks the law is, without regard to political considerations.”

Barr, *supra* note 17, at 34–35.

<sup>67</sup> *Id.* at 35.

reasonable argument to sustain a given action before the courts.”<sup>68</sup> Moss explains that there are several reasons why the Attorney General and the OLC should “strive to find the best view of the law, rather than to accept (and endorse) any reasonable argument that promotes the goals and interests of the President.”<sup>69</sup>

[T]he . . . most compelling reason why the Attorney General and the Office of Legal Counsel must accept only the strongest legal arguments is that the Constitution mandates that the Executive [B]ranch interpret and apply the law—no less than the courts—as objectively and accurately as possible.

. . . .

[T]he Framers’ intent to stress the President’s obligation to perform his duties with a steadfast and principled adherence to the law. The obligation is not to execute the law in a *reasonable* or *colorable* manner, but in a *faithful* manner.<sup>70</sup>

The Constitution authorizes the President to Take Care that the laws are faithfully executed and that he is sworn by oath to faithfully execute the duties of his office to the best of his ability.<sup>71</sup> Moss concludes that when placing these two clauses together a President is required to “use all of his abilities . . . to ‘preserve’ the Constitution.”<sup>72</sup> Thus, a President who interprets the law and the Constitution “without regard for its best construction and application, but rather based on the expediency of the day, could hardly be said to be preserving the Constitution to the best of his ability.”<sup>73</sup>

Against this background, the duty of the Executive Branch lawyer to provide the best, as opposed to a merely colorable, view of the law to his or her client is plain . . . . The [E]xecutive [B]ranch has no authority

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<sup>68</sup> Clement, *infra* note 187.

<sup>69</sup> Moss, *supra* note 59, at 1311.

<sup>70</sup> *Id.* at 1312–13.

<sup>71</sup> U.S. CONST. art. II, §§ 1, 3.

<sup>72</sup> Moss, *supra* note 59, at 1315.

<sup>73</sup> *Id.*

to act beyond the authority provided by the Constitution or statutes of the United States, and, if the Constitution and relevant statutes are best construed to preclude a proposed policy or action, it is largely irrelevant whether a reasonable argument might be made in favor of the legality of the proposal . . . . A reasonable argument might diminish the political cost of the contemplated action and it might avoid embarrassment in the courts, but it cannot provide the authority to act. Only the best view of the law can do that.<sup>74</sup>

It is the failure to submit the best view of the law, and not a reasonable or merely legally viable view of the law in order to meet the needs of the Bush Administration, which resulted in the errors within the OLC torture memos.

Professor John O. McGinnis, who served in the OLC as an Attorney Advisor (1985–1987) and as a Deputy Assistant Attorney General (1987–1991) in the Reagan and Bush Administrations, agreed with the traditional views expressed by General Barr along with Moss and Comey that the role of the Attorney General is to aid the President in the implementation of his legal responsibilities to faithfully execute the laws and govern his administration under the rule of law. Though it is a truism that “the Constitution gives the President these legal responsibilities, it does not expressly define how they should be exercised and therefore has left substantial room for disagreement concerning the Attorney General’s obligation as a legal advisor and opinion writer.”<sup>75</sup> McGinnis provides three models on the role of the Attorney General in regard to serving the needs of the President: the *Court-Centered* model, the *Independent Authority* model, and the *Situational* model.<sup>76</sup> The *Court-Centered* model proposes that legal advice provided by the Attorney General must reflect and be limited to judicial precedent.<sup>77</sup> The *Independent*

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<sup>74</sup> *Id.* at 1316.

<sup>75</sup> John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 380 (1993).

<sup>76</sup> *Id.* at 380–81.

<sup>77</sup> *Id.* at 382–84.

*Authority* model proposes that the Attorney General and the President should interpret the law as they deem it proper independent of judicial precedent.<sup>78</sup> The *Situational* model proposes that the Attorney General and the President should interpret the law in line with their political goals and policy objectives.<sup>79</sup> McGinnis suggests that the differences between these models, when viewed with “a more refined analysis” are not as “substantial as might at first appear.”<sup>80</sup>

All three models are reflective of the *Court Advocacy* and *Public Legal Policy* advocacy approaches. The *Court-Centered* model presupposes that the Attorney General will propose interpretations of the law that would prevail or at least could prevail in litigation. As discussed in Part III, this is the approach of the Solicitor General’s Office, not the OLC. This approach requires that the legal opinion of the Executive Branch must be in congruence with legal precedent. Thus, the Attorney General is free to choose among various reasonable theories of the law that are in line with court precedent and meet the policy goals of the President. But as Barr and Moss assert, the point of the legal opinion of the Attorney General (and the OLC) on what the law requires when advising a president, the focus of the opinion should not be what can be argued realistically in court, but what is the best answer (the best view of the law) to the question presented or policy proposed. The *Independent Authority* model and the *Situational* model are clearly within the public legal policy advocacy approach. The *Independent Authority* model rests upon the idea that the President, co-equal with the judiciary, has equal authority to determine what the Constitution and federal statutes mean independent of the Judiciary—the very argument that General Bates made on behalf of President Lincoln against the argument of Chief Justice Taney in the *Ex parte Merryman*.<sup>81</sup> The *Situational* model rests on the proposition that the President is elected to implement certain policies and goals, and he is at liberty to interpret the law in ways that advance the

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<sup>78</sup> *Id.* at 389.

<sup>79</sup> *Id.* at 389–401.

<sup>80</sup> McGinnis, *supra* note 75, at 381.

<sup>81</sup> ARTHUR H. GARRISON, SUPREME COURT JURISPRUDENCE IN TIME OF NATIONAL SECURITY, WAR AND TERRORISM: A HISTORICAL PERSPECTIVE (2011).

implementation of those goals and policies. In other words, the President is at liberty to see the law as a means and not an end.

All three of the models, taken to an extreme, could result in serious Constitutional conflicts with the two other branches of government, but historically such views have been tempered by the practical political nature of governing. As a practical matter, as observed by past Attorneys General, many of the legal determinations made by the Attorney General will not be reviewed or addressed by the judiciary, and as such, he or she will have the ability to independently determine what the legal answers to those questions are. In other words, court precedent may be silent on the issue. The *Situational* model proposes that the Attorney General is at liberty to answer legal questions in light of the goals of the President. But as a practical matter, a President has a Congress, a public press, and the American people to contend with, each having its own view of what the law requires. An Attorney General can propose that President Bush does not need a Congressional resolution to go to war with Iraq as a legal matter, but the politics of the matter may require him to seek such a resolution—as it required President Bush to do in January 1991.<sup>82</sup> The problem with all three models is that they make the law subject to policy and do not seek to meet the values within the *Barr Doctrine* or the *Neutral Expositor* model of providing the best view of the law. The significance of the rule of law is that it rules over politics and power, the rule of law is the highest authority. The *Barr Doctrine* and the *Neutral Expositor* models honor and enforce that final authority; the *Court-Centered*, the *Independent Authority*, and the *Situational* models at best place policy and politics on equal footing with the law and at worst, places the rule of law as subservient with only the counter balancing powers of Congress, the Judiciary, and public outcry as its protector.

Another approach to the role of the Attorney General in providing legal advice is the *Private Lawyer* model. Professor Nelson Lund, who served as an attorney advisor in the OLC (1986–1987) in the Reagan Administration and the White House Associate Counsel to the President (1989–1992) in the first Bush Administration, describes the *Private Lawyer* model as requiring the

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<sup>82</sup> Arthur Garrison, *Hamiltonian and Madisonian Democracy, the Rule of Law and Why the Courts Have a Role in the War on Terror*, 8 J. INST. JUST. & INT'L STUD. 120 (2008).

Attorney General to provide legal analysis the same way a lawyer in private practice would.

In private practice, the client sets the objectives and the lawyer's function is to help the client understand the legal constraints and risks that should be weighed by the client in pursuing those objectives. The quality of the advice is measured by the degree to which it enables the client to make fully informed decisions, and, when the advisor is presented with those interesting cases that call for "creative lawyering," by the lawyer's success in devising ways to lower the risk . . . entailed in pursuing the objectives set by the client.<sup>83</sup>

Another way to view the *Private Lawyer* model is in how the advice is provided. The private lawyer, when asked if a particular action is legal, will respond from the point of view of whether a court in hindsight will find the action lawful.<sup>84</sup> Government attorneys applying this model, with the focus being on the ambitions and policies of their client, i.e., the President, would respond in the form of approving hesitation—"While I think it's a stretch to argue that the AUMF [Authorization for Use of Military Force] supersedes the warrant requirement in FISA [Foreign Intelligence Surveillance Act], it's not a ridiculous argument, so if you're willing to accept the risk of losing in court, you can go for it."<sup>85</sup> The point being that the *Private Lawyer* model accepts that the judiciary will have the final say as to what the law means, but the private attorney is not bound to provide the best view of the law. Nor is the attorney bound to develop legal reasoning as a court would (*Court-Centered* model) if it does not serve the political interests of the President. Of course as a side point, the time between the implementation of a policy with a facially reasonable legal justification and the final rejection of that policy by the Supreme Court can be years, and the time difference

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<sup>83</sup> Nelson Lund, *Rational Choice at the Office of the Legal Counsel*, 15 CARDOZO L. REV. 437, 448 (1993).

<sup>84</sup> See W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333 (2009).

<sup>85</sup> *Id.* at 1346.



alone may serve the political and/or policy interests of the President. The private lawyer approach is only limited by the requirement that the legal assertion is made in good faith and as long as it is facially reasonable, the government attorney proposing it and defending it in court will not risk sanctions or disbarment.<sup>86</sup>

The *Private Lawyer* model derives its context from the adversarial system. As Professor Wendel explains, the “adversary system . . . enacts a normative division of labor among various institutional actors, responding to political needs such as limiting government power and enhancing accountability”<sup>87</sup> and applying the law to specific circumstances and facts. The goal of the adversarial system, from the litigant’s point of view, is not establishing the best view of the law or fidelity to the law over the litigant’s own interests, but defending a reasonable view of the law in good faith to a neutral third party against an equally plausible view of the law by one’s adversary.<sup>88</sup> In private litigation, the point is which side can prevail

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<sup>86</sup> See George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT’L SEC. L. POL’Y 409, 418 (2005) (“The legal profession’s standards of conduct offer surprisingly little guidance specifically for lawyers who advise the government on legal issues”). Although Professor Harris concluded that the OLC “torture memos” were clearly drafted under the *Private Lawyer* model and failed to provide a full view and accounting of the law in order to serve and support the Bush Administration policy as well as failed to adhere to the classical traditions (*Barr Doctrine* and the *Neutral Expositor* best view of the law approach) of OLC opinion writing, he could not conclude that the opinions violated ABA professional rules of conduct. *Id.* This was the same conclusion reached by Associate Deputy Attorney General David Margolis who reversed an Office of Professional Responsibility (OPR) report that concluded that John Yoo and Jay Bybee had engaged in professional misconduct and should be reported to their state bar associations. See David Margolis, *Memorandum for the Attorney General and Deputy Attorney General: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation in the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists* (January 5, 2010) [hereinafter *Margolis Opinion*].

<sup>87</sup> Wendel, *supra* note 84, at 1347.

<sup>88</sup> As Professor Wendel explains, “I have never understood why this argument from the adversary system is thought to prove anything about legal advising outside the litigation context.” *Id.* “Litigation is a special case because lawyers are permitted to assert the *arguable* legal entitlements of clients, leaving it

in court with a facially reasonable argument<sup>89</sup> on the applicable law, not establishing and defending the best view of the law under the Constitution. It is this normative difference that makes the *Private Lawyer* model inapplicable to the roles of the Attorney General and the OLC when they are tasked with providing legal advice to the President. It is because the Attorney General and the OLC are delegated the responsibility to preserve, protect, and defend the law above policy and politics that both offices are endowed with quasi-judicial power within the Executive Branch to determine the meaning of the law.

Professor Lund correctly observes that in the absence of the client's interests as the central motivator of the Attorney General's advice, the process of the Attorney General in legal opinion writing will become quasi-judicial.<sup>90</sup> Although he is correct, he is wrong as to why. The reason is not that "removing the constraint of serving a client's interest [will] leave him free either to enjoy the intellectual pleasure of expressing uninhibitedly his own opinion of what the law is or to promote other interests of his own;"<sup>91</sup> but, the removal of the political interests of the President in lieu of the interest and dictates of the law will result in making the Attorney General a neutral expositor of law in line with the *Barr Doctrine*. To paraphrase Chief Justice John Marshall, when the Attorney General gives an opinion on the meaning of the law, he or she must remember it is the law he or she is espousing. Legal ethics that govern private attorneys make clear that their role is to serve the purposes and goals of the client, not the best view of the law or the law itself. They are required, under the pain of sanction or disbarment, to serve the client without

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up to the workings of the adversary system to evaluate whether the lawyer's position is plausible." *Id.* at 1348.

<sup>89</sup> Professor Wendel might assert that I am overstating the looseness that private litigators can engage in regarding the assertion of a particular view of the law on behalf of their clients because lawyers cannot assert views of the law that are not grounded in established law, they are obligated to cite governing law even if the opposing counsel fails to disclose such law, and can be sanctioned for overreaching or stretching the applicability of the law in their arguments. *Id.* All true and conceded, but the point is not that private attorneys are without limits, but government attorneys—the Attorney General and the OLC—have a higher minimum standard than private attorneys in litigation.

<sup>90</sup> Lund, *supra* note 83, at 441.

<sup>91</sup> *Id.* at 447.

clearly breaking the law. The private attorney has, and is required to have, fidelity to his client and the interest of his client, not to the law.<sup>92</sup> While private attorneys are not required to seek, serve, protect, and assert the best view of the law, the Attorney General and the President are required to do so by both their oaths and statutory law to preserve, protect, and defend the Constitution<sup>93</sup> above their political policy interests. The relationship between the Attorney General and the President, when the meaning of the law is concerned, is to place the Constitution and the law above policy and politics. This is why the *Private Lawyer* model is inapplicable, both because the Attorney General is not any private lawyer serving his clients

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<sup>92</sup> For a contrary view on the ethical normative aspects of the responsibility of the private lawyer, Attorney General Michael Mukasey, in an address to the graduates of Boston Law School in 2008, stated that:

If the lawyer's best reading of the law permits some policy, he has a professional obligation to say that it would be lawful—even if he personally disagrees with it, or recognizes that it may one day prove *politically* controversial. Just as important—perhaps more important—if the lawyer believes that some policy would be unlawful, he has a professional and ethical obligation to say no—even if some people think that the policy is critical. The rule of law, and the oath every public servant takes to support and defend the Constitution, depend on it.

. . . The lawyer in private practice must not confuse his client's interest with the law; he has an obligation to say no if no is the right answer, even if the client doesn't want to hear it. The lawyer pursuing what he believes to be the public interest must not confuse personal views on what the law ought to be for what the law is . . . .

In becoming lawyers, you are becoming the custodians of a trust—a trust whose assets are the rule of law and the justice that results from that rule of law. Being a custodian of that trust carries with it solemn responsibilities . . . .

Michael Mukasey, *The Role of Lawyers in the Global War on Terrorism*, 32 B.C. INT'L & COMP. L. REV. 179, 185 (2009).

<sup>93</sup> The Constitution requires the President to preserve, protect, and defend the Constitution and faithfully to the best of his ability execute the office of President which includes the responsibility to take care that the laws, not political policies, are faithfully executed. U.S. CONST. art. II, §§ 1, 3. The Attorney General's oath obligates him to "support and defend the Constitution" and to "bear true faith and allegiance to the same." 5 U.S.C. § 3331 (1988).

personal goals and ambitions and the President is not any client who seeks legal advice to serve his own desires.<sup>94</sup> Both seek the other in the service of the law and the Constitution. It is this understanding that provides the Attorney General and the OLC the power and responsibility to act quasi-judicially when providing opinions on the meaning of the law—because it is the law that is being espoused.

The public application of the *Private Lawyer* model is the *Agency Loyalty* model, which focuses on the government attorney's duty and loyalty to the agency that employs him, and that relationship applies the same legal and ethical responsibilities that govern the private lawyer.<sup>95</sup> Thus, the role of the government lawyer under the *Agency Loyalty* model is to serve the interests and goals of the agency just as a private attorney would serve the interests of his client. As one commentator observed:

Of course it should be remembered that while the government lawyer is part of the agency, the government lawyer is not the agency. Thus, the lawyer does not bear full responsibility for the agency's final outcome; rather, the lawyer bears

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<sup>94</sup> The *Private Lawyer* model fails for another normative reason. The model raises the question of what is the client's purpose for asking the attorney's advice.

[O]ne who contends that a government lawyer need provide only a colorable legal basis for a proposed course of action has the burden to explain why a lawyer, seeking to ascertain whether a client has a legal entitlement to do something, should be content to get the answer only approximately right . . . . In the legal counseling context, the reason clients seek merely colorable advice is that they are interested in getting away with something that is not a genuine legal right.

Wendel, *supra* note 84, at 1348. In a counseling context, the best view of the law involves the assessment of what "the client's right probably is, and what the client's right likely is not." *Id.* The point being in the *Private Lawyer* model counseling context "a lawyer's job is to find the limits of the client's legal entitlements, because the client is only permitted to act with legal authorization." *Id.* at 1349. Such is the minimum that is required with private parties.

<sup>95</sup> Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170 (2002).

responsibility for faithfully fulfilling her role in the process.<sup>96</sup>

The *Agency Loyalty* model could be considered as a mode for the *Barr Doctrine* or the *Neutral Expositor* model if it is the goal that the agency (the OLC for our purposes) is to provide the *best view of the law* to the President and cabinet officers regardless of their individual desire to have the law support their initiatives. The role of attorneys within the OLC is not to make policy choices for the Department of Justice or the President but to provide a neutral best view of the law.<sup>97</sup> The *Agency Loyalty* model can facilitate this result when the work of the OLC includes the goal of not proposing, as the Bush Administration OLC did, politically useful general constitutional views of executive power to serve the perceived national security needs of the nation after 9/11. The faithful fulfilling of his or her role in the OLC process is to present the best view of the law, not the most policy congruent, legally plausible view of the law.

During the first two years after 9/11, John Yoo and others within the administration adopted, supported, and implemented a strong version of the *Private Lawyer* model in which it was assumed that the “Justice Department and specifically OLC serve in part as the lawyers for the executive branch.”<sup>98</sup> [And it] exists to interpret the Constitution and federal law for the executive branch”<sup>99</sup> in that order and for that purpose. As Jack Goldsmith, former Assistant Attorney General for the OLC, wrote in *The Terror Presidency*:

Especially on national security matters, *I would work hard to find a way for the President to achieve his ends*. Whenever I advised the White House that a proposed action was legally problematic, I would try to suggest ways to achieve its goals through alternative and legally available means.

. . . Legal advice to the President from the Department of Justice is neither like advice from a private attorney nor like a politically neutral ruling

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<sup>96</sup> *Id.* at 1181.

<sup>97</sup> See *supra* notes 17, 55, 59, 61–63 and accompanying text.

<sup>98</sup> JOHN YOO, WAR BY OTHER MEANS 186 (2006).

<sup>99</sup> *Id.* at 19.

from a court. It is something inevitably, and uncomfortably, in between.

OLC also needn't look at legal problems the way courts do. Most Americans (including most lawyers) think the law is what courts say it is, and they implicitly equate legal interpretation with judicial interpretation. But the executive branch does not have the same institutional constraints as courts, especially on national security issues where the President's superior information and quite different responsibilities foster a unique perspective.<sup>100</sup>

Goldsmith was even more candid when he concluded that “[his] job was to make sure the President could act right up to the chalk line of legality.”<sup>101</sup> Although he wrote that he was in agreement with the *Barr Doctrine*,<sup>102</sup> he also wrote candidly that the goal of OLC opinion writing during the initial post 9/11 years was to provide:

[T]he legal cover needed to overcome law-induced bureaucratic risk-aversion . . . [and the] OLC would have been of little help to the Bush II White House without someone in the office willing and able to write clear and forceful opinions supporting the President's aggressive counterterrorism program. By an accident of fate, . . . John Yoo—was sitting in OLC on September 11.<sup>103</sup>

As Goldsmith later explained to a conference hosted by the Army Judge Advocate General School, when he began his tenure at the OLC he, thought that the issue of how to advise the Executive

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<sup>100</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 35 (2007) (emphasis added).

<sup>101</sup> *Id.* at 78.

<sup>102</sup> *Id.* at 33–34.

<sup>103</sup> *Id.* at 96–97.

Branch was “a simple matter.”<sup>104</sup> In describing his view of the OLC and his role as head of the OLC:

I testified to this effect at my confirmation hearings—that I was simply going to provide good faith, impartial legal advice. I was influenced by one of my predecessors, William Barr . . . . This was my attitude going in, and I think it’s a good attitude to have going in. But as soon as I got there, I realized this attitude was too simple.<sup>105</sup>

Goldsmith asserted that the government lawyer’s advice to the President is political.

This doesn’t mean that you’re supposed to be political, and it doesn’t mean you can be an advocate in the same sense that you would if you were a private attorney advising a client. Rather, it means that the lawyer is a member of an Executive Branch and is not neutral to the President’s or to the commander’s agenda when advising him or her on a legal matter. Unlike a court that often just says “no” or “yes,” I never said “no” to any of my superiors without trying to find a way to help them find a way to achieve their desired ends within the law.<sup>106</sup>

Goldsmith found agreement with John Yoo that the role of the OLC, not differing from the role of any executive branch attorney, is to provide the Executive Branch with a legal avenue to achieve its desired goals. According to Goldsmith, the President should be given every legal benefit of the doubt as to the law when addressing a legal policy posed by him;<sup>107</sup> and, in regard to counterterrorism policy after September 11th, the “President had to do what he had to

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<sup>104</sup> Jack Goldsmith, *The Third Annual Solf-Warren Lecture in International and Operational Law: Reflections on Government Lawyering*, 205 MIL. L. REV. 192, 195 (2010).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 196.

<sup>107</sup> *Id.*

do to protect the country. And the lawyers had to find some way to make what he did legal.”<sup>108</sup>

Another way to view the debate on the role of government attorneys in providing legal advice is the public choice versus public interest approaches. Public choice is a type of rational choice law and economics’ theory. The rational choice theory views human interactions in economic terms meaning that in a world of scarce resources in which there is not enough for all to share to each person’s satisfaction, all those interested in securing a scarce resource will maximize his or her accumulation of the resource to the detriment of others if necessary.<sup>109</sup> Public choice theory, as applied to our discussion proposes that the “President competes with other branches of government, and other actors within the executive branch, over the scarce good of determining government policy. A lawyer, as the faithful agent of her client, seeks to advance her client’s interests through any lawful means.”<sup>110</sup> The scarce good is the power and ability to control government policy-making. The *Private Lawyer* model is one example of the public choice theory because the focus is not on the law but on maximizing the client’s achievement of a scarce resource short of illegal activity. As Professor Wendel observed:

[T]he public choice approach . . . denies that lawyers can have any genuine obligation of fidelity to law . . . . If it is possible to act lawlessly and get away with it, lawyers have no duty to advise their client against that course of action and, indeed, if it is in the client’s interests, the lawyer may have a duty to assist the client.<sup>111</sup>

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<sup>108</sup> GOLDSMITH, *supra* note 100, at 81 (emphasis added).

<sup>109</sup> For example, see DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* (1994). For examples of the application of rational choice theory to law, see Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982) and David Cole, *The Poverty of Posner’s Pragmatism: Balancing Away Liberty After 9/11*, 59 STAN. L. REV. 1735 (2007).

<sup>110</sup> Wendel, *supra* note 84, at 1341.

<sup>111</sup> *Id.* at 1349.



. . . [T]hat the lawyer's role is primarily to be understood with reference to client interests, with the law understood as nothing more than an obstacle standing in the way of their clients' ends.<sup>112</sup>

Although it could be argued that Professor Wendel may be overstating his point, he is correct that, under the *Public Choice* model, the best view of the law is not a scarce resource maximizing approach. In contrast, the *Public Interest* model does provide a framework for applying the *Barr Doctrine* and the *Neutral Expositor* model.

In Shakespeare's famous play *Henry VI*, Dick the Butcher responds to Jack Cade's ideal—to provide for all of the needs of the people, relieving them of the need for money, so they can live in perfect harmony—with the famous phrase, “[t]he first thing we do, let's kill all the lawyers.”<sup>113</sup> Leaving aside whether this famous quote is a joke—that to have a peaceful and happy society, the first group that must go is the legal profession or, alternatively, a subtle warning that before establishing a societal utopia (an imposed uniform equality—as determined by the king—among all in which individuality is abandoned) one must destroy the legal profession which protects individualism and uses the law to shield society from the raw power of government, either observation is a comment on the role of attorneys and whose interests they serve—those of the individual or those of society as a whole.<sup>114</sup> The latter raises the

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<sup>112</sup> *Id.* at 1350.

<sup>113</sup> WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 2, sc. 2.

<sup>114</sup> The idea that the attorney has an obligation to serve society as a whole and the interests of society was famously advocated by Charles Huston, Vice-Dean of the Howard Law School, who is often quoted as saying to his students:

A lawyer's either a social engineer or he's a parasite on society . . . A social engineer [is] a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of [the] problems of . . . local communities and in 'bettering conditions of the underprivileged citizens.'

question: should an attorney serve the public interest above the interests of his or her client, or in the case of government attorneys (or the OLC), those interests of the President? This is not an academic or philosophical issue for a debate class, it matters what those in power think the rule of law means in practical application in times of stress and political pressure.<sup>115</sup> During the Justice

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MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 84 (1983). See also; *Charles Hamilton Houston: Legal Social Engineer for a Just Society*, INFO OF ARTIST BIOGRAPHY (Aug. 1, 2010, 12:42 PM), <http://american-biography.blogspot.com/2010/08/charles-hamilton-houston-legal-social.html>.

<sup>115</sup> Intestinal fortitude matters in government when one must stand for something. After the midnight confrontation between the White House attorneys and the Department of Justice attorneys in Ashcroft's room, in which Ashcroft had stared down the White House staff (suffering from gallstone pancreatitis) almost flat on his back and sending them back without his signature, a beleaguered Ashcroft looked at Mueller and said, "Bob, I don't know what's happening," and Mueller looked at him and said, "There comes a time in every man's life when he's tested, and you passed your test tonight." GRAFF, *infra* note 117, at 488.

In a meeting a day before the midnight hospital incident, Comey attended a meeting with V.P. Cheney, White House Chief of Staff Andy Card, Goldsmith (head of the OLC), and Deputy Assistant Attorney General (OLC) Patrick Philbin to get a briefing from the FBI and National Security Agency on the TSP program in which the message to the Department of Justice holdouts was "If the program didn't continue, thousands would die, and it would be Jim Comey's fault." *Id.* at 486. To which Comey told the room, "That's not helping me" and when he made clear that the Yoo memo "analysis is flawed – in fact, fatally flawed. No lawyer reading that could reasonably rely on it" the General Counsel to the Vice President David Addington said "well, I'm a lawyer and I did." To which Comey answered the challenge and said "No good lawyer." *Id.*

The memo that Comey referred to was the November 2, 2001 memo that Yoo submitted to the Attorney General. In the heavily redacted publically released version, Yoo asserted that "FISA only provides a safe harbor for electronic surveillance, and cannot restrict the President's ability to engage in warrantless searches that protect the national security" and although "FISA purports to be the exclusive statutory means for conducting electronic surveillance for foreign intelligence . . . . Such a reading of FISA would be an unconstitutional infringement on the President's Article II authorities." Yoo concluded that "unless Congress made a clear statement in FISA that it sought to restrict presidential authority to conduct warrantless searches in the national security area—which it has not—then the statute must not be construed to avoid such a reading." Yoo then asserted that Congress could not place such a restriction on the Article II power of the Commander-in-Chief; and, when the president orders such searches in the name of national security, he has plenary power to do so because "intelligence gathering in direct support of military operations does not trigger constitutional rights against

Department dispute with the White House over the TSP program, the conflict was not whether the program was a good program or useful program; it was a conflict over its legality.<sup>116</sup> During the conflict, FBI Director Bob Mueller played a significant role in settling the dispute with the White House acceding to the Justice Department's concerns for the illegality of the program.<sup>117</sup> Mueller approached the dispute by backing Comey and making it clear that his role, as director of the FBI, is "to uphold the Justice Department's responsibility for protecting the Constitution" because he "hadn't sworn to serve George W. Bush, [but] he had sworn to protect the Constitution from all enemies, foreign and domestic."<sup>118</sup>

The *Public Interest* and the *Agency Loyalty* models were both utilized when the entire senior leadership of the Department of Justice, including Ashcroft and Mueller, were prepared to resign<sup>119</sup>

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illegal searches and seizures." Yoo asserted that the fourth amendment protection against warrantless searches was not absolute, and "a warrantless search can be constitutional when special needs, beyond the normal need of law enforcement, make the warrant and probable-cause requirement impractical." John Yoo, *Memorandum to the Attorney General* (November 2, 2001) [http://www.aclu.org/files/assets/NSA\\_Wiretapping\\_OLC\\_Memo\\_Nov\\_2\\_2001\\_Yoo.pdf](http://www.aclu.org/files/assets/NSA_Wiretapping_OLC_Memo_Nov_2_2001_Yoo.pdf).

On May 6, 2004 Goldsmith issued a memo to the Attorney General asserting that "the President, as Commander in Chief and Chief Executive, has legal authority to authorize the NSA to conduct the signals-intelligence activities described above; that the activities, to the extent they are searches subject to the Fourth Amendment, comport with the requirements of the Fourth Amendment; and thus that the operation of the [TSP] program as described above is lawful." Jack Goldsmith, *Memorandum to the Attorney General* (May 6, 2004), at 108 [http://www.aclu.org/files/assets/NSA\\_Wiretapping\\_OLC\\_Memo\\_May\\_6\\_2004\\_Goldsmith.pdf](http://www.aclu.org/files/assets/NSA_Wiretapping_OLC_Memo_May_6_2004_Goldsmith.pdf).

Both memos were withdrawn by the OLC. See Steven Bradbury, *Memorandum for Files: Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (January 15, 2009) at 6, available at <http://www.justice.gov/opa/documents/memostatusolcopinions01152009.pdf>.

<sup>116</sup> See *supra* notes 40–52; GRAFF, *infra* note 117. When President Bush met with Mueller two days after the midnight hospital incident, "Mueller refused to budge from his position. The Stellar Wind program [TSP] as instituted was illegal. Simple as that." *Id.* at 493.

<sup>117</sup> GARRETT M. GRAFF, *THE THREAT MATRIX: THE FBI AT WAR IN THE AGE OF GLOBAL TERROR* 490–91 (2011).

<sup>118</sup> *Id.* at 491 and 493 respectively.

<sup>119</sup> *Id.* at 489; *supra* notes 40–52.

when the President signed the reauthorization of a program that had been determined to be illegal. Ashcroft and Comey had determined after a meeting on March 4, 2004 that to do otherwise would expose the Department to “tremendous dangers” by making it “knowingly complicit in active lawbreaking. Given the Department’s—and the FBI’s—mandate, to do so would constitute a fundamental sort of corruption.”<sup>120</sup> The *Agency Loyalty* model allowed for the entire senior leadership of the Department of Justice to threaten resignation because the role of their agency, protection of the rule of law, was directly attacked and they were bound to defend their agency; and the *Public Interest* model allowed them to act because the higher public interest was the law, not the administration’s policy. As Director Mueller stated in a speech before the American Civil Liberties Union on June 13, 2003, less than a year before the dispute came to a climax,

[t]he FBI puts a premium on thoroughly training our Special Agents about their responsibility to respect the rights and dignity of individuals. In addition to extensive instruction on Constitutional law, criminal procedure, and sensitivity to other cultures, every new FBI Agent makes a visit to the Holocaust museum to see for themselves what happens when law enforcement becomes a tool for oppression.

We live in dangerous times, but we are not the first generation of Americans to face threats to our security. Like those before us, we will be judged by future generations on how we react to this crisis. And by that I mean not just whether we win the war on terrorism, because I believe we will, but also whether, as we fight that war, we safeguard for our citizens the very liberties for which we are fighting.

. . .

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<sup>120</sup> GRAFF, *supra* note 117, at 485. The Administration lead by President Bush and Vice President Cheney viewed the program differently than the Justice Department in that “the administration viewed the surveillance program as a necessity for the nation’s security; Mueller felt just the opposite: The nation’s security rested with its primacy of law . . . . If President Bush didn’t change course, Mueller had no choice, he said.” *Id.* at 493.

. . . the FBI will live up to its obligation to protect the citizens of the United States as well as the rights afforded to each citizen under our Constitution . . . .

. . . But in fighting terrorists, we seek to prevent the “tyranny of the minority” from destroying our fundamental way of life. The FBI will be judged not just on how we effectively disrupt and deter terrorism, but also on how we protect the civil liberties and the Constitutional rights of all Americans, including those who wish us ill. We must accomplish both, so that future generations can enjoy lives that are both “safe” and “free.” The FBI is dedicated to protecting Americans, and America’s freedoms, and we will.<sup>121</sup>

The *Public Interest* model is an alternative to the *Private Lawyer model* by emphasizing that the role of the attorney, in general, and (for the present discussion) the role of the Attorney General and the OLC, is to serve the public good or, at the very least, the interests of the institution of the Presidency and the national government, not the specific individual holding the Office of the Presidency.<sup>122</sup> As General Bell observed in his remarks regarding the role of government attorneys: “Although our client is the government, in the end we serve a more important constituency: the American people.”<sup>123</sup> The *Public Interest* model requires the Attorney General and the OLC to answer a President’s request for the interpretation of the law with the best view of the law, not with the answer the President would like to receive, because the interests of the Attorney General and the OLC are institutional not individual.<sup>124</sup> It is granted that, even under this rubric, the most honest lawyers would disagree on the resolution of specific legal questions, but the point is that the goal under the *Public Interest* model is functionally and normatively different than the *Private Lawyer* model in which

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<sup>121</sup> Robert Mueller, Address to the American Civil Liberties Union 2003 Inaugural Membership Conference Washington, DC (June 13, 2003), <http://www.fbi.gov/news/speeches/protecting-americans-against-terrorism>.

<sup>122</sup> See *supra* notes 17, 53, 55, 59–63 and accompanying text.

<sup>123</sup> Bell, *supra* note 22, at 1069.

<sup>124</sup> See *supra* notes 17, 53, 55, 59–63 and accompanying text.

the goal to be reached is the one held by the client. The *Public Interest* model is not defined by the specific legal conclusions reached but by the process and goal of focusing on the law above politics; for doing so maintains the elevation of the principle of the rule of law over the rule by law.<sup>125</sup>

The *Public Interest* model approach was advocated by Dawn Johnsen, Acting Assistant Attorney General for the OLC (1997–1998)<sup>126</sup> and OLC Deputy Assistant Attorney General in the Clinton Administration (1993–1996), in a memo addressed to Attorney General Ashcroft, Alberto Gonzalez (White House Counsel) and Daniel Levin (Acting Assistant Attorney General for OLC) on December 21, 2004 after the OLC *August 2002 Memo* on interrogation had been released.<sup>127</sup> The memo listed ten guiding principles on OLC legal opinion writing. The first principle correctly rejected the *Private Lawyer* model and supported the *Barr Doctrine* and *Neutral Expositor* model for providing opinions to the President.<sup>128</sup> It is not contended that the memo does not reflect a political agenda of the signors of the document<sup>129</sup> or bias against the

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<sup>125</sup> *Id.* See also Garrison, *supra* note 82.

<sup>126</sup> Ms. Johnsen was nominated to be the Assistant Attorney General for the OLC by President Obama in January 2009 and, although being positively reported out of the Senate Judiciary Committee in March 2009, her nomination received significant Republican opposition due to her positions on abortion and the Bush post-September 11th policies which resulted in failure to schedule a final Senate vote. Johnsen withdrew her nomination in April 2010.

<sup>127</sup> Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007).

<sup>128</sup> *Id.* at 1604.

When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

*Id.* (italics removed).

<sup>129</sup> All of the signatories were members of the OLC during the Clinton Administration.

work of the Bush Administration OLC,<sup>130</sup> but that the memo is correct that the OLC opinions should reflect the best view of the law and should be provided with the fidelity to the law and not primarily to the interests of the President.

A final approach to how government attorneys should approach legal advising is called the *Critical Analysis* model.<sup>131</sup> This approach supplements the *Public Interest* model by observing that attorneys have significant input in policy determinations and strategic planning by the nature of the fact that government agencies seek to act within the law.<sup>132</sup> Thus, the best view of the law, reflecting the public interest values of the rule of law prevailing over policy when the two are in conflict, is implemented by the process in which “the government lawyer draws on the numerous sources from which the public interest can be extrapolated to help the agency define its position in light of those values.”<sup>133</sup>

The role of opinion writing first established by the Attorney General and then transferred to the OLC is not equivalent to the role of the private lawyer providing advice to his client. The OLC has a public interest to protect, which private and other government attorneys do not share. The history of legal opinion writing within the Executive Branch has a higher purpose than simply securing an

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<sup>130</sup> For example, after providing the first principle, the memo explains as follows:

To fulfill this function appropriately, OLC must provide advice based on its best understanding of what the law requires. OLC should not simply provide an advocate’s best defense of contemplated action that OLC actually believes is best viewed as unlawful. To do so would deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action.

*Id.* Notice the assumption in the second sentence that “OLC should not simply provide an advocate’s best defense of contemplated action that OLC actually believes is best viewed as unlawful,” clearly implying that OLC knew the advice that Yoo and Barbee provided was unlawful but decided to provide the administration with its best argument on how to sustain an “unlawful” act.

<sup>131</sup> Note, *supra* note 95, at 1182.

<sup>132</sup> *Id.* at 1176.

<sup>133</sup> *Id.* at 1186.

answer to a legal question. The purpose is to aid the Office of the President to faithfully execute the laws.<sup>134</sup> This responsibility can be implemented through various models on the role of government attorneys. The *Barr Doctrine* and the *Neutral Expositor* models provide a context for the *Public Interest* and the *Critical Analysis* models; all of which provide a framework for reaching the same objective, the rule of law over politics and policy. The institution of legal opinion writing under the authority of the Attorney General is separate and above the role as cabinet officer and political subordinate to the President. The *Barr Doctrine*, the *Neutral Expositor* model, the *Public Interest* model, and the *Critical Analysis* model applied to executive legal opinion writing protect the principle of the rule of law and the OLC obligation to get correct what the law rules. It is when the OLC abandons this role for that of the private lawyer or policy advocate that errors are made.

### III. THE BUSH ADMINISTRATION, THE OLC, THE JAGS AND THE WAR ON TERROR: WHERE POLICY AND LAW INTERACTED

*Lord Young:* We were showing that this is not a state where the rule of law counts for nothing, and where a member of the security services can appoint themselves as an executioner.

*Harry:* Well, I hope you remember that pious bullshit the next time there's a terrorist outrage on these shores.

*Lord Young:* I hope you remember that a democracy is not only protected with guns.<sup>135</sup>

It is a truism that a democracy is not only protected by guns, but is protected even more by the rule of law and what the rule of law protects. Not since the attacks of December 7, 1941 had the United States suffered a major attack on its shores, and in the very first

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<sup>134</sup> Garrison, *supra* note 2; Barr, *supra* note 17; Comey, *supra* note 55; Moss, *supra* note 59.

<sup>135</sup> BBC TV Series MI-5 Persephone Season 3, Episode 6 (November 15, 2004), available at <http://www.tv.com/shows/spooks-uk/episode-6-375582/>.



national security meeting after the attacks of 9/11, General Ashcroft summarized a key policy determination by the Bush Administration—that the goal was to make sure they never happen again.<sup>136</sup> The Bush Administration approached the attacks with two policy determinations: first, that they were acts of war and not international criminal acts;<sup>137</sup> and second, it was the policy of the national government, law enforcement, and intelligence institutions *to prevent* a second occurrence of the attacks.<sup>138</sup> One of the resulting policy initiatives was the determination that the administration would not approach the capturing of those who participated and planned the

<sup>136</sup> JOHN ASHCROFT, NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE 133 (2006).

<sup>137</sup> President Bush in his *State of the Union Address* on January 20, 2004 made clear:

As we gather tonight, hundreds of thousands of American service men and women are deployed across the world in the war on terror. By bringing hope to the oppressed and delivering justice to the violent, they are making America more secure.

.....

America is on the offensive against the terrorists who started this war. . . .

.....

Many of our troops are listening tonight. And I want you and your families to know: America is proud of you. And my administration and this Congress will give you the resources you need to fight and win the war on terror.

.....

I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments.

.....

After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States. And war is what they got.

*Text of President Bush's 2004 State of the Union Address*, WASH. POST (Jan. 20, 2004),

[http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext\\_012004.html](http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html) [hereinafter *State of the Union Address*].

<sup>138</sup> ASHCROFT, *supra* note 136; YOO, *supra* note 98; Mueller, *supra* note 121.

attacks with a law enforcement perspective—i.e. by bringing them before the bar of justice—but the purpose of capture was interrogating and gathering actionable intelligence to prevent future attacks.<sup>139</sup> There is a difference between the gathering of evidence for trial and the gathering of intelligence in war, and the differences in purpose and techniques between them are legitimate but are almost always mutually exclusive. General Ashcroft made this clear when he said at the first national security meeting that if we don't go to trial, so be it.<sup>140</sup>

The initial problem with the Bush policy after 9/11 was that the nation, as a whole, was not totally convinced that the attacks were acts of war and should be handled as such.<sup>141</sup> But more importantly, the problem that the Bush Administration created for itself was that, after declaring that the attacks were acts of war and would be treated as such, it determined that the rules of war—as understood by the international, academic, and uniformed armed forces' legal communities—did not apply.<sup>142</sup> If the attackers of 9/11, and those who helped in the planning and operation of it, had committed war, how could they be detained and questioned (interrogated) outside of the Geneva Convention and its protections? The answer to this question is not insignificant because, since the end of World War II, the nature of war has changed to include the reduction of civilian casualties as a primary military and legal obligation of all nations. More importantly, with the advent of international treaties, the international human rights movement (and supporting organizations) and international judicial bodies designed to govern the dogs of war and enforce the role of the law in the operational aspect of war have become significant aspects of planning by line military officers. This application of law as a part of warfare has come to be called "lawfare;" and, in the U.S. military, lawfare has resulted in the increased significance of the armed forces' Judge Advocates General

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<sup>139</sup> ASHCROFT, *supra* note 136.

<sup>140</sup> *Id.* at 133.

<sup>141</sup> President Bush acknowledged as much in his 2004 State of the Union Address: "I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments." *See State of the Union Address, supra* note 137.

<sup>142</sup> *See supra* notes 3, 7–10 and *infra* Part III.

(JAGs).<sup>143</sup> This aspect of the legalization of warfare was part of the explanation for the dispute over the OLC opinions between the OLC and JAGs.<sup>144</sup> The Bush Administration policy of asserting that the Geneva Convention protections did not apply to those captured during the war on terror was defended with the assertion that the war on terrorism—though a war and not a criminal matter for the courts—was a different type of war;<sup>145</sup> and thus, the Geneva Convention did not apply as commonly understood in post World War II conflicts like Korea, Vietnam,<sup>146</sup> or the first Gulf War. The

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<sup>143</sup> Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815 (2007).

<sup>144</sup> *Id.*

<sup>145</sup> Sulmasy and Yoo write that this difference is significant both in understanding the nature of the attacks of 9/11 and in the civilian/military relationship over war policy. They write:

Another cause of different preferences is the nature of the fight against al Qaeda. The United States continues to justify its policies with principles embodied in the laws of war. These rules, however, were drafted primarily to deal with two types of armed conflict—wars between nation-states, and internal civil wars. The September 11th attacks introduced a different type of armed conflict, one between a nation-state and an international terrorist organization with international reach and the ability to inflict levels of destruction previously only in the hands of states. Claims of deference to military expertise will not prove as compelling to civilians when the rules of warfare are being adapted to a new situation.

*Id.* at 1835 (internal citations omitted).

<sup>146</sup> Vietnam was a significant point in the history of the JAGs in operational warfare involvement due to the nature of the war, the blurring of battle lines, identification of the enemy, the nature in which the military engaged the war, and the nature of the loss of the war. As Sulmasy and Yoo explain:

The American experience in Vietnam changed perceptions of the role of law in warfare. The Vietnam War raised novel tactical and legal issues . . . This experience, where lawlessness and legal complexities impacted combat operations, encouraged the increased involvement of JAGs in wartime decisions. The Vietnam environment blurred the line between civilian and enemy fighters, and the law of armed conflict became increasingly difficult to apply in combat situations.

war on terror was not like these conventional wars, and the rules governing such conflicts did not apply to the like of al Qaeda.

Leaving aside the policy aspects of this assertion, as a legal matter the answer failed to convince significant parts of the Executive Branch's legal community,<sup>147</sup> especially the uniformed

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In addition, the media was now reporting on the conduct of the war . . . .

. . . The unpopular war and relative shock of witnessing the brutal nature of warfare itself created increased concern as to the Armed Forces' conduct in warfare. . . .

This concern with the lawfulness of combat operations by the U.S. military was highlighted by the singular case of Lieutenant William Calley and the atrocity that occurred at My Lai in March 1968 . . . .

. . . This incident, coupled with the emerging emphasis on the law of armed conflict, led to a variety of investigations by both civilian and military leaders. One problem was evident to the investigators: The United States maintained a woefully inadequate training program for soldiers on the laws of war. As a result, the Department of Defense placed primary responsibility for this training on JAGs. This new role provided military lawyers their first entrée into impacting war fighting and promoting adherence to the laws of armed conflict.

Subsequent conflicts in Grenada, Panama, and the Persian Gulf continued to transform the role of JAGs. By the 1990s, JAGs became an intimate part of operational advice to combatant commanders. In the Kosovo campaign, JAGs were an integral component of the decisionmaking process in military operations. JAGs were now teaching the laws of war to all members of the Armed Forces, performing mission and operational legal analysis, actively participating in war games, drafting (rather than merely advising on) rules of engagement, participating in the targeting process, and even reviewing battle plans and orders. As a direct result, JAGs are now found at every layer of the command structure.

*Id.* at 1839–41 (internal citations omitted).

<sup>147</sup> See, e.g., Alberto J. Mora, Memorandum for Inspector General, Department of the Navy, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues (June 18, 2004) [hereinafter *Mora Memo*]; Colin Powell, Counsel to the President Assistant to the President for National Security Affairs, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002); William H. Taft IV, General Counsel to the President, Comments on your paper on the Geneva Convention (Feb. 2, 2002); see also Alberto Gonzales, White

military justice community.<sup>148</sup> The JAGs provided the Bush Administration *DOD Working Group to Assess the Legal, Policy and*

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House General Counsel to the President, Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002) (provided President Bush with a summary of the arguments that Secretary Powel and William Taft made against the OLC memos asserting the Geneva Convention did not apply to captured al Qaeda and Taliban fighters; President Bush affirmed the OLC); President George W. Bush, Memorandum on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002).

<sup>148</sup> The uniform Judge Advocates General voiced various concerns regarding the opinions of the OLC and the general issue of not applying the Geneva Convention to captured detainees. For example, Kevin M. Sandkuhler, Brigadier General, USMC, Staff Judge Advocate to the Commandant, Marine Corp, wrote to the General Counsel of the Air Force:

1. In addition to comments we submitted 5 February, we concur with the recommendations submitted by the Navy (TJAG RADM Lohr), the Air Force (TJAG MGen Rives), and the Joint Staff Legal Counsel's Office. Their recommendations dealt with policy considerations, contention with the OLC opinion, and foreign interpretations of GC IV (Civilians) and customary international law, respectively.

2. The common thread among our recommendations is concern for service members. OLC does not represent the services; thus, understandably, concern for service members is not reflected in their opinion. Notably, their opinion is silent on the UCMJ and foreign views of international law.

. . . . .  
. . . . . When assessing whether to use exceptional interrogation techniques, consideration should be given to the possible adverse effects on U.S. Armed Forces culture and self-image *which suffered during the Vietnam conflict and at other times due to perceived law of war violations. DOD policy indoctrinated in the DOD Law of War Program in 1979 and subsequent service regulations, greatly restored the culture and self-image of U.S. Armed Forces by establishing high benchmarks of compliance with the principles and spirit of the law of war and humane treatment of all persons in U.S. Armed Forces custody.* In addition, consideration should be given to whether implementation of such techniques is likely to result in adverse impacts for DOD personnel who are *captured or detained* [become POWs], including possible perceptions by other nations that the United States is lowering standards related to the treatment of prisoners *and other detainees*, generally.

*Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism*<sup>149</sup> with their own legal analysis of the OLC opinions and the obligations that the U.S. had under the United Nations Convention Against Torture (CAT) and the Geneva Conventions.<sup>150</sup> Rumsfeld ordered the U.S. Department of Defense (DOD) General Counsel to establish the working group to review all of the pertinent issues relating to the interrogation of detainees held by the U.S. Armed Forces on January 15, 2003.<sup>151</sup> The working group was chaired by the General Counsel of the Air Force.<sup>152</sup> The order was issued after the General Counsel of the Navy, Alberto J. Mora, threatened to issue a legal opinion that some of the eighteen methods approved by Rumsfeld on December 2, 2002 “constituted cruel and unusual treatment or torture and that use of the techniques would violate domestic and international law.” (This prompted Rumsfeld to resend the December 2, 2002 approval memo on January 15, 2003).<sup>153</sup>

General Jack L. Rives, Major General, U.S. Air Force, Deputy Judge Advocate General, in a memo to the General Counsel of the Air Force, commented on the practical impact of informing the military that the Geneva Convention does not apply to interrogations

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Memorandum for General Counsel of the Air Force, Working Group Recommendations on Detainee Interrogations 1–2 (Feb. 27, 2003). Italics in original show wording that General Sandkuhler recommended be placed in the DOD WORKING GROUP REPORT ON DETAINEE INTERROGATION IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS DRAFT REPORT (Mar. 6, 2003). The final report was released April 4, 2003. Both reports are reprinted in KAREN J. GREENBERG, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *THE TORTURE PAPERS*].

<sup>149</sup> DOD WORKING GROUP REPORT ON DETAINEE INTERROGATION IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS DRAFT REPORT (Mar. 6, 2003).

<sup>150</sup> *Id.*

<sup>151</sup> *THE TORTURE PAPERS*, *supra* note 148, at 238.

<sup>152</sup> *Id.* at 240.

<sup>153</sup> DEP’T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY DRAFT REPORT, (U) INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA ON ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 48 (2008); *see also* DAVID COLE, *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* 17 (David Cole ed., 2009); *Mora Memo*, *supra* note 147, at 14–15.

of captured enemy combatants. His concern was that legal distinctions have consequences. He wrote:

*While the detainees' status as unlawful belligerents may not entitle them to protections of the Geneva Conventions, that is a legal distinction that may be lost on the members of the armed forces. Approving exceptional interrogation techniques may be seen as giving official approval and legal sanction to the application of interrogation techniques that U.S. Armed Forces have heretofore been trained are unlawful . . . .*

General use of exceptional techniques (generally, having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations, and may adversely affect the cultural self-image of the U.S. armed forces.<sup>154</sup>

Thomas J. Romig, Major General, U.S. Army, Judge Advocate General, was blunt in his criticism of the logic of the OLC legal advice to the DOD. He wrote to the General Counsel of the Air Force:

3. (U) While the OLC analysis speaks to a number of defenses that could be raised on behalf of those who engage in interrogation techniques later perceived to be illegal, the “bottom line” defense proffered by OLC is an exceptionally broad concept of “necessity.” This defense is based upon the premise that any existing federal statutory provision or international obligation is unconstitutional per se, where it otherwise prohibits conduct viewed by the

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<sup>154</sup> Memorandum for SAF/GC from AF/JA, Comments on Draft Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism 1–2 (Feb. 6, 2003).

President, acting in his capacity as Commander-in-Chief, as essential to his capacity to wage war. I question whether this theory would ultimately prevail in either the U.S. courts or in any international forum. If such a defense is not available, soldiers ordered to use otherwise illegal techniques run a substantial risk of criminal prosecution or personal liability arising from a civil lawsuit.

4. (U) The OLC opinion states further that customary international law cannot bind the U.S. Executive Branch as it is not part of the federal law. As such, any presidential decision made in the context of the ongoing war on terrorism constitutes a “controlling” Executive act; one that immediately and automatically displaces any contrary provision of customary international law. This view runs contrary to the historic position taken by the United States Government concerning such laws and, in our opinion, could adversely impact DOD interests worldwide. On the one hand, such a policy will open us to international criticism that the “U.S. is a law unto itself.” On the other, implementation of questionable techniques will very likely establish a new baseline for acceptable practice in this area, putting our service personnel at far greater risk and vitiating many of the POW/detainee safeguards the U.S. has worked hard to establish over the past five decades.<sup>155</sup>

The JAGs concurred that there were serious policy as well as legal<sup>156</sup> errors and ramifications to the OLC opinions.<sup>157</sup> They all

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<sup>155</sup>Memorandum for General Counsel of the Department of the Air Force, Draft Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism 1 (Mar. 3, 2003) [hereinafter *March 3, 2003 Memorandum*], available at <http://balkin.blogspot.com/jag.memos.pdf>.

<sup>156</sup>Michael F. Lohr, Rear Admiral, JAGC, U.S. Navy, Judge Advocate General, who took issue with the draft report conclusion (echoing the *August 2002 Memo*) that if a detainee was harmed during an interrogation he could claim that it was done to prevent another Al Qaeda attack. Admiral Lohr informed the



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Secretary of the Air Force that “this sentence is not true.” *March 3, 2003 Memorandum, supra* note 155, at 1. Admiral Lohr asserted:

There are domestic limits on the President’s power to interrogate prisoners. One of them is Congress’s advice and consent to the US ratification to the Geneva Conventions that limit the interrogation of POWs. The willingness of the Executive, and of the Legislative Branch, to enforce those restrictions is a different matter.

*March 3, 2003 Memorandum, supra* note 155, at 1.

<sup>157</sup> See generally *Mora Memo, supra* note 147. General Rives concluded in an opinion to the Air Force Judge Advocate General that

1. (U) In drafting the subject report and recommendations, the legal opinions of the Department of Justice, Office of Legal Counsel (DoJ/OLC), were relied on almost exclusively. Although the opinions of DoJ/OLC are to be given a great deal of weight within the Executive Branch, their positions on several of the Working Group’s issues are contentious. As our discussion demonstrate, others within and outside the Executive Branch are likely to disagree . . . .

2. (U) Several of the more extreme interrogation techniques, on their face, amount to violations of domestic criminal law and the UCMJ (e.g., assault). Applying the more extreme techniques during the interrogation of detainees places the interrogators and the chain of command at risk of criminal accusations domestically. Although a wide range of defenses to these accusations theoretically apply, it is impossible to be certain that any defense will be successful at trial; our domestic courts may well disagree with DoJ/OLC’s interpretation of the law. Further, while the current administration is not likely to pursue prosecution, it is impossible to predict how future administrations will view the use of such techniques.

3. (U) Additionally, other nations are unlikely to agree with DoJ/OLC’s interpretation of the law in some instances. Other nations may disagree with the President’s status determination regarding the Operation ENDURING FREEDOM (OEF) detainees; they may conclude that the detainees are POWs entitled to all of the protections of the Geneva Conventions. Treating OEF detainees inconsistently with the Conventions arguably “lowers the bar” for the treatment of U.S. POWs in future conflicts. Even where nations agree with the President’s status determination, many would view the more extreme interrogation techniques as violative of other international law (other treaties or customary international law) and perhaps

warned that the use of enhanced techniques, and the policy initiatives that placed limits on the applicability of the Geneva Conventions, reduced the self-image of the U.S. military, lowered the bar on the standards of treatment of the enemy in times of war, opened the military to possible prosecution in both domestic and international courts due to the use of enhanced interrogation techniques, and placed captured American military personnel at risk of torture by the enemy due to the American policy of weakened observance of the Geneva Convention standards regarding its treatment of captured enemy combatants.<sup>158</sup>

The opinions of the uniformed armed forces legal community did not prevail<sup>159</sup> in part because the OLC opinions were considered dispositive on both the applicability of the CAT and the Geneva Convention to the question of the definition of and the use of enhanced interrogation and the power of the President to determine the treatment of captured enemy combatants. The civilian policymakers in the Pentagon provided a final report to Secretary Rumsfeld, *Final Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to*

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violative of their own domestic law. This puts the interrogators and the chain of command at risk of criminal accusations abroad, either in foreign domestic courts or in international fora, to include the ICC.

Memorandum for SAF/GC from AF/JA, Final Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism 1 (Feb. 5, 2003), available at <http://balkin.blogspot.com/jag.memos.pdf>.

<sup>158</sup> See *supra* notes 147–48, 154–57; *infra* notes 159, 161 and accompanying text.

<sup>159</sup> The opinion of the JAGs did not prevail, in no small part, as a result of the OLC advice and its publication of the Military Interrogations Memo which supported the techniques in Rumsfeld's December 2002 memo. The working Group developed its policy recommendations between January 18 and 29, 2003 and "during this period, OLC delivered its draft legal memo on interrogation techniques [and] contributions from the members of the Working Group, including OGC, began to be rejected if they did not conform to the OLC guidance." See *Mora Memo*, *supra* note 147, at 16–18. The process was such that because the OLC opinion was considered binding "it became evident to me and my OGC colleagues that the Working Group report being assembled would contain profound mistakes in its legal analysis, in large measure because of its reliance on the flawed OLC memo." *Id.*

*Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism* (April 4, 2003), which approved thirty-five techniques that could be used by the military personnel.<sup>160</sup> They included many of the same techniques authorized by the *August 2002 Memo*, *CIA Interrogation*, and *Military Interrogation* opinions. General Rives, Deputy Judge Advocate General of the Air Force, warned of the political ramifications of the OLC opinions and the techniques being approved by the DOD. He warned:

Should any information concerning the exceptional techniques become public, it is likely to be exaggerated/distorted in both the U.S. and international media. This could have a negative impact on international, and perhaps even domestic, support for the war on terrorism. It could likewise have a negative impact on public perception of the U.S. military in general.<sup>161</sup>

This is exactly what happened. The Abu Ghraib scandal along with the leaking of the OLC *August 2002 Memo* forever blackened the policy arguments made by the Bush Administration that it was in compliance with the rule of law and that the war on terror was different. The Abu Ghraib and the later GITMO abuse scandals gave evidence to those who asserted that the U.S. had outright authorized torture and other inhuman tactics in violation of international law and that the U.S. was acting as a law unto itself.<sup>162</sup> This was the exact reaction the uniformed armed forces legal community warned would happen. The Bush Administration thereafter battled the narrative that it had sacrificed the law, and the rule of law, on the altar of American

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<sup>160</sup> See THE TORTURE PAPERS, *supra* note 148, at 340–43. See also JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 105–06 (2006).

<sup>161</sup> Memorandum for SAF/GC from AF/JA, Comments on Draft Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Feb. 6, 2003), *available at* <http://balkin.blogspot.com/jag.memos.pdf>.

<sup>162</sup> Garrison, *supra* note 9.

fears and the arrogant desire to make policy unilaterally in the name of providing security for America.<sup>163</sup>

As Benjamin Franklin observed, a nation that trades freedom and liberty for security will lose both and deserves neither.<sup>164</sup> A republic maintains freedom and liberty, in times of war and national security crisis, by maintaining and defending the rule of law, which involves interpreting the law correctly.<sup>165</sup> The rule of law is a principle in which all segments of society, including the government, is subservient to the dictates of the law, and the law should be consulted and adhered to in all policy matters.<sup>166</sup> But “failing to follow the rule of law” is not synonymous with failure to apply what the law rules correctly.<sup>167</sup> More importantly, the rule of law does not require action or inaction based on what people want the law to rule when it doesn’t.<sup>168</sup> The error by the OLC was not that the rule of law was not honored. The rule of law is honored when the OLC is sought to provide a legal opinion on a proposed policy. The error was not that the OLC got the law (the meaning of Section 2340) wrong in the *August 2002 Memo* but that the approach of the memo was an abandonment of the traditional *Neutral Expositor* of the best view of the law as advocated by General Barr and others for the *Private Lawyer* model.<sup>169</sup>

The OLC proposed legal answers to questions not asked and asserted that any law, including a domestic criminal statute outlawing torture, was unconstitutional if applied to the Commander-in-Chief power of the President in time of war.<sup>170</sup> Although the OLC and,

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

<sup>164</sup> Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor (Nov. 11, 1755), in *THE PAPERS OF BENJAMIN FRANKLIN VOL. 6*, 242 (Leonard W. Labaree ed., 1963).

<sup>165</sup> Arthur H. Garrison, *The Rule of Law and What the Law Rules: The History of Executive Branch Legal Opinions on the Commander-in-Chief Power and the Department of Justice Office of Legal Counsel Torture and Commander-in-Chief Opinions During the First Two Years of the Bush Administration after September 11* (unpublished doctoral thesis, on file with the Northeastern University Library system).

<sup>166</sup> *Id.*

<sup>167</sup> Garrison, *supra* note 3.

<sup>168</sup> *Id.*

<sup>169</sup> Garrison, *supra* notes 3 and 9.

<sup>170</sup> *Id.* See also *supra* note 115 and accompanying text.

before that, the Attorney General have issued opinions favorable to the President in defining the breadth and depth of the Commander-in-Chief power,<sup>171</sup> never before had the OLC or the Department of Justice made the assertion that the president was not bound to comply with a criminal statute because it interfered with his general Commander-in-Chief power, not even in the days of World War II!<sup>172</sup> Since Attorney General Bradford advised President Washington that he did not have to release diplomatic papers to Congress,<sup>173</sup> and General Bates affirmed the power of President Lincoln to suspend the writ of habeas corpus in order to deal with the slave owner rebellion in 1861<sup>174</sup> Attorneys General and the OLC have historically protected the inherent powers of the President; but the Bush Administration OLC took assertion of presidential power during war to a new level. Even the OLC opinions issued during the Nixon Administration, during the expansion of a secret war into Cambodia, and those of the Reagan and the First Bush Administrations never asserted that domestic criminal law can be disregarded by the President.<sup>175</sup> Even Dellinger's OLC opinion,<sup>176</sup> which proposed there are times when a President can disregard a federal statute, never asserted a President could disregard a federal criminal statute. Dellinger did accept that under the Constitution the President is obligated to protect his office from encroachments by the

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<sup>171</sup> Arthur H. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, 43 CUMB. L. REV. (forthcoming 2013).

<sup>172</sup> At the height of World War II, the Executive Branch never asserted that judicial review of war policy, much less a criminal statute, was beyond judicial review. It should be remembered that it was during World War II that the court determined the boundaries of the internment policy and set limits on its implementation. See ARTHUR H. GARRISON, *SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR: A HISTORICAL PERSPECTIVE* 201–35 (2011).

<sup>173</sup> *Id.* at 266.

<sup>174</sup> *Id.* at 56–60.

<sup>175</sup> Garrison, *supra* note 3.

<sup>176</sup> Memorandum for the Honorable Abner J. Mikva, Counsel to the President Re: Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 OPINION OF THE OFFICE OF LEGAL COUNS. 199 (Nov. 2, 1994), available at <http://www.justice.gov/olc/nonexecut.htm>. What is interesting is that Yoo never cited this opinion for the proposition that the President could disregard the prohibition on torture since it impacted on his Commander-in-Chief power.

Legislative Branch; and, in doing so, has the authority to make independent determinations on what the Constitution requires, especially when the dispute is not justiciable in the Supreme Court. Dellinger asserted in his memo:

6. The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment . . . .

Some legislative encroachments on executive authority, however, will not be justiciable or are for other reasons unlikely to be resolved in court. If resolution in the courts is unlikely and the President cannot look to a judicial determination, he must shoulder the responsibility of protecting the constitutional role of the presidency. This is usually true, for example, of provisions limiting the President's authority as Commander-in-Chief. Where it is not possible to construe such provisions constitutionally, the President has the authority to act on his understanding of the Constitution.<sup>177</sup>

Dellinger made clear that the President “should presume that enactments are constitutional [and] the President should give great deference to the fact that Congress passed the statute and that Congress believed it was upholding its obligation to enact constitutional legislation;”<sup>178</sup> and, if the President believed the law to be unconstitutional, he should declare it as such and submit the law to the Supreme Court for final determination.<sup>179</sup>

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<sup>177</sup> *Id.* at 201.

<sup>178</sup> *Id.* at 200.

<sup>179</sup> Dellinger notes:

5. Where the President's independent constitutional judgment and his determination of the Court's probable decision

#### IV. THE OLC, INTRA-EXECUTIVE BRANCH LEGAL POLICYMAKING, AND WHY IT MATTERS WHAT THE OLC SAYS

Although the OLC holds the institutional and administrative authority of being dispositive on questions of law within the Executive Branch, this does not mean that there is not inter-agency competition for acceptance of those opinions by the President. In the Bush Administration, the JAGs opposed the OLC and its opinions regarding the applicability of the Geneva Conventions and the legality of proposed interrogation techniques.<sup>180</sup> In the third year of the Obama Administration, an OLC opinion was reportedly<sup>181</sup>

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converge on a conclusion of unconstitutionality, the President must make a decision about whether or not to comply with the provision. That decision is necessarily specific to context, and it should be reached after careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch's constitutional authority. Also relevant is the likelihood that compliance or non-compliance will permit judicial resolution of the issue. That is, the President may base his decision to comply (or decline to comply) in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch. 6. The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment. If the President does not challenge such provisions (i.e., by refusing to execute them), there often will be no occasion for judicial consideration of their constitutionality; a policy of consistent Presidential enforcement of statutes limiting his power thus would deny the Supreme Court the opportunity to review the limitations and thereby would allow for unconstitutional restrictions on the President's authority.

*Id.* at 200–01.

<sup>180</sup> See *supra* Part III.

<sup>181</sup> See Trevor W. Morrison, *Libya, "Hostilities," The Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. FORUM 62 (2011); Charlie Savage & Thom Shanker, *Scores of U.S. Strikes in Libya Followed Handoff to NATO*, N.Y. TIMES, June 11, 2011, at A8; Bruce Ackerman, *Legal Acrobatics, Illegal war*, N.Y. TIMES (June 20, 2011), <http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html>; Jack Balkin,

opposed by the State Department Legal Advisor over the applicability of the War Powers Resolution (WPR) regarding the U.S. Armed Forces' participation in a multinational force to enforce a United Nations Resolution against Libya. The OLC, backed by Attorney General Holder, advised President Obama that the WPR "hostilities" provision is applicable to the Commander-in-Chief power when "the military operations that the President anticipated ordering would be sufficiently extensive in 'nature, scope, and duration'" to constitute a "war" requiring prior specific congressional approval under the Declaration of War Clause.<sup>182</sup> In other words, the WPR 60-day rule is implicated by the "hostilities" provision but that, in turn, is defined by the Declaration of War Clause. The OLC concluded that the proposed action did not activate the Declaration of War Clause, so the WPR Congressional prior approval provision was not invoked by the proposed deployment of troops.<sup>183</sup> The State Department advised the President that the WPR was applicable to his decision to deploy troops, but "hostilities" is a factual and policy question, not a legal one; and, although "hostilities" occurs when American forces are in a situation in which they are fired upon, the fact that they are fired upon does not mean they are in "hostilities"

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*George W. Obama and the OLC*, BALKINIZATION (June 18, 2011, 8:35 AM), <http://balkin.blogspot.com/2011/06/george-w-obama-and-olc.html>; Jack Goldsmith, *President Obama Rejected DOJ and DOD Advice, and Sided with Harold Koh, on War Powers Resolution*, LAWFARE (June 17, 2011, 11:38 PM), <http://www.lawfareblog.com/2011/06/president-obama-rejected-doj-and-dod-advice-and-sided-with-harold-koh-on-war-powers-resolution/>; Michael Isikoff, *On Libya, President Obama evaded rules on legal disputes, scholars say Decision to override Justice Department unit called 'disturbing' by one former legal adviser*, NBC NEWS (June 21, 2011, 6:09 AM), [http://www.msnbc.msn.com/id/43474045/ns/politics-white\\_house/t/libya-president-obama-evaded-rules-legal-disputes-scholars-say/#.T-O\\_3JhnzIQ](http://www.msnbc.msn.com/id/43474045/ns/politics-white_house/t/libya-president-obama-evaded-rules-legal-disputes-scholars-say/#.T-O_3JhnzIQ); Eric Posner & Adrian Vermeule, *Libyan Legal Limbo: Why there's nothing wrong with Obama ignoring some of his own legal advisors on Libya*, SLATE (July 5, 2011, 6:17 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/06/libyan\\_legal\\_limbo.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/libyan_legal_limbo.html); Charles Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <http://www.nytimes.com/2011/06/18/world/africa/18powers.html?pagewanted=all>.

<sup>182</sup> Caroline D. Krass, Memorandum Opinion for the Attorney General: Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (Apr. 1, 2011) at 10, available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>.

<sup>183</sup> *Id.* at 13.



that triggers the 60-day rule for withdrawal under the WPR.<sup>184</sup> The distinction between the two opinions was on the meaning of “hostilities” in which the State Department agreed that the proposed action constituted hostilities but not the type that required the activation of the 60-day rule while the OLC asserted that the 60-day rule is implicated only when the military action constitutes a war. President Obama accepted the view of the State Department Legal Advisor on the issue of the meaning and applicability of the WPR “hostilities” in his report to Congress.<sup>185</sup> The result of both opinions

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<sup>184</sup> Testimony by State Department Legal Advisor Harold Hongju Koh, *Libya and War Powers*, U.S. Senate Foreign Relations Committee (June 28, 2011) (SH 112-89) at 14, available at [http://www.fas.org/irp/congress/2011\\_hr/libya.pdf](http://www.fas.org/irp/congress/2011_hr/libya.pdf). Mr. Koh explained to Congress that in line with the historical view of the WPR and the Commander-in-Chief power the State Department’s position on the President’s deployment of troops is

when U.S. forces engage in a limited military mission that involves limited exposure for U.S. troops and limited risk of serious escalation and employs limited military means, we are not in hostilities of the kind envisioned by the War Powers Resolution that was intended to trigger an automatic 60-day pullout.

*Id.* at 9.

<sup>185</sup> UNITED STATES ACTIVITIES IN LIBYA 25 (June 15, 2011), available at <http://www.washingtonpost.com/wp-srv/politics/documents/united-states-activities-libya.html> (President Barack Obama’s report to Congress regarding U.S. activities in Libya). The President asserted in his report to Congress:

The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because U.S. military operations are distinct from the kind of “hostilities” contemplated by the Resolution’s 60-day termination provision. U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops,

was accepted by the President; the dispute between the OLC and the State Department was over the legal reasoning each agency provided to the President regarding the conclusion of law and not the conclusion of law they both provided. As John P. Elwood, Deputy Assistant Attorney General for the OLC, testified in 2008, the role of the OLC is to advise the President of law and, in so doing, protect the rule of law within the Executive Branch; it is not the role of the OLC to prevail in policy disputes that might entail the law.

It is true that OLC opinions ordinarily are controlling within the executive branch on questions of law.

While OLC's legal advice may inform its clients' policy decisions, its legal advice rarely, if ever, compels the adoption of any particular policy. Rather, it remains up to the policymakers to decide whether, and how, to act. . . .

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But the purpose of OLC opinions is not to provide cover, even legal protection, for actors. Its purpose is to help the President effect his duty to take care that the laws be faithfully executed. So before he undertakes action, he routinely asks us for legal advice on matters that might be subject to dispute. That's the purpose of OLC opinions.<sup>186</sup>

Elwood is correct that the OLC's utility is not in prevailing over other agencies in the policy application of its legal determinations. Its utility lies in providing a nonbiased best view of the law assessment of the law and being prepared to tell the President "no" and providing that assessment to those who have to apply the law and policy and bear the responsibility of the results.

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U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.

*Id.* at 25.

<sup>186</sup> *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 110th Cong. 6, 30 (2008) (statement of John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel) [hereinafter *Secret Law*].

Former Solicitor General Paul D. Clement, in a keynote address at Emory Law School, provided a useful discussion on the nature of intra-Executive Branch separation of powers and a description of various forms of statutory interpretation available within the Executive Branch.<sup>187</sup> Although his keynote address focused on the Office of the Solicitor General, his comments on the various forms of agency decision making and the consequences of each is useful in examining the proper role of the OLC. General Clement explained that there are differences within the field of policy and law; specifically, there are differences between (1) policymaking (political agenda preferences) and legal decision making (quasi-judicial),<sup>188</sup> (2) legal counseling (providing advice on matters that most likely will not be litigated) and litigating (defending a policy in court),<sup>189</sup> and (3) trial decisions (what cases are brought to court) and appellate decisions (what cases are appealed).<sup>190</sup> The former in each grouping deals with policy considerations while the latter deals with quasi-judicial or objective legal determinations. The nonpartisan, nonpolitical role of the OLC, like the Office of the Solicitor General, lies in the fact that it does not make decisions based on the political needs and desires of the Executive Branch *per se*. Both offices make decisions based on neutral interpretation of the law. To put the organizational system within the Justice Department and within the Executive Branch in perspective, the OLC determines what the law means and how the law governs the boundaries of executive policymaking power (*Barr Doctrine*, *Neutral Expositor* model), the Solicitor General determines whether the statute or policy once implemented can be reasonably defended before the bar of justice (*Court Centered* model), and the White House Counsel or the DOJ Office of Legal Policy determines if a proposed policy is in line with the political goals and objectives of the President (*Independent Authority*, *Private Lawyer* models).<sup>191</sup> Institutionally, the first two

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<sup>187</sup> Paul D. Clement, *The Intra-Executive Separation of Powers: Keynote Address*, 2009 *Randolph W. Throver Symposium*, 59 *EMORY L.J.* 311 (2009).

<sup>188</sup> *Id.* at 315–18.

<sup>189</sup> *Id.* at 318–23.

<sup>190</sup> *Id.* at 323–24.

<sup>191</sup> See Darby Morrisroe, Co-Counsel to the President: Assessing the Bush White House Legal Policymaking Process (Sept. 6, 2009) (APSA 2009 Toronto Meeting Paper), available at <http://ssrn.com/abstract=1450694>.

agencies involve legal decision-making, and the last two agencies involve legal policymaking. Put another way, the first two (the OLC and the Solicitor General) are more concerned with the rule of law and what the law requires while the last two (the White House General Counsel and the DOJ Office of Legal Policy) are concerned with political achievement within the law. There are various strategies from which an agency empowered to interpret statutory or constitutional law can approach its role; in general, the two main approaches are quasi-judicial and policy-oriented. The former approach functions like a court, with the primary focus on the meaning of the law rather than achieving a specific policy consequence of the interpretation. The focus is on establishing and ruling on what the law provides. The latter approach focuses on the achievement of a specific policy or political objective. Neither approach is wrong *per se*. The issue is which approach is correct based on the purpose of the agency.

Where the Bush Administration OLC went wrong is that it produced opinions, the *August 2002 Memo* and *CIA Interrogation Memo* specifically, that abandoned the former role of quasi-judicial or objective legal determination for the latter role of achieving political objectives.<sup>192</sup> The OLC (specifically John Yoo), in an effort to be seen as relevant and helpful to the political objectives of the Administration, abandoned its specific agency role of being the objective legal advisor to the Administration.<sup>193</sup> The rule of law, which is above politics and policymaking, protects the system of government; the law governs the actions of politics. The OLC is not a policy agency to be used as a political ideological weapon or shield for the White House. Its role is quasi-judicial and it stands as the agency whose purpose is to apply and defend the law within the Executive Branch. The failure to adhere to this role explains, in part, the torture memos.

The distinction in the role and purpose of the OLC compared to other legal executive branch agencies is not trivial. General Clement provided five reasons why the distinction between the role of the OLC and the Office of Solicitor General, and the political

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<sup>192</sup> See YOO, *supra* note 98; GOLDSMITH, *supra* note 100; Goldsmith, *supra* note 104 and accompanying text.

<sup>193</sup> YOO, *supra* note 98; GOLDSMITH, *supra* note 100; Goldsmith, *supra* note 104.

policymaking role of the White House and other agencies and offices within and outside of the Department of Justice are important. These include: (1) efficient division of required skills and abilities to address overall operation within the Executive Branch, (2) the promotion of good inter-agency relationships, (3) the establishment of a framework for decision-making, (4) establishing a proper relationship with the White House, and (5) accountability for decisions when they are made. It is the last two that are important for determining how the OLC produced the famed torture memos (from an agency perspective) and how the distinction between legal decision making and legal policy making were blurred within the Bush Administration.<sup>194</sup> The White House and the White House Office of General Counsel, by definition, operate within the area of politics, policy and power. The Attorney General, appointed by the President, is tasked with directing the Justice Department in line with the political views of the President. To insulate the interpretation of the law from political determinations, the OLC and the Solicitor General are not invited into policymaking decisions within the White House. The proper interaction between the White House Counsel, the OLC, and the Solicitor General should be when the White House needs a determination on what the law requires and if a proposed policy or statute can be defended before the bar of justice, not whether a policy should be implemented, supported, or opposed to achieve a specific political objective. The OLC, after 9/11, confused this distinction and division of labor. The OLC became the agency within the Bush Administration to justify policy rather than determine what the law required using its best, policy-outcome-neutral, judgment.<sup>195</sup>

As General Clement correctly explained, there is accountability when the political branches of the White House determine and implement a policy because the consequences can clearly be applied to those who made those determinations. There is

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<sup>194</sup> The literature on how the Bush Administration organized legal policymaking is critical of both the failure of the OLC to remain policy-neutral and the overshadowing of the White House Counsel, the Justice Department, and other legal policy offices by the Office of Legal Counsel to the Vice President. *See, e.g.*, Morrisroe, *supra* note 191; James P. Pfiffner, *The Contemporary Presidency: Decision Making in the Bush White House*, 39 PRESIDENTIAL STUD. Q. 363 (2009).

<sup>195</sup> GOLDSMITH, *supra* note 100, at 96–97 and accompanying text.

also clear accountability when those agencies responsible for holding the line in defining and protecting the rule of law within the Executive Branch focus exclusively on the rule of law and what the law rules. The lines of accountability and judgment become blurred when the agency responsible for politics confuses what is politically desirable with what is legally required under the rule of law and, even worse, when the agency responsible for protecting the rule of law confuses legal analysis with achieving policy objectives.

## V. CONCLUSION

In discussing the purpose and history of the Office of the Attorney General,<sup>196</sup> and later the Department of Justice and the OLC,<sup>197</sup> General Bell concluded that all three serve the public interest by focusing on the observation that “[a]lthough our client is the government, in the end we serve a more important constituency: the American people.”<sup>198</sup> As one observer of the history of the Attorney General commented, although

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<sup>196</sup> In drawing an analogy between the office of the U.S. Attorney General and the English Attorney General, Professor John Edwards observed the importance of the duty of the Attorney General to protect the public interest.

A point that was made earlier—one that would be familiar to an English Attorney General—is that there is a residual responsibility for the public interest. It is not, I think, without significance that historically, certainly for the past few centuries, the Attorney General of England has always been described as the guardian of the public interest. He is both a member of the Administration and more . . . He is required to rise above the partisan obligations of being a member of the prevailing Administration . . . He has to have regard to the wider community. It is a difficult tightrope he has to walk between these several obligations. And it is only to the extent that he keeps them distinct, where there appears to be a conflict . . .

DANIEL J. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 119–20 (1980). Former U.S. Attorney General Griffin Bell responded to this statement saying, “I was going to follow up on what John Edwards said. I think our concept of the Attorney General is, or it should be, just what he describes as being the case in England.” *Id.* at 121.

<sup>197</sup> Garrison, *supra* note 2.

<sup>198</sup> Bell, *supra* note 22, at 1069.

[a]ny cabinet officer is bound to act lawfully and not disobey the law . . . no other cabinet officer is the “custodian of the law” within the executive branch the way the Attorney General is . . . . That is, the office is created to provide within the executive branch a quasi-judicial person—a member of the bar—who keeps the executive branch under law, and to whom the President and other executive officials can look for a uniform, authoritative pronouncement of the law, at least short of the courts.<sup>199</sup>

The institutional purpose of the OLC is to provide the President, the White House General Counsel, the Attorney General, and the various agencies within the Executive Branch legal opinions on what the law is and if a proposed policy is in violation of the law.<sup>200</sup> The OLC, as an agency within the Justice Department, has the exclusive authority to determine the meaning of the law and its determinations are determinative and authoritative on all Executive Branch agencies with one exception—the Office of Solicitor General.<sup>201</sup> The power of the OLC to interpret the law and its meaning regarding Executive Branch policymaking is significant (again, as an institutional matter) because “an agency’s approach to statutory interpretation is in part a function of the policymaking form through which it acts.”<sup>202</sup> In other words, how the OLC perceived its

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<sup>199</sup> MEADOR, *supra* note 196, at 118.

<sup>200</sup> *Secret Law*, *supra* note 186, at 111.

<sup>201</sup> Nancy Kassop, *The View from the President*, in MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 72 (Mark C. Miller & Jeb Barnes eds., 2004); Mary Anne Borrelli, Karen Hult & Nancy Kassop, *The White House Counsel’s Office*, 31 PRESIDENTIAL STUD. Q. 561, 570 (2001); CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* (1992); Nelson Lund, *Guardians of the Presidency: The Office of the Counsel to the President and the Office of Legal Counsel*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY 209 (Cornell W. Clayton ed., 1995); Michael Strine, *Counsels to the President: The Rise of Organizational Competition*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY 257 (Cornell W. Clayton ed., 1995).

<sup>202</sup> Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225, 226 (2009).

function within the policymaking process during the first two years after the events of 9/11 governed how it produced its memos. Although it is a truism that the Attorney General and the Assistant Attorney General for the OLC are political appointees and as such should reflect the political and legal philosophy of the President who appoints them, both have a higher obligation to interpret the law without regard for the political objectives of the President. To be sure, there are other branches within the Executive Branch that support and implement purely political objectives of the President. *The point is that the OLC is not one of them.* The OLC, exercising the power of the Attorney General, is tasked with providing the best, nonpolitical view of the law to the President. In doing so, the OLC assists the President in making sure that the laws are faithfully executed. It is this purpose, history, and tradition that supports, justifies, and legitimates the quasi-judicial power that rests in the hands of the OLC, which originate in the Article II power of the President.