

The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11

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INTRODUCTION

What are the professional responsibilities of lawyers who provide legal advice to the executive branch, particularly in times of crisis? Who, exactly, is their client? Do professional responsibility standards shed any light on the circumstances that faced executive branch lawyers in the months following 9/11? What can we learn from the experience of those lawyers about competing principles of professional responsibility?

In the wake of 9/11, executive branch officials must have felt, even more acutely than the rest of the nation, an extreme sense of crisis and an urgent imperative to address decisively the unprecedented threat to national security posed by the attacks. If there was ever a time to think outside of the box, surely this was it. Business as usual would not surmount this challenge. Lawyers within the executive branch stood alongside elected officials and policymakers at the epicenter of this shocking and historic moment.

The Bush administration quickly concluded that our criminal justice system was not adequately equipped to deal with the new threat of ideologically motivated global terrorism. Constitutional restraints on the detention and interrogation of terrorism suspects – including the right to counsel and due process itself – would unduly shackle the effort to detain and interrogate possible terrorists. The imminent threat of further attacks required an emphasis on intelligence-gathering and prevention rather than on prosecution and punishment.

With these considerations in mind, the Administration decided to shift anti-terrorism efforts from a criminal justice model to a war model. Less than a week after 9/11, Congress provided some foundation for this shift, adopting a joint resolution that authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons,

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in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”¹

Coming to terms with this shift was merely the beginning of the legal challenges facing executive branch lawyers. While some have observed that, at least historically, “[i]n time of war, the laws are silent,”² the Geneva Conventions, other treaties, and customary international humanitarian law constrain the detention and interrogation of enemy soldiers and civilians just as domestic law constrains the detention and interrogation of criminal suspects. The perceived challenge was to navigate between the Scylla and Charybdis of criminal justice standards, on the one hand, and international law, on the other, to craft a legal doctrine that would allow for aggressive detention and interrogation of terrorism suspects and thus enable the “war” on terrorism.

The legal solution to this challenge was the “unlawful enemy combatant” doctrine. In the months following 9/11, executive branch lawyers in the Office of Legal Counsel (“OLC”) authored a series of legal opinion memos (“the Opinion Memos”) that articulated the foundation for this doctrine.³ In the form of responses to questions posed by White House Counsel Alberto Gonzales and Department of Defense General Counsel William Haynes, the Opinion Memos laid out a radical view of the President’s war powers as they relate to the detention and interrogation of terrorism suspects. Terrorism

1. Authorization for Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224 (2001).

2. See David G. Savage, *Historically, Laws Bend in Time of War, Rehnquist Says; Courts: Chief Justice Contends Judges Are Inclined To Back the Government in Crises. Lincoln’s Suspension of Habeas Corpus Is Cited*, L.A. TIMES, June 15, 2002, at A22, citing WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998).

3. See Memorandum for Alberto R. Gonzales, White House Counsel, and William J. Haynes II, General Counsel, Dept. of Defense, from Jay S. Bybee, Assistant Attorney General, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Jan. 22, 2002 [hereinafter “January 22 OLC Memo”], available at www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf; Memorandum for Alberto R. Gonzales, White House Counsel, from Jay S. Bybee, Assistant Attorney General, *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, Feb. 7, 2002 [hereinafter “February 7 OLC Memo”], available at <http://news.findlaw.com/wp/docs/torture/bybee20702mem.html>; Memorandum for William J. Haynes II, General Counsel, Dept. of Defense, from Jay S. Bybee, Assistant Attorney General, *Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan*, Feb. 26, 2002 [hereinafter “February 26 OLC Memo”], available at www.washingtonpost.com/wp-srv/nation/documents/022602bybee.pdf; Memorandum for Alberto R. Gonzales, White House Counsel, from Jay S. Bybee, Assistant Attorney General, *Standards of Conduct for Interrogation Under 18 U.S.C. §§2340-2340A*, Aug. 1, 2002 [hereinafter “August 2002 OLC Torture Memo”], available at <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf>. Many of the documents and reports cited herein are compiled in MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004).

suspects could be treated as unlawful enemy combatants in the war on terror with no rights under either domestic criminal law or the international law of war. Under this new doctrine, the President would have unreviewable discretion to detain these suspects indefinitely without charges pursuant to his Commander-in-Chief powers. In stark contrast to the position articulated by the United States to the international community prior to 9/11, the Opinion Memos sanctioned the use of cruel, inhuman, and degrading treatment (“CIDT”), and even torture, if determined to be necessary by the President as Commander in Chief. In effect, the Opinion Memos advised the President that he was unconstrained by either domestic or international law in the detention and interrogation of terrorism suspects.

This novel legal theory was created for the most part in secret, without notice to, or comment from, the public or other branches of government and with only minimal vetting within the executive branch itself. The Opinion Memos, which were drafted in 2002 and dealt with pressing issues of detention and interrogation, were not released to the public until June 2004.⁴

In the Opinion Memos, OLC lawyers advised the President and executive branch officials that, among other things:

1. Article II of the Constitution grants the President unilateral power to suspend treaty obligations, including compliance with the Geneva Conventions.⁵
2. Even if treaty obligations are not suspended, certain deviations from the requirements of treaty obligations, including the Geneva Conventions, are permissible as a matter of domestic law and can be justified as part of a nation’s inherent right to self-defense.⁶
3. Customary international law does not constrain the President or the actions of the U.S. military because it is not federal law.⁷
4. For an action to constitute torture within the meaning of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) (ratified by the U.S. in 1994), it must result in: (1) intense physical pain or suffering equivalent in intensity to “the pain that would be associated with

4. See *Bush Administration Documents on Interrogation*, available at <http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html>.

5. January 22 OLC Memo, *supra* note 3, at 2, 10-15.

6. *Id.* at 28-29.

7. *Id.* at 32-37.

serious physical injury so severe that death, organ failure, or permanent damage resulting in loss of significant body function will likely result”; or (2) mental pain or suffering that results in psychological harm that lasts for months or even years.⁸

5. Cruel, inhuman, or degrading treatment that does not rise to the level of torture is implicitly permissible since it is not specifically criminalized by U.S. legislation implementing CAT.⁹
6. To avoid unconstitutional infringement on the President’s Commander-in-Chief powers, U.S. law prohibiting torture should be construed as not applying to interrogations of terrorism suspects pursuant to those powers.¹⁰
7. Criminal law defenses of necessity and self-defense could justify torture of terrorism suspects that would otherwise violate U.S. law prohibiting torture.¹¹

Some aspects of the unlawful enemy combatant doctrine have been struck down by U.S. courts. In *Hamdi v. Rumsfeld*, the Supreme Court held that, although detention of enemy combatants captured on the battlefield is “a fundamental incident of waging war,” U.S. citizens held as enemy combatants are entitled to judicial review of their confinement, and Congress has not authorized “indefinite detention for the purpose of interrogation.”¹² In *Rasul v. Bush*, the Court held that federal district courts have jurisdiction to hear challenges to the legality of the detention of foreign nationals captured abroad and held at Guantánamo.¹³ A number of Guantánamo detainees have since filed habeas petitions, and whether detainees have standing to raise claims based on alleged violations of the Geneva conventions is now pending before the Court.¹⁴

8. August 2002 OLC Torture Memo, *supra* note 3, at 5-13, 46.

9. *Id.* at 2, 15, 46.

10. *Id.* at 34, 46.

11. *Id.* at 39-46.

12. 542 U.S. 507, 519, 521 (2004).

13. 542 U.S. 466 (2004).

14. See *Hamdan v. Rumsfeld*, 126 S. Ct. 622 (2005) (No. 05-184), *granting cert. in* 415 F.3d 33 (D.C. Cir. 2005) (holding that enemy combatants have no right to enforce provisions of Geneva Convention III in the U.S. courts and that, even if Geneva Convention III could be enforced in court, trial of an enemy combatant by a military commission would not violate his rights under that Convention); see also *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005) (concluding that “no viable legal theory exists by which [the court] could issue a writ of habeas

Other aspects of the unlawful enemy combatant doctrine have been disavowed by the Administration since they became public. The August 2002 OLC Torture Memo, which analyzed the proper definition of torture and concluded that prohibitions on torture did not apply to conduct pursuant to the President's Commander-in-Chief powers, was withdrawn by the OLC shortly after it became public in the summer of 2004; it was replaced six months later by a more circumscribed analysis.¹⁵

Nonetheless, the unlawful enemy combatant doctrine as articulated in the Opinion Memos has largely guided our policy toward the detention and interrogation of terrorism suspects over the years since 9/11. It is not clear that this policy has changed significantly in practice, especially regarding suspects

corpus" for "non-resident aliens captured abroad and detained outside the territorial sovereignty of the United States, pursuant to lawful military orders, during a Congressionally authorized conflict"). *But see* *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 474-478 (D.D.C. 2005) (holding that Taliban detainees had valid claims that Geneva III gave them a right to have their prisoner of war status determined by a competent Article 5 tribunal, and that the government's definition of "enemy combatant" is vague and overly broad).

15. The August 2002 OLC Torture Memo interpreted "torture" narrowly and concluded, among other things, that: (1) to avoid unconstitutional infringement on the President's Commander-in-Chief powers, U.S. law prohibiting torture should be construed as not applying to interrogations pursuant to those powers; and (2) criminal law defenses of necessity and self-defense could justify treatment of terrorism suspects that would otherwise violate U.S. law prohibiting torture. August 2002 OLC Torture Memo, *supra* note 3, at 34, 39. That memo became public in June 2004. Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002*, WASH. POST, June 8, 2004, at A1; *see* Neil A. Lewis, *Ashcroft Says the White House Never Authorized Tactics Breaking Laws on Torture*, N.Y. TIMES, June 9, 2004, at A1 (crediting *The Washington Post* with having disclosed the August 2002 OLC Torture Memo on June 8, 2004). The OLC announced in June 2004 that it was withdrawing the August 2002 OLC Torture Memo. *See* Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed; Justice Document Had Said Torture May Be Defensible*, WASH. POST, June 23, 2004, at A1. On December 30, 2004, the OLC publicly released a new opinion memo, which superseded the August 2002 OLC Torture Memo "in its entirety." Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, *Legal Standards Applicable Under 18 U.S.C. §§2340-2340A*, Dec. 30, 2004 [hereinafter "December 2004 Revised OLC Torture Memo"], at 2 *available at* <http://www.usdoj.gov/olc/dagmemo.pdf>. The new memo limited its analysis to statutory interpretation of the U.S. criminal prohibition against torture and characterized the prior memo's consideration of the President's Commander-in-Chief powers and potential defenses to liability as "unnecessary." *Id.* It rejected key elements of the August 2002 OLC Torture Memo's interpretation of the prohibition on "torture," including its narrow definition of "severe pain." *Id.* at 10-13.

held in undisclosed locations without access by the International Red Cross or other monitors.¹⁶

While it is difficult to trace causal relationships between the legal advice rendered by executive branch lawyers and resulting government conduct, certain post-9/11 conduct is consistent with the new unlawful enemy combatant doctrine and the conclusions in the Opinion Memos.¹⁷ That conduct has included:

1. Indefinite military detention without charge or judicial review of hundreds of non-U.S. citizens at Guantánamo and other U.S. military installations, which have functioned as interrogation camps.¹⁸

16. See, e.g., AMNESTY INTERNATIONAL, GUANTÁNAMO AND BEYOND: THE CONTINUING PURSUIT OF UNCHECKED EXECUTIVE POWER (2005) (estimating that 100 to 150 detainees were secretly transferred to third countries and are being held in undisclosed prison camps); Jane Mayer, *Outsourcing Torture; The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005 ("The CIA itself is holding dozens of 'high value' terrorist suspects outside of the territorial jurisdiction of the U.S. . . ."); Don Van Natta Jr. & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. TIMES, Jan. 9, 2005, at A1 (reporting a German citizen's allegations that he was detained while crossing the Serbia-Macedonia border, interrogated, and subsequently flown to Afghanistan, where he was held and abused by Americans for five months); Carol D. Leonnig, *Further Detainee Abuse Alleged; Guantanamo Prison Cited in FBI Memos*, WASH. POST, Dec. 26, 2004, at A1 (reporting new abuse allegations from at least ten current and former Guantánamo detainees, with some confirmation of conditions from FBI agent reports); Neil A. Lewis, *Iraq Prisoner Abuse Reported After Abu Ghraib Scandal*, N.Y. TIMES, Dec. 8, 2004, at A12 (reporting Defense Department intelligence officials' observation of abuse at Guantánamo in June 2004).

17. Having received the January 22 and February 7 OLC Opinion Memos, the President sent a memorandum to top officials asserting that "the war against terrorism ushers in a new paradigm" that "requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva." Memorandum for the Vice President, et al., from President George W. Bush, *Humane Treatment of al Qaeda and Taliban Detainees*, Feb. 7, 2002, at 1, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>. Relying explicitly on the January 22 OLC Memo, the President determined, among other things, that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world" and that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva." *Id.* at 1, 2. The President's memo reaffirmed a directive "that the detainees be treated humanely and . . . in a manner consistent with the principles of Geneva," but with a significant qualification that implied license: Geneva principles should be followed "to the extent appropriate and consistent with military necessity." *Id.* at 2.

18. FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DEPARTMENT OF DEFENSE DETENTION OPERATIONS, Aug. 2004 [hereinafter "Schlesinger Report"], at 11, available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>; *Ending Secret*

2. Indefinite military detention without charge and extended interrogations of at least two U.S. citizens: Yaser Hamdi and José Padilla.¹⁹
3. Detention by the U.S. military or CIA of numerous terrorism suspects at undisclosed locations without access to the International Red Cross or any monitoring group.²⁰
4. Regular use of interrogation techniques that constitute CIDT (if not torture) at Guantánamo and elsewhere, apparently with numerous resulting deaths and suicide attempts.²¹
5. Rendition of numerous terrorism suspects for detention and interrogation to countries known to engage in torture.²²
6. Migration of cruel, inhuman, and degrading treatment from Guantánamo to Abu Ghraib in Iraq.²³

Detentions, HUMAN RIGHTS FIRST, June 2004, updated in *Behind the Wire*, HUMAN RIGHTS FIRST, March 2005; *Enduring Freedom: Abuses by U.S. Forces in Afghanistan*, HUMAN RIGHTS WATCH, Mar. 2004.

19. See Hamdi, *supra* note 12; *Rumsfeld v. Padilla*, 542 U.S. 426, 432 (2004).

20. AMNESTY INTERNATIONAL, *supra* note 16; Schlesinger Report, *supra* note 18; *Ending Secret Detentions*, *supra* note 18; *Enduring Freedom: Abuses by U.S. Forces in Afghanistan*, *supra* note 18; David Jehl, Douglas Johnston & Neil A. Lewis, *CIA Is Seen as Seeking New Role on Detainees*, N.Y. TIMES, Feb. 16, 2005, at A1 (under Administration directives, CIA is holding an estimated three dozen detainees as unlawful combatants without charges and without access to lawyers or human rights groups).

21. HUMAN RIGHTS WATCH, *GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES*, Apr. 23, 2005 (finding overwhelming evidence that U.S. mistreatment and torture of Muslim prisoners took place not merely at Abu Ghraib but at facilities throughout Afghanistan and Iraq as well as Guantánamo and at secret locations around the world, in violation of the Geneva Convention and the laws against torture); Schlesinger Report, *supra* note 18; *Ending Secret Detentions*, *supra* note 18; *Enduring Freedom: Abuses by U.S. Forces in Afghanistan*, *supra* note 18.

22. Mayer, *Outsourcing Torture*, *supra* note 16; *The United States' "Disappeared": The CIA's Long-Term "Ghost Detainees"*, HUMAN RIGHTS WATCH, Oct. 2004; *Ending Secret Detentions*, *supra* note 18; Dana Priest & Joe Stevens, *Secret World of U.S. Interrogation; Long History of Tactics in Overseas Prisons Is Coming to Light*, WASH. POST, May 11, 2004, at A1.

23. The Schlesinger Report found that: "Interrogators and lists of techniques circulated from Guantanamo and Afghanistan to Iraq. . . . [T]he augmented techniques for Guantanamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded. . . . Interrogation techniques intended only for Guantanamo came to be used in Afghanistan and Iraq. Techniques employed at Guantanamo included the use of stress positions, isolation for up to 30 days and removal of clothing. In Afghanistan techniques included removal of clothing,

The Schlesinger Report counted, as of mid-August 2004, 300 allegations of abuse, with 155 investigations completed, 66 substantiated cases, and 5 detainee deaths.²⁴ Given the numerous cases of abuse (including claims by recently released Guantánamo detainees) that have been reported since August 2004,²⁵ and the Schlesinger Report's acknowledgment that it had no information regarding CIA interrogations of detainees kept at undisclosed locations,²⁶ these figures likely represent only the tip of the iceberg.

Many domestic and international commentators have condemned this conduct and the legal doctrine that enabled it as a repudiation of the rule of law.²⁷ A statement issued on August 4, 2004, entitled "Lawyers' Statement on

isolating people for long periods of time, use of stress positions, exploiting fear of dogs, and sleep and light deprivation." Schlesinger Report, *supra* note 18, at 9, 14, 68. Press reports have documented the use of similar techniques. See Marc Kaufman, *Army Probing Deaths of 2 Afghan Prisoners*, WASH. POST, Mar. 5, 2003, at A13 (reporting an investigation into deaths recorded as homicides resulting from blunt force injuries of two Afghan men in U.S. custody at Bagram Air Force Base in Afghanistan in December 2002); Jess Bravin & Gary Fields, *How Do U.S. Interrogators Make a Captured Terrorist Talk?*, WALL ST. J., Mar. 4, 2003, at B1 (reporting admissions by U.S. officials of rough treatment of detainees, including "a little bit of smacky-face"); Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1 (reporting that detainees are "sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles, according to intelligence specialists familiar with CIA interrogation methods. At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights – subject to what are known as 'stress and duress' techniques.").

24. Schlesinger Report, *supra* note 19, at 5, 12-13. According to a press report, the Army prematurely closed a number of abuse cases. R. Jeffrey Smith & Josh White, *Army Closed Many Abuse Cases Early; Few Detainee-Treatment Inquiries Led to Penalties, Documents Show*, WASH. POST, Jan. 25, 2005, at A1 ("Army personnel have admitted to beating or threatening to kill Iraqi detainees and stealing money from Iraqi civilians but have not been charged with criminal conduct, according to newly released Army documents.").

25. See Desmond Butler, *Ex-Guantánamo Inmates Say U.S. Brutalized Them*, SACRAMENTO BEE, Aug. 5, 2004, at A16; Lizette Alvarez, *Briton Held at Cuba Base Cites Torture*, N.Y. TIMES, Oct. 2, 2004, at A16.

26. Schlesinger Report, *supra* note 18, at 6, 70, 87.

27. See Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14 ("Legal scholars asked to assess the recently released Justice Department memorandums concerning torture all but unanimously agreed that the quality of work in them is poor."); Neil A. Lewis, *Justice Memos Explained How to Skip Prisoner Rights*, N.Y. TIMES, May 21, 2004, at A10 (the OLC memos "were crucial in building a legal framework for United States officials to avoid complying with international laws and treaties on handling prisoners, lawyers and former officials say."); Robert K. Goldman, *Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture*, 12 HUM. RTS. BR. 1, 3-4 (2004) ("Apart from ignoring Supreme Court decisions rejecting such exorbitant claims of executive powers, the Office of Legal Counsel's arguments reflect either an appalling

Bush Administration's Torture Memos" ["Lawyers' Statement"], signed by 106 lawyers, including 12 former judges and 5 former members of Congress, charged that "the Administration's memoranda . . . ignore and misinterpret the U.S. Constitution and laws, international treaties and rules of international law" and that "[t]he lawyers who prepared and approved these memoranda have failed to meet their professional obligations" and "their high obligation to defend the Constitution."²⁸ The Lawyers' Statement characterized the Justice Department memoranda as "hav[ing] counseled individuals to ignore the law and offered arguments to minimize their exposure to sanction or liability for doing so."²⁹ According to a press report, the Justice Department opened an inquiry into whether the lawyers who authored the Opinion Memos "breached their ethical obligations by seeming to condone torture."³⁰ Other commentators have defended the executive branch lawyers, arguing that they provided appropriate legal analysis as a foundation for policy decisions and confronted unpleasant but vital questions (for example, what is torture?) in the formulation of an effective anti-terrorism policy.³¹

The Lawyers' Statement contends that the "ultimate client" for such lawyers is "the American people."³² But is that formulation helpful or even meaningful in defining their professional duties or guiding their conduct? If the executive branch lawyers who advised the executive branch post-9/11 and produced the Opinion Memos failed to fulfill their professional responsibilities, what factors led to that failure? What principles should guide similarly situated lawyers in the future?

ignorance of, or sheer contempt for, international law It would be difficult to construct legal arguments that could be more exquisitely antithetical to and utterly destructive of the underlying object and purpose of the Torture Convention than those contained in the Office of Legal Counsel's opinion."). The Schlesinger Report concluded, "The damage these incidents [of abuse] have done to U.S. policy, to the image of the U.S. among populations whose support we need in the Global War on Terror and to the morale of our armed forces, must not be repeated." Schlesinger Report, *supra* note 18, at 18-19.

28. *Lawyers' Statement on Bush Administration's Torture Memos* (n.d.) (addressed to President George W. Bush, Vice President Richard B. Cheney, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, and Members of Congress), available at <http://www.afj.org/spotlight/0804statement.pdf>.

29. *Id.*

30. Michael Isikoff & Daniel Klaidman, *Gonzales's View on the Question of Torture*, NEWSWEEK, Nov. 22, 2004, at 9.

31. See Jeffrey K. Shapiro & Lee A. Casey, *Let Lawyers Be Lawyers; Two Former Justice Lawyers Defend the Attorneys Who Counseled the Administration on Detainee Interrogation Conventions*, AM. LAW., Sept. 1, 2004, at 9.

32. Lawyers' Statement, *supra* note 28.

This article reviews the relevant existing professional responsibility standards and commentary as they apply to government lawyers generally, and OLC lawyers in particular, and considers the Opinion Memos and the circumstances of their creation in that light. It concludes that, considering the OLC's unique mission to exercise the Attorney General's statutory opinion power and provide authoritative interpretation of the law on behalf of the executive branch, the authors of the Opinion Memos had duties of professional responsibility to the executive branch as a whole and to the rule of law itself. It finds that, contrary to the obligations of all lawyers who advise clients regarding the limits of legal conduct, the authors of the Opinion Memos engaged primarily in advocacy rather than advice, failing to identify opposing points of view, relevant authority, and prior statements of the executive branch relevant to the issues presented. This failure to provide an objective view of the law takes on additional significance in light of the OLC's unique responsibilities. The article identifies a variety of factors – the post- 9/11 crisis atmosphere, pressure from policymakers to be freed from the constraints of the criminal justice system and international law, the need to justify conduct already taking place, extreme views of executive power held by key players within the Justice Department, lack of transparency and intra-branch consultation, and an institutional climate that stifled dissent – that synergistically produced a “perfect storm” of legal bias that inappropriately skewed the advice provided to the executive branch, and thereby ultimately disserved the executive branch, the nation, and the rule of law.

I. EXISTING GUIDANCE FOR THE GOVERNMENT LAWYER

A. *General Standards*³³

The legal profession's standards of conduct offer surprisingly little guidance specifically for lawyers who advise the government on legal issues. What guidance there is tends to treat the government as a special variety of organizational client, with differing views as to how or under what circumstances the government differs from a private, organizational client. The relevant rules and commentary also vary in their answers to the foundational question: who is the “entity” client to which the government

33. This section discusses the general principles of professional responsibility found in the model standards adopted by the American Bar Association and the Federal Bar Association, as well as those found in the ALI Restatement of the Law Governing Lawyers. The specific legal standards applicable to the lawyers who wrote the OLC Opinion Memos can be found in the state bar rules adopted by the states where those lawyers are licensed and where they practiced on behalf of the government. *See* 28 U.S.C. §530B (2000) (the McDade Amendment).

lawyer owes her duties? While these authorities would, in most circumstances, focus on the agency or department of the government that employs the lawyer, not the “public interest” or the “American people” in a more general sense, there are differing views about what role the “public interest” should play in guiding the government lawyer’s conduct. The ABA Model Rules of Professional Conduct devote a rule to the “Special Responsibilities of a Prosecutor” (Rule 3.8) and one to “Special Conflicts of Interest for Former and Current Government Officers and Employees” (Rule 1.11), but they mention a lawyer’s duties to a government client only as a comment to Rule 1.13 (“Organization as Client”). That comment advises that the duty defined in Rule 1.13 “applies to government organizations.”³⁴ It warns, however, that “[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.”³⁵

Rule 1.13 provides generally that a lawyer for an organization represents the entity – “the organization acting through its duly authorized constituents” – rather than any constituent of the organization.³⁶ A comment notes that for the government lawyer “in some circumstances the client may be a specific agency, [but] it may also be a branch of government, such as the executive branch, or the government as a whole.”³⁷ With apparent reference to the lawyer’s “reporting up” duties and “reporting out” discretion under Rule 1.13 in the case of wrongful conduct by a constituent acting on behalf of the organization,³⁸ the comment also suggests that whistle-blowing may more often be appropriate for the government lawyer than for her private counterpart, since the public interest is at stake.³⁹

34. MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 9 (2003) [hereinafter ABA MODEL RULES].

35. *Id.*

36. *Id.* R. 1.13(a).

37. *Id.* R. 1.13 cmt. 9.

38. *See id.* R. 1.13(b) (explaining that if the lawyer knows the organization intends to violate the law, resulting in injury, the lawyer must consider how to act, including possibly taking such measures as referring a matter to a higher authority in the organization); *see also id.* 1.13(c) (explaining that if the lawyer’s attempts to report the situation up to the highest authority are ineffective, then the lawyer may reveal information relating to the representation, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization).

39. “[I]n a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question [conduct by government officials] more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.” *Id.* R. 1.13 cmt. 9.

Some provisions of the Model Rules that are not specific to representation of the government apply to a lawyer who advises any client about what the law allows or prohibits. Model Rule 2.1, which pertains specifically to a lawyer's duties as an "Advisor," provides, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."⁴⁰ The official comments to Rule 2.1 emphasize the need for candor and "honest assessment,"⁴¹ even when the advice may be unwelcome to the client, and they stress the need in some circumstances to go beyond "[p]urely technical legal advice" to include "moral and ethical considerations in giving advice."⁴²

Model Rule 1.2(d) addresses the limits of the role that a lawyer may play in advising a client on legal prohibitions. It provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." The comments to Rule 1.2 provide that a lawyer may "[give] an honest opinion about the actual consequences that appear likely to result from a client's conduct,"⁴³ emphasizing the distinction between "presenting an analysis of legal aspects of questionable conduct," which is permissible, and "recommending the means by which a crime or fraud might be committed with impunity," which is not.⁴⁴

40. *Id.* R. 2.1.

41. "A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." *Id.* R. 2.1 cmt. 1.

42. "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." *Id.* R. 2.1 cmt. 2.

43. *Id.* R. 1.2 cmt. 9.

44. *Id.*

The predecessor to the Model Rules, the ABA Model Code of Professional Responsibility, also contains minimal direct guidance to the lawyer for the government. Recognizing that “the lawyer in the federal government faces ethical problems not dealt with by the ethical considerations of the Code of Professional Responsibility,” the Federal Bar Association in 1973 adopted “Federal Ethical Considerations” to supplement the Code’s Ethical Considerations and promulgated a related formal opinion (Opinion 73-1 of the Committee on Professional Ethics of the Federal Bar Association).⁴⁵ These Federal Ethical Considerations provide, among other things, that “[t]he immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency.”⁴⁶ They direct the government lawyer’s duty of zealous representation not to the agency or department itself, however, but to “the public interest entrusted to the department, agency or other governmental agency of his employment.”⁴⁷ As analyzed by one commentator, the Federal Bar Association’s ethical considerations and opinion, at least in the disclosure context, located the government lawyer’s duties of client loyalty as much or more with the lawyer’s view of the public interest as with the agency that employs her.⁴⁸

In 1988, a special committee of the District of Columbia Bar issued a report on government lawyers and their duties under the Model Rules.⁴⁹ It concluded that the agency, not the public interest, should be considered the government lawyer’s client. It reasoned that government officials “must

45. C. Normand Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 FED. GOV’T LAW. 1541 (1974) (citing Opinion 73-1 of the Committee on Professional Ethics of the Federal Bar Association, published in 32 FED. BAR J. 71 (1973)).

46. *Id.* at 1543.

47. *Id.* at 1544.

48. See Robert P. Lawry, *Who Is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. BAR J. 61, 66 (1978) (“Opinion 73-1 does not stand for the proposition that the agency is the client, nor even that the federal government is the client – at least not in any traditional sense. It stands for the proposition that the public (or the public interest) is to be served, and that the government lawyer may disclose improper conduct to the public presumably, for example, if the authorities fail to take appropriate remedial measures. The appropriateness is to be judged by the lawyer as a prudent and responsible professional – though this will be translated by most to mean, ‘the dictates of conscience.’”); see also Keith W. Donahoe, *The Model Rules and the Government Lawyer, A Sword or Shield? A Response to the D.C. Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct*, 2 GEO. J. LEGAL ETHICS 987, 992 (1989) (“While the Federal Bar Committee concluded that the client of the government lawyer should be the employing agency, it clearly recognized that the government attorney had obligations beyond those of the agency.”).

49. *Report by the District of Columbia Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct*, WASH. LAW., Sept./Oct. 1988, at 53.

believe that the lawyer will represent the legitimate interests the governmental client seeks to advance, and not be influenced by some unique and personal vision of the ‘public interest.’”⁵⁰

The ALI Restatement of the Law Governing Lawyers, adopted in 1998, concludes that “[n]o universal definition of the client of a governmental lawyer is possible.”⁵¹ While noting that “the goals of a governmental client necessarily include pursuit of the public interest,”⁵² it advises that “[f]or many purposes, the preferable approach . . . is to regard the respective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the matter involved in the representation.”⁵³

Commentators have split between the “agency loyalty” and “public interest” approaches to government lawyering.⁵⁴ Many agree with the Restatement that there is no universal answer to the question of who is the government lawyer’s client and that the question can only be answered when placed in specific context. As Professor Wolfram has observed, “the question, which seems straightforward, in fact disguises complexities that arise in very different settings, in many of which it should be given different answers.”⁵⁵

In addition to the agency and public interest approaches, there is a third approach, based on the work of William Simon and others, which takes a critical legal studies perspective on the client-lawyer relationship. A recent Harvard Law Review note applies this “critical model” to the role of government lawyers.⁵⁶ From the perspective of the critical model, “the government lawyer’s primary responsibility is to help the agency develop its position in a way that is consistent with democratic values.”⁵⁷ The lawyer should not only determine whether the agency’s proposed objectives comply with established understandings of the law, but “should also consider whether the objectives are consistent with the underlying purposes of the law; whether

50. *Id.* at 54.

51. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §97 cmt. c (2000).

52. *Id.* cmt. b.

53. *Id.* cmt. c.

54. Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1173-1178 (2002). Compare Catherine J. Lancot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991) (arguing that the duty of zealous advocacy applies equally to government lawyers, so long as the adversary system is in place), with Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269 (1999) (arguing that the unique role of the government lawyer requires that the public good be the ultimate concern).

55. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 754 (1986).

56. See Note, *supra* note 54.

57. *Id.* at 1188.

they comport with executive and congressional policy; whether they can be justified in terms of commonly accepted values; and whether they treat the affected parties justly.”⁵⁸ The lawyer’s goal is to “develop the agency’s position with reference to the public interest” and, through a process of communication with other members of the agency and the public, “to help the agency understand and realize [its] objectives.”⁵⁹

B. The Office of Legal Counsel

Whatever model one follows in assessing the professional responsibilities of government lawyers, the specific context of the lawyer’s service is clearly crucial. I focus here on the OLC, which was the primary generator of the legal analysis on which the Administration has based the enemy combatant doctrine that has informed its conduct of the war on terror and its policies toward the detention and interrogation of terrorism suspects.

The OLC is an elite group of approximately 20 Justice Department lawyers that “drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the executive branch, and offices within the Department.”⁶⁰ It is sometimes referred to as the Attorney General’s lawyer.⁶¹ The OLC is headed by an Assistant Attorney General, who is a political appointee confirmed by the Senate.⁶²

The Attorney General has delegated to the OLC most of its authority to render legal opinions. Under statutory language which may be traced back to the Judiciary Act of 1789, the Attorney General is authorized to render opinions on questions of law when requested by the President or the head of an executive branch of the government.⁶³ Under statutory authority,⁶⁴ the

58. *Id.*

59. *Id.*

60. U.S. Dept. of Justice, Office of Legal Counsel, *About OLC* (n.d.), at <http://www.usdoj.gov/olc/>.

61. Douglas W. Kmiec, *OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993).

62. John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 421 (1993).

63. See 28 U.S.C. §511 (2000) (“The Attorney General shall give his advice and opinion on questions of law when required by the President.”); see also 28 U.S.C. §512 (“The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department.”).

64. See 28 U.S.C. §510 (2000) (“The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.”).

Department of Justice has promulgated regulations delegating certain matters to the OLC, including, among other things, “[p]reparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet.”⁶⁵ With this and other duties, the OLC now “renders all but a small portion of the formal legal opinions of the Department of Justice.”⁶⁶ Since 1977, the OLC has published selected opinions.⁶⁷ It also keeps extensive files of unpublished opinions.⁶⁸ Unless overruled by the President or the Attorney General, its opinions are generally treated as binding throughout the executive branch.⁶⁹

Commentators, primarily former OLC lawyers, have taken divergent views on the degree to which the OLC should be “quasi-judicial” in nature, on the one hand, or an advocate for the President’s position, on the other. In a 1993 *Cardozo Law Review* symposium about the OLC, articles by several former OLC lawyers, all of whom are now law professors, explored this and related issues.

Professor Douglas Kmiec, a former OLC Assistant Attorney General, concluded that the OLC, like the Attorney General, must sometimes be an “advocate for the President” and sometimes an “impartial judicial decisionmaker,” depending on the context.⁷⁰ Another former OLC lawyer, Professor Nelson Lund, concluded that the “OLC more truly deserves a reputation as the President’s lawyer than as any sort of quasi-judicial advisor.”⁷¹ Lund emphasized the OLC’s institutional incentive to compete with other legal advisors and maximize its influence on the White House by providing “client-oriented” advice.⁷² This dynamic has been described by another commentator this way: “If the Attorney General’s legal opinions do

65. 28 C.F.R. §0.25(a) (2005).

66. Randolph D. Moss, *Recent Developments Federal Agency Focus: The Department of Justice: Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1308 (2000).

67. *Id.* at 1305 n.8 (the OLC publishes selected opinions for the convenience of all branches of the government, the professional bar, and the general public).

68. McGinnis, *supra* note 62, at 376.

69. Moss, *supra* note 66, at 1305, 1319 (while generally treated as binding and although “the Supreme Court [has] taken the view that the opinions of the Attorney General *should* be followed within the executive branch,” Attorneys General have periodically expressed differing views on the question, and it has not been conclusively settled); *see also* Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 489 n.128 (1993).

70. Kmiec, *supra* note 61, at 374.

71. Lund, *supra* note 69, at 505.

72. *Id.* at 504-505.

not, in the main, support the President's interests and if the President does not see him as a strong supporter, the temptation might arise for the President to resort to other sources of legal advice."⁷³

Another participant in the Cardozo symposium, former OLC lawyer John McGinnis, identified three

plausible models of Attorney General as opinion writer: the "court-centered" model that views the Attorney General as bound by Supreme Court precedent and therefore as essentially circumscribed by the judiciary's view of the law; the "independent authority" model which views the Attorney General as providing an interpretation of the law that articulates the President's jurisprudential principles rather than those of the Court; and the "situational" model which views the Attorney General as interpreting the law in a manner that most advances the President's political or situational interest on a particular issue with little or no sense of obligation to either court-centered or autonomous jurisprudential principles.⁷⁴

He concluded that "OLC's opinion work cannot be described as following any one particular model but rather is an eclectic mix of different models and models used to different degrees depending on the function of the opinion."⁷⁵ While acknowledging the executive's constitutional duty to uphold the law and the resulting "substantial pressures for some kind of legal regularity," McGinnis argued that there is "a wide spectrum of approaches to executive interpretation that are more or less autonomous from judicial interpretation and more or less driven by jurisprudential as opposed to policy considerations."⁷⁶

73. DANIEL J. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 39-40 (1980). To illustrate this point, Meador quotes a letter from Antonin Scalia (former head of the OLC, now Associate Justice of the Supreme Court):

The White House will accept distasteful legal advice from a lawyer who is unquestionably "on the team;" it will reject it, and indeed not even seek it, from an outsider – when more permissive and congenial advice can be obtained closer to home. And it almost always can be, if not from the White House Counsel then from one of the Cabinet members who is a lawyer, or from one of the Washington attorneys who soon become advisors of any administration.

Id. at 40 (quoting a letter from Antonin Scalia to Meador, dated July 20, 1979).

74. McGinnis, *supra* note 62, at 377.

75. *Id.* at 434.

76. *Id.* at 435-436.

While not addressing directly the client-centered versus quasi-judicial debate, observations in the Cardozo symposium by Harold Koh, another former OLC lawyer who is now Dean of Yale Law School, are also worth noting. Dean Koh identified three problems in the OLC process and suggested three corresponding remedies: (1) to avoid the problem of “lock-in” and partiality that results when the OLC is consulted only after government officials have committed themselves to a course of action, the OLC should be consulted whenever possible before, not after, such commitment; (2) to avoid the problem of “opacity,” “the danger that [OLC] will support political action with a legal opinion that cannot be publicly examined or tested,” OLC opinions should be promptly and fully published; and (3) to avoid unjustified “overruling” of its own opinions, the OLC should articulate principles for the overruling of prior precedent.⁷⁷

An article by outgoing OLC Assistant Attorney General Randolph Moss, published just one year before 9/11, made the case for the quasi-judicial or “neutral expositor” model of the OLC’s proper function.⁷⁸ Tracing this model to an 1854 opinion by Attorney General Caleb Cushing,⁷⁹ and emphasizing the executive’s constitutional duty under the Take Care Clause⁸⁰ and the Presidential Oath Clause,⁸¹ Moss argued that the OLC has a plain duty to provide “the *best* view of the law” and “should take the obligation neutrally to interpret the law as seriously as a court.”⁸² Since “[t]he executive branch has no authority to act beyond the authority provided by the Constitution or statutes of the United States,” only the best view of the law can provide legitimate authority to act, and “it is largely irrelevant whether a *reasonable* argument might be made in favor of the legality of [a proposed course of action].”⁸³ In determining the best view of the law (“that which provides the

77. Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 *CARDOZO L. REV.* 513, 515-516 (1993).

78. Moss, *supra* note 66.

79. In advice to President Pierce, Cushing concluded that “his duty to provide advice and opinions on questions of law was ‘quasi-judicial’ in nature, and that ‘whether it be so or not, he feels, in the performance of . . . his duty [to provide advice and opinion], that he is not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and legal obligation.’” *Id.* at 1309.

80. U.S. CONST. art. II, §3 (the President “shall take Care that the Laws be faithfully executed”).

81. U.S. CONST. art. II, §1, cl. 8 (the President “shall take the following Oath or Affirmation: ‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’”).

82. Moss, *supra* note 66, at 1306.

83. *Id.* at 1316.

most coherent explanation of [legal] principles and precedents”), however, the executive branch lawyer should do so “with due respect, not only for judicial precedent, but also for the existing body of executive branch practice and precedent.”⁸⁴

More recently, with the controversy over the Opinion Memos clearly in mind, Moss and 18 other former OLC attorneys, all of whom served at OLC under the Clinton administration, signed and published a document entitled “Principles To Guide the Office of Legal Counsel.”⁸⁵ Consistent with the Moss article, this document emphasizes the delegation to the OLC of the Attorney General’s opinion authority, and the executive branch’s constitutional duty to the rule of law.⁸⁶ Asserting that an advocacy model of the OLC’s duties inadequately meets that constitutional duty, the proposed principles would direct OLC lawyers to (1) either render advice based on the best view of the law or clearly announce that the advice is advocacy; (2) promote transparency through publication of opinions whenever possible; and (3) seek the views of affected agencies and departments.⁸⁷ Shortly after publication of these proposed principles, Douglas Kmiec, who served at the OLC during the Reagan administration, argued that adoption of such principles would be unwise.⁸⁸

C. The Role of Government Lawyers in Formulating the Unlawful Enemy Combatant Doctrine

In the months following 9/11, the OLC responded to requests from the White House and the Department of Defense for interpretation of domestic and international law bearing on the detention and treatment of terrorism suspects. OLC lawyers surely understood not only the urgency and significance of those requests, but also the profound implications of the issues raised for international relations and the rule of law itself.

84. *Id.* at 1321-1324.

85. *Principles To Guide the Office of Legal Counsel*, Dec. 21, 2004, available at <http://www.acslaw.org/node/391>.

86. *Id.* at 1-2.

87. *Id.*

88. Douglas W. Kmiec, *Wise Counsel: Putting Alberto Gonzales’s “Torture Memo” in Perspective*, WALL ST. J., Jan. 5, 2005, at A10 (arguing that public disclosure of legal advice is not a good principle for the OLC to follow, “as longstanding ethical and evidentiary rules protecting lawyer-client work-product and conversations make clear”; and that seeking the views of all affected agencies before rendering final advice “would invite ‘affected agencies’ to lobby for their desired policy over the restraints of existing law,” thus “confus[ing] the OLC’s role as legal interpreter for that of policy maker”).

If those lawyers consulted the professional canons at this historic moment, they found, as demonstrated above, somewhat varied and equivocal guidance. Even approaching their responsibilities in the narrowest possible way, however, as parallel to the duties of a private lawyer asked by an organizational client for guidance regarding the limits of legal conduct, certain guiding principles should have been uncontroversial.

As expressed in Model Rules 1.2 and 2.1, they were obligated: (1) to provide advice, not advocacy – an honest and objective assessment of the actual legal and other consequences likely to result from any proposed courses of conduct, including the risks associated with those courses of conduct; (2) not to confine themselves to technical legal advice, if broader moral and ethical considerations were relevant; and (3) not to counsel any criminal conduct or recommend any means by which a crime might be committed with impunity. Whether or not those lawyers had broader, constitutional duties in light of their high office and oath, as a simple matter of competence and diligence⁸⁹ they were obligated to consider: (1) relevant executive branch as well as judicial precedent, including any history of prior executive branch opinions on related topics; and (2) likely responses to any proposed course of conduct by other government officials or parties that would be of consequence to the client.

The OLC lawyers who authored the Opinion Memos were not, however, merely lawyers for a private organizational client. The Assistant Attorney General in charge of the OLC was himself a high government official, appointed by the President and confirmed by the Senate. He and all of his deputies had taken oaths to uphold the Constitution and laws of the United States.⁹⁰ In preparing opinion memos for the President and other executive branch officials, they were exercising authority, given to the Attorney General by Congress in the Judiciary Act of 1789 and delegated by the Attorney General to the OLC, to determine the legal boundaries of executive power and discretion under the Constitution and laws. They knew that their opinions would likely guide the conduct of the President and bind the rest of the executive branch.

As noted above, commentators with OLC experience have differed regarding if and when the OLC's role should be quasi-judicial rather than client-centered. Unlike many of the opinion requests routinely discharged by the OLC that are subject to immediate judicial testing through the adversary

89. See ABA MODEL RULES, *supra* note 34, R. 1.1.

90. 5 U.S.C. §3331 (2000) (“An individual . . . appointed to an office of honor or profit in the civil service . . . shall take the following oath: ‘I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic.’”).

process – such as, for example, the constitutionality and effect of proposed legislation or the soundness of the government’s proposed litigation posture – OLC lawyers understood that the requests addressed by the post-9/11 Opinion Memos had immediate implications for executive action that would be reviewed, if ever, only after the implementation of executive policies with potentially far-reaching impact on domestic and international affairs. Indeed, the Opinion Memos opined that the President’s determination of some of these matters would never be subject to judicial review.⁹¹

In this context, the quasi-judicial model championed by former OLC chief Randolph Moss a year before the 9/11 attacks⁹² seems particularly appropriate. Guardianship of the rule of law itself lay conspicuously in the OLC’s in-box. Advising the President on whether he could unilaterally suspend or disregard treaty obligations or customary international law would be reckless on anything but the “best view” of the law arrived at after full consideration of relevant executive branch as well as judicial precedent.

As noted above, rules and commentary differ on the degree to which a government lawyer’s duties of client loyalty are informed by her independent assessment of the “public interest” rather than her adherence to the policy views of the officials to whom she reports. Certainly OLC lawyers had no privileged perspective from which to make the difficult policy judgments thrust on the nation by the 9/11 attacks, and no license to disregard the policy judgments made by the President and his appointees. The conclusion of the 1998 D.C. Bar special committee that a government lawyer should “not [be] influenced by some unique and personal vision of the ‘public interest’”⁹³ is no less pertinent in this circumstance than in other government contexts.

Nonetheless, the OLC’s statutory and historical mission to carry out the Attorney General’s opinion function for the executive branch of the government argues for a broad understanding of the client to whom the OLC owed its duties in two regards. First, it suggests that the OLC’s client was best understood to be the executive branch as a whole, not solely White House Counsel or the Department of Defense or whatever executive branch officer may have posed questions to it. OLC lawyers knew that their interpretation of the law would be regarded as binding on the executive branch as whole, and that they were exercising the opinion power bestowed upon the Attorney General by Congress in the Judiciary Act of 1789. With that understanding,

91. See, e.g., January 22 OLC Memo, *supra* note 3, at 15 (advising that the President could suspend Geneva III obligations toward Taliban militia on the basis that Afghanistan is a failed state and that the validity of such a decision would be a political question not subject to judicial review).

92. See *supra* notes 78-84 and accompanying text.

93. See *supra* text accompanying note 50.

the observation of the critical model that the government lawyer best serves the client by engaging in a process of communication within the agency to determine the underlying purposes of the implicated laws and to develop the agency's understanding of the public interest takes on significance.⁹⁴ Particularly given the long and deep involvement of State Department lawyers with the formulation and articulation of international treaty law obligations and the institutional experience and expertise of career Judge Advocate General lawyers in implementing those obligations, one would expect OLC lawyers to initiate communications within the executive branch as part of their process of analysis and to have thoroughly vetted proposed opinions within the executive branch.

Second, the OLC's unique role in carrying out the Attorney General's opinion function gives special meaning to a government lawyer's duty to faithfully serve the Constitution and laws of the nation. In advising the President, who is bound by the Constitution to "take Care that the Laws be faithfully executed,"⁹⁵ and declaring the limits of the President's authority under the Constitution and laws of the United States, OLC lawyers had a special duty to the rule of law. Indeed, as those designated by Congress to interpret in the first instance the commands of the law on the executive branch, their client duties were, in a sense, to the rule of law itself.

In considering the proper approach to the OLC's post-9/11 mission, two of Dean Koh's procedural observations would also have been well worth considering. First, to avoid lock-in, White House counsel and the Department of Defense should ideally have taken care to consult the OLC before committing to any specific course of action regarding the post-9/11 detention and interrogation of terrorism suspects. Second, to avoid opacity, OLC opinions setting forth legal conclusions supporting the administration's unlawful enemy combatant policy should have been: (1) vetted as widely as possible with the executive branch, and (2) made public as promptly and fully as possible to allow for testing through public examination.

II. THE OPINION MEMOS

The Opinion Memos prepared in the months following 9/11 provided a legal rationale for the newly-formulated unlawful enemy combatant doctrine that was, in effect, a repudiation of apparent legal constraints in favor of executive discretion and power. Under this doctrine, terrorism suspects could be held by the Department of Defense indefinitely without charges in the

94. See *supra* text accompanying note 59.

95. U.S. CONST. art. II, §3.

unreviewable discretion of the executive branch as long as the “war” on terror continues, and interrogation of those suspects could make use of cruel, inhuman, and degrading treatment or even torture as determined necessary by the Commander in Chief to conduct the “war” on terror.

It is not the purpose of this article to review comprehensively or to dispute the legal conclusions in the Opinion Memos, but rather to consider them in the light of the professional responsibilities of the executive branch lawyers who created them. Regardless of whether one ultimately agrees with the positions taken in the Opinion Memos, certain of their characteristics seem relatively self-evident and significant in the context of the professional responsibility guidance. The Opinion Memos: (1) engage largely in advocacy rather than advice, let alone quasi-judicial decision-making with regard to the questions they address; (2) fail to describe fairly the opposing points of view, including views held by those with institutional expertise within the executive branch; (3) provide narrow and technical answers to legal questions posed, without identifying other relevant authority or larger, non-legal concerns; and (4) fail to identify and describe prior executive branch statements bearing on the questions presented.

A. Advocacy, Not Advice

While styled as legal opinion memos in response to questions raised by the Department of Defense and/or White House Counsel, the Opinion Memos engage, for the most part, in advocacy rather than quasi-judicial weighing of the issues. They tend to move through a series of alternative arguments, each reaching the same conclusion. Even from a client-centered perspective, they do not give a balanced assessment of the issues presented. In many instances, they do not even purport to give the best view of the law, as opposed to an arguable view.

One example is OLC’s response to the question whether Taliban soldiers captured in the war in Afghanistan were entitled under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (“Geneva III”) to hearings to determine whether they were prisoners of war subject to the protections of that Convention. Article 5 of Geneva III provides that when there is “any doubt” as to whether detainees are “prisoners of war” (as defined by Article 4 of Geneva III), “such persons shall enjoy the protection of the present Convention until such time as their status has been determined

by a competent tribunal.”⁹⁶ This issue is addressed in the January 22 OLC Memo.⁹⁷

While acknowledging that “as a matter of practice prisoners are presumed to have article 4 POW status until a tribunal determines otherwise” and that Article 5 “seem[s] to contemplate a case-by-case determination of an individual detainee’s status,” the January 22 OLC Memo advises that “the President could determine categorically that all Taliban prisoners fall outside article 4.”⁹⁸ In support of that position it argues:

Under Article II of the Constitution, the President possesses the power to interpret treaties on behalf of the Nation. He could interpret Geneva III, in light of the known facts concerning the operation of Taliban forces during the Afghanistan conflict, to find that all of the Taliban forces do not fall within the legal definition of prisoners of war as defined by article 4. A presidential determination of this nature would eliminate any legal “doubt” as to the prisoners’ status, as a matter of domestic law, and would therefore obviate the need for article 5 tribunals.⁹⁹

The memo cites no precedent for such a universal, executive determination of the status of all war detainees as a substitute for a “competent tribunal,” and it does not explain how a factual determination of this kind would constitute treaty interpretation.¹⁰⁰

96. Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

97. January 22 OLC Memo, *supra* note 3, at 30-31. Two weeks earlier, a draft of a similar memo was sent to Haynes by John Yoo and Robert J. Delahunty. Draft Memorandum for William J. Haynes II, General Counsel, Department of Defense, from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Jan. 9, 2002, available at <http://www.gwu.edu/~sarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>; see Michael Isikoff, *Double Standards? A Justice Department Memo Proposes That the United States Hold Others Accountable for International Laws on Detainees – But That Washington Did Not Have To Follow Them Itself*, NEWSWEEK NATIONAL NEWS, May 25, 2004, at <http://msnbc.msn.com/id/5032094/site/newsweek/>.

98. January 22 OLC Memo, *supra* note 3, at 30.

99. *Id.* at 30-31.

100. Somewhat similarly, supported only by a strained analogy to an individual’s legal claim of self-defense to a murder charge, the January 22 OLC Memo advises that the United States can justify modifications of its treaty obligations based on a national right to self-defense and force protection. January 22 OLC Memo, *supra* note 3, at 28-29. No consideration is given to possible opposing analysis, including the obvious problem that such an exception could swallow the rule and render treaty obligations by warring parties meaningless.

A February 7, 2002, follow-up OLC memo to White House counsel Gonzales advised, based on a submission of facts from the Department of Defense and the same legal analysis, that “the President could *reasonably* interpret GPW [Geneva III] in such a manner that none of the Taliban forces fall within the legal definition of POWs as defined by Article 4.”¹⁰¹ As is true of the January 22 OLC Memo, the February 7 OLC Memo gives no consideration to what might be the *best* interpretation of Geneva III on this point. On that same day, the President issued a memorandum relying on the OLC Opinion Memos and determining, among other things, that “the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.”¹⁰² On that basis, interrogation techniques that would clearly violate the Geneva Conventions were authorized for use at Guantánamo.¹⁰³

Another example of advocacy in the Opinion Memos is the interpretation of the term “severe pain” as used to define “torture” in 18 U.S.C. §2340A, which implements the United States obligation under CAT to criminalize any act of “torture.” In an attempt to define “severe pain,” the August 2002 OLC Torture Memo relies on the use of that phrase in statutes defining emergency medical conditions for the purpose of providing health benefits. Those statutes

define an emergency condition as one “manifesting itself by acute symptoms of sufficient severity (including *severe* pain) such that a prudent lay person, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in – placing the health of the individual . . .

101. February 7 OLC Memo, *supra* note 3, at 8 (emphasis added).

102. Schlesinger Report, *supra* note 18, at app. C. On February 7, 2002, Press Secretary Ari Fleischer released a two-page fact sheet announcing this determination. *Fact Sheet: Status of Detainees at Guantánamo*, Feb. 7, 2002, available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (“Under the terms of the Geneva Convention . . . the Taliban detainees do not qualify as POWs. Therefore, neither the Taliban nor al-Qaida detainees are entitled to POW status.”). Nearly three years later, a federal district court for the District of Columbia granted the habeas petition of a Guantánamo detainee on the basis that the government had never provided him a hearing by a competent tribunal as required by article 5 of Geneva III. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 162 (D.D.C. 2004) (President's determination that “detainee al Qaeda members are not prisoners-of-war under the Geneva Conventions” is not conclusive because the “President is not a ‘tribunal’” as required by article 5 of Geneva III; “Until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war.”). That decision was reversed by the D.C. Circuit. *Hamdan v. Rumsfeld*, 415 F.3d 33 (2005), *cert. granted*, 126 S. Ct. 622 (2005) (No. 05-184).

103. Schlesinger Report, *supra* note 18, at 7-8, apps. D, E.

(i) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part.”¹⁰⁴

In what can charitably be described as strained logic, the August 2002 OLC Torture Memo, by analogy to those statutes, concludes “that ‘severe pain,’ as used in [the U.S. criminal law prohibition against torture], must rise to a similarly high level – the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions – in order to constitute torture.”¹⁰⁵

Not surprisingly, this narrow construction of the torture statute, as well as other aspects of the August 2002 OLC Torture Memo, met with widespread criticism when the memo became public in June 2004,¹⁰⁶ and the OLC announced in June 2004 that it was withdrawing it.¹⁰⁷ The OLC’s December 30, 2004 Opinion Memo, signed by Acting Assistant Attorney General Daniel Levin, “supersede[d] the August 2002 Memorandum in its entirety.”¹⁰⁸ The new memo specifically rejected the August 2002 Memo’s narrow definition of “severe pain” and the logic that supported it:

The August 2002 Memorandum also looked to the use of “severe pain” in certain other statutes, and concluded that to satisfy the definition in section 2340, pain “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” We do not agree with those statements. Those other statutes define an “emergency medical condition,” for purposes of providing health benefits They do not define “severe pain” even in that very different context (rather, they use it as an indication of an “emergency medical condition”), and they do not state that death, organ failure, or impairment of bodily function cause “severe pain,” but rather that “severe pain” may indicate a condition that, if untreated, could cause one of those results. We do not believe that they provide a proper guide for interpreting “severe pain” in the very different context of the prohibition against torture in sections 2340-2340A.¹⁰⁹

104. August 2002 OLC Torture Memo, *supra* note 3, at 6 (quoting 42 U.S.C. §1395w-22(d)(3)(B) (2000) (emphasis in original)).

105. *Id.*

106. See *supra* notes 27-30 and accompanying text.

107. See Allen & Schmidt, *supra* note 15.

108. December 2004 Revised OLC Torture Memo, *supra* note 15, at 2.

109. *Id.* at 8 n.17 (citation omitted).

The December 2004 Revised OLC Torture Memo went on to do what the August 2002 OLC Torture Memo did not do, but what one would expect to find in a balanced advice memo to a client, and especially in a quasi-judicial interpretation of statutory law on behalf of the executive branch. It looked to judicial interpretations of the parallel definition of torture in the Torture Victims Protection Act (“TVPA”), which also uses “severe pain” as part of its definition of “torture.”¹¹⁰

B. Failure To Describe Opposing Points of View

1. The Views of Commentators on International Law

The application of the unlawful enemy combatant doctrine to Taliban detainees – that is, the conclusion that the United States could invade a country that is signatory to the Geneva Conventions, intervene in an ongoing civil war in that country (the war between the Taliban and the Northern Alliance), detain combatants in that war, and then determine, without the finding of any tribunal, that those combatants have no rights under international law – is somewhat remarkable on its face. Not surprisingly, not all commentators on international law endorse this interpretation or recognize as legitimate the concept of the “unlawful enemy combatant” as implemented by post-9/11 United States policy.

Indeed, the Geneva Conventions’ prohibitions on abuse of detainees are not limited to those who qualify as prisoners of war. As explained by one standard commentary, all detainees of any kind are subject to the standards established in the Conventions.

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention.¹¹¹

Thus, in the view of at least some, including the International Committee of the Red Cross (“ICRC”), under the Geneva Conventions no detainees are properly classified as “unprivileged belligerents” or “unlawful enemy combatants.” Detainees are either enemy combatants subject to the protections

110. *Id.* at 8-10.

111. OSCAR M. UHLER ET AL., COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (1958).

of the Conventions, who may be held until the cessation of hostilities, or civilian detainees, who must be charged with a crime and tried.¹¹²

This expansive view of the Conventions' coverage was not difficult to anticipate. Indeed, parallel provisions in Geneva III and the Convention Relative to the Protection of Civilian Persons in Time of War ("Geneva IV"), provide that certain acts "shall remain prohibited at any time and in any place whatsoever" with respect to non-combatants, including "members of armed forces who have laid down their arms."¹¹³ The universally prohibited acts include "cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment."¹¹⁴ "Persons protected" under Geneva IV include, with the exception of nationals of a State not bound by the Convention, "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."¹¹⁵ Geneva IV further provides, "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."¹¹⁶

The January 22 OLC Memo, which addresses "the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan,"¹¹⁷ discusses Geneva III but does not consider the effect of Geneva IV. Nor does it acknowledge the views of the ICRC and well-known international commentaries that would preclude the conclusion that any detainees are without rights.

112. Schlesinger Report, *supra* note 18, at 85-88 (noting that the ICRC does not recognize "unprivileged belligerents" as a proper category, and that such a category is not consistent with its interpretation of the Geneva Conventions).

113. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter "Geneva IV"]; *see also* Geneva III, *supra* note 96, art. 3.

114. Geneva IV, *supra* note 113, art. 3; Geneva III, *supra* note 96, art. 3.

115. Geneva IV, *supra* note 113, art. 4.

116. *Id.* art. 31. While an individual "definitely suspected of or engaged in activities hostile to the security of the State . . . shall not be entitled to claim such rights and privileges under [Geneva IV] as would, if exercised in the favour of such individual person, be prejudicial to the security of such State," and "a spy or saboteur" may "where absolute military security so requires, be regarded as having forfeited rights of communication[.] . . . such persons shall nevertheless be treated with humanity" and their full rights and privileges are to be granted "at the earliest date consistent with the security of the State or Occupying Power." *Id.* art. 5.

117. January 22 OLC Memo, *supra* note 3, at 1.

The Schlesinger Report summarizes this point of view:

The ICRC . . . considers the U.S. policy of categorizing some detainees as “unlawful combatants” to be a violation of their interpretation of international humanitarian law. It contends that Geneva Conventions III and IV, which the U.S. has ratified, allow for only two categories of detainees: (1) civilian detainees who must be charged with a crime and tried and (2) enemy combatants who must be released at the cessation of hostilities. In the ICRC’s view, the category of “unlawful combatant” deprives the detainees of certain human rights.¹¹⁸

Even from a narrow, “client-centered” perspective regarding the duties of the OLC lawyers who prepared the January 22 OLC Memo, one would expect this point of view to be anticipated, acknowledged, and addressed.

*2. The Views of State Department and Career Judge Advocate
General Lawyers*

The January 22 OLC Memo, which advocates a rejection of the Geneva Conventions and treatment of all detainees from the Afghanistan war as unlawful enemy combatants, is also silent with regard to the views of State Department and career Judge Advocate General lawyers. Given the institutional expertise of those lawyers in interpreting and applying the Geneva Conventions, one would expect that questions in this area would have been thoroughly vetted with them. Moreover, one would expect that White House Counsel and Department of Defense General Counsel, the recipients of the memo, would want to know the views of those lawyers.

OLC did, in fact, provide drafts of the January 22 OLC Memo to State Department lawyers, if not to Judge Advocate General lawyers. A January 11, 2002, memo from State Department legal adviser William H. Taft IV to John Yoo at OLC, which became public in 2005, commented on a January 9 draft of the January 22 OLC Memo. Taft summarized those comments as “suggest[ing] that both the most important factual assumptions on which your draft is based and its legal analysis are seriously flawed.”¹¹⁹ A January 23, 2002, Memo from Taft to Yoo, which commented on a January 18 draft of the

118. Schlesinger Report, *supra* note 18, at 86-87.

119. Memorandum for John C. Yoo, Deputy Asst. Attorney General, OLC, from William H. Taft IV, Legal Adviser, Dept. of State, *Your Draft Memorandum of January 9*, Jan. 11, 2002, available at http://www.newyorker.com/online/content/?050214on_onlineonly02.

January 22 OLC Memo, asserted that the State Department “continue[d] to have fundamental problems with the proposed analysis.”¹²⁰ The State Department memo took the position, among other things, that even al Qaeda terrorists captured in Afghanistan were “entitled to the fundamental humane treatment standards of common Article 3 of the Geneva Conventions” and that Taliban fighters were “entitled to POW status, at least as a rebuttable presumption,” subject to hearing before an Article 5 tribunal in cases of doubt.¹²¹

The January 22 OLC Memo did not mention these dissenting opinions of the State Department. On January 26, 2002, four days after the January 22 OLC Memo had been delivered in final form, Secretary of State Colin Powell took issue with some of its conclusions in a memorandum to White House Counsel commenting on a draft decision memorandum that had been prepared for the President based on the advice in the OLC Memo.¹²² With regard to the January 22 OLC Memo’s advice that the President was free to conclude that the Geneva Conventions did not apply to the conflict in Afghanistan, Powell wrote:

- It will reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.
- It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy.¹²³

Powell noted that the draft Presidential memorandum, prepared on the basis of the January 22 OLC Memo, was “inaccurate or incomplete in several respects.”¹²⁴ It advised, among other things, that the Presidential memorandum “should . . . note that the OLC opinion is likely to be rejected by foreign

120. Memorandum for John C. Yoo, Deputy Asst. Attorney General, OLC, from William H. Taft IV, Legal Adviser, Dept. of State, *Your Draft Memorandum of January 18*, Jan. 23, 2002, at 1, available at http://www.newyorker.com/online/content/?050214on_onlineonly02.

121. *Id.* at 2.

122. Memorandum for Counsel to the President and Assistant to the President for National Security Affairs, from Colin L. Powell, Secretary of State, *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan*, Jan. 26, 2002, available at <http://msnbc.msn.com/id/4999363/site/newsweek>.

123. *Id.* at 2.

124. *Id.* at 4.

governments and will not be respected in foreign courts or international tribunals which may assert jurisdiction over the subject matter.”¹²⁵

According to the Schlesinger Report, career Judge Advocate General lawyers as well as State Department lawyers opposed abandonment of the Geneva Conventions and adoption of the unlawful enemy combatant doctrine.

Earlier, the Department of State had argued the Geneva Conventions in their traditional application provided a sufficiently robust legal construct under which the Global War on Terror could effectively be waged. The Legal Advisor to the Chairman, Joint Chiefs of Staff, and many of the military service attorneys agreed with this position. . . . They were concerned that to conclude otherwise would be inconsistent with past practice and policy, jeopardize the United States armed forces personnel, and undermine the United States military culture which is based on a strict adherence to the law of war.¹²⁶

The OLC lawyers who prepared the OLC Opinion Memos failed to acknowledge this point of view in the Opinion Memos. Under even a narrow, client-centered view of their professional responsibilities, this was a significant oversight.

C. Failure To Identify Other Relevant Authority

The first two sentences of the January 22 OLC Opinion Memo describe its purpose:

You have asked for our Office’s views concerning the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan. In particular, you have asked whether certain treaties forming part of the laws of armed conflict apply to the conditions of detention and the procedures for trial of members of al Qaeda and the Taliban militia.¹²⁷

Despite this broad topic statement, the statutory analysis is limited to Geneva III and the War Crimes Act, 18 U.S.C. §2441.¹²⁸

125. *Id.* at 5.

126. Schlesinger Report, *supra* note 18, at 7, 34.

127. January 22 OLC Memo, *supra* note 3, at 1.

128. *Id.* at 1-9.

The Geneva Conventions are not, however, the only international treaties that govern the treatment of prisoners or detainees. CAT, ratified by the United States in 1994, categorically prohibits CIDT and torture.¹²⁹ It provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹³⁰ The January 2002 OLC Memo neglects to mention CAT. The implications of CAT are not discussed in the OLC Opinion Memos until nearly seven months later in the August 2002 OLC Torture Memo. By that time, hundreds of detainees had been interrogated pursuant to the unlawful enemy combatant doctrine in Afghanistan, at Guantánamo, and elsewhere.

*D. Failure To Identify Prior Relevant Statements by
the Executive Branch*

As noted above, when the OLC did finally consider the effect of CAT and implementing federal statutes, the August 2002 OLC Torture Memo concluded that: (1) to avoid unconstitutional infringement on the President’s Commander-in-Chief powers, U.S. law prohibiting torture should be construed as not applying to interrogations of terrorism suspects pursuant to those powers; and (2) criminal law defenses of necessity and self-defense could justify torture of terrorism suspects that would otherwise violate U.S. law prohibiting torture.¹³¹

Those conclusions are remarkable given the categorical nature of CAT’s prohibitions on torture.¹³² Even more remarkable, those conclusions were reached, and the OLC advised White House counsel and the Department of Defense on the basis of those conclusions, *without ever acknowledging directly contrary prior statements by the executive branch*. A 1999 report of the State Department to the U.N. Committee Against Torture, typical of pre-9/11 executive interpretations of the duties of the United States under CAT,

129. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

130. *Id.* at art. 2, para. 2. The *Guidelines on Human Rights and the Fight Against Terrorism*, adopted by the Council of Europe Committee of Ministers on July 11, 2002, available at [http://www.coe.int/T/E/Human_rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf), addressed the prohibition of CIDT and torture as it applies to terrorism suspects. It reaffirmed that “[t]he use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of terrorist activities, irrespective of the nature of the acts that the person is suspected of” *Id.* at 8.

131. *See supra* text accompanying notes 10-11.

132. *See supra* text accompanying notes 129-130.

unequivocally articulated that United States law prohibits torture or CIDT without exception:

Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. . . . No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as justification of torture. U.S. law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a “state of public emergency”) or on orders from a superior officer or public authority.¹³³

Under any view of the proper role of the lawyers who advised the executive branch in the months following 9/11, identification of prior executive branch statements bearing on the issues presented was a necessary component of the diligent discharge of their professional responsibilities.

III. THE “PERFECT STORM”: FIVE FACTORS THAT MAY HAVE SKEWED THE PROCESS

Identifying the factors that led to the Opinion Memos and the formulation of the unlawful enemy combatant doctrine necessarily involves some

133. U.S. DEPT. OF STATE, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE AGAINST TORTURE 2 (1999), *available at* http://www.state.gov/www/global/human_rights/torture_intro.html. Even after 9/11 and after the August 2002 OLC Torture Memo was issued, public statements of the United States continued to affirm the absolute nature of CAT’s prohibition on torture. For example, a June 2003 statement from the White House, released on United Nations International Day in Support of Victims of Torture, stated, “Freedom from torture is an inalienable human right. [CAT], ratified by the United States and more than 130 other countries since 1984, forbids governments from deliberately inflicting severe physical or mental pain or suffering on those within their custody or control.” Statement by the President, *United Nations International Day in Support of Victims of Torture*, June 26, 2003, *available at* <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html>. Ironically, in light of the release of the August 2002 OLC Torture Memo and subsequent revelations about prisoner abuse by the U.S. at Abu Ghraib and elsewhere, the June 2003 statement also condemned “[n]otorious human rights abusers,” including Iraq prior to the ouster of Saddam Hussein, and asserted, “The United States is committed to the world-wide elimination of torture and we are leading this fight by example.” *Id.*

speculation by those not privy to the inner workings of the Justice Department in the months following 9/11. Evidence available to the public suggests, however, several factors that skewed the process of providing legal advice and resulted in a narrowly-considered, extreme view of executive authority. These factors include: (1) client pressure to provide a “forward-leaning” legal solution that enabled an aggressive war on terrorism; (2) “lock-in,” as a result of the opinions being solicited at a time when detainees were already being subjected to coercive interrogations inconsistent with the commands of the Geneva Conventions and CAT; (3) the personal views of key players within the OLC; (4) lack of transparency; and (5) a climate within the Justice Department that stifled dissenting points of view.

A. Client Pressure To Be “Forward Leaning”

A December 2004 *Newsweek* magazine article describes a July 2002 meeting between White House Counsel Alberto Gonzales and OLC lawyers, including Assistant Attorney General Jay Bybee and Deputy Assistant Attorney General John Yoo.¹³⁴ The topic of the meeting was how far the CIA could go in interrogating terrorism suspects – an inquiry that would, according to the article, lead to the August 2002 OLC Torture Memo. According to *Newsweek*’s source, the question from Gonzales was: “Are we forward-leaning enough on this?”¹³⁵ As the article describes it, “[I]ean forward’ had become a catchphrase for the administration’s offensive approach to the war on terror,” and it was a phrase that “Gonzales use[d] many times.”¹³⁶

Whether or not the *Newsweek* account of this meeting between White House counsel and OLC lawyers is accurate, it is not difficult to imagine that lawyers within the executive branch in the months following 9/11 felt pressure, along with the rest of the executive branch team, to be aggressive in supporting the Administration’s anti-terrorism policy. It is, of course, a lawyer’s duty, when appropriate, to tell a client “No,” however intent the client is on getting a “Yes” answer.¹³⁷ But the Administration’s desire to be “forward-leaning” may have tested the ability of executive branch lawyers to heed that duty.

134. Michael Isikoff, Daniel Klaidman & Michael Hirsh, *Torture’s Path*, NEWSWEEK, Dec. 27, 2004, at 54.

135. *Id.* at 55.

136. *Id.*

137. Elihu Root, Secretary of State from 1905 through 1909, is quoted as saying, “About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.” Deborah L. Rhode, *The Profession and the Public Interest*, 54 STAN. L. REV. 1501, 1504 (2002) (quoting PHILLIP C. JESSUP, 1 ELIHU ROOT 133 (1938)).

B. Lock-In

As noted above, Dean Koh has described as “lock-in” the problem that OLC lawyers face when consulted only after government officials have committed to a course of action. While it is not publicly known what consultations may have pre-dated the formal promulgation of the OLC Opinion Memos (or additional memos that may exist but have not yet been made public),¹³⁸ the rapid pace of events in Afghanistan and the evidence of prisoner abuse at a very early stage in those events suggest that the OLC may have been considering issues regarding the detention and interrogation of terrorism suspects at a time when a form of the unlawful enemy combatant doctrine, including an aggressive view of permissible interrogation of terrorism suspects, was already being acted on.

The Administration’s war model for pursuit of terrorism suspects was activated quickly in the weeks following the 9/11 attacks.¹³⁹ By early October of 2001, the United States had begun military operations in Afghanistan, aligning itself with the loosely combined force of Afghan warlords known as the Northern Alliance in the ongoing military conflict between the Northern Alliance and the Taliban.¹⁴⁰ By December of 2001, the Northern Alliance was taking into custody thousands of surrendering Taliban soldiers and others, many of whom were turned over to the U.S. military for detention and interrogation.¹⁴¹ Among the captives were non-Afghan “foreign fighters” who had fought with the Taliban.¹⁴² These “foreign fighters” were assumed to be associated with al Qaeda and were considered intelligence “assets” – prime targets for intelligence interrogations.¹⁴³ Many were interrogated immediately at various locations in Afghanistan, including Bagram Air Force Base, and/or aboard U.S. warships in the Arabian Sea.¹⁴⁴ Hundreds of these detainees were

138. According to press reports, the CIA sought advice from the Justice Department on the legal limits of interrogation techniques prior to the August 2002 OLC Torture Memo, and as early as March of 2002. See David Johnston, Neil A. Lewis & Douglas Jehl, *Nominee Gave Advice to C.I.A. on Torture Law*, N.Y. TIMES, Jan. 29, 2005, at A1.

139. See *supra* text accompanying note 1.

140. See John Diamond & Tim Jones, *U.S. Inserts Troops To Aid Rebels*, CHI. TRIB., Oct. 31, 2001, at 1; see also Michael R. Gordon & Eric Schmitt, *A Nation Challenged: Strategy*, N.Y. TIMES, Oct. 31, 2001, at B1.

141. See Beth Daley, *Fighting Terror/Detainees; Old Loyalties Blur Fate of Pakistan’s Captives*, BOSTON GLOBE, Dec. 18, 2001, at A1.

142. See James Risen & Thom Shanker, *The Struggle for Iraq: Terror Captives; Hussein Enters Post-9/11 Web of U.S. Prisons*, N.Y. TIMES, Dec. 18, 2003, at A1.

143. See Tom Bowman, *Operatives of al-Qaida Captured*, BALT. SUN, Jan. 9, 2002, at 1A.

144. See *id.*; see also Risen & Shanker, *supra* note 142.

ultimately transferred to the newly-established detention and interrogation camp at Guantánamo Bay, Cuba.¹⁴⁵

There is evidence that aggressive interrogations, including the use of CIDT (if not torture), were well underway by late 2001 – before the OLC completed its January 2002 memo addressing whether al Qaeda and Taliban detainees were subject to the protections of the Geneva Conventions, and long before the OLC drafted its August 2002 memo on the applicability of legal prohibitions on torture. The earliest allegations of abuse are from December 2001 in Afghanistan at the Kandahar airbase and the Sherbegan prison.¹⁴⁶ Claims of abuse from this period include hooding, repeated beatings, exposure to freezing outdoor temperatures for hours at a time, sleep deprivation, use of unmuzzled dogs to intimidate detainees, interrogations at gunpoint, and threats of death.¹⁴⁷ A letter from a detainee at Guantánamo claims that he was threatened with torture, was actually tortured, and was a partial witness to two detainees' deaths in Afghanistan during this time period.¹⁴⁸ A detainee who was in Kandahar in early 2002 reported the use of sleep deprivation and beatings, including beating prisoners until they were unconscious and forcing prisoners to lie outside on frozen ground for extended periods of time.¹⁴⁹

There are claims that detainee abuse began in Guantánamo immediately upon detainee arrival from Afghanistan in January 2002.¹⁵⁰ These allegations of abuse include repeated beatings, long interrogations without breaks, and death threats.¹⁵¹ There are also reports from Guantánamo of the use of

145. See Risen, *supra* note 142.

146. See Complaint, *Rasul v. Rumsfeld*, No. 04-1864 (D.D.C. filed Oct. 27, 2004) [hereinafter *Rasul Complaint*], at ¶¶39-40, 44-45, 47-52, available at <http://news.findlaw.com/hdocs/docs/terrorism/rasulrums102704cmp.html>; Petition for Writ of Mandamus and/or Writ of Habeas Corpus, *al Qosi v. Bush*, No. 04-1937 (D.D.C. filed Nov. 8, 2004), at ¶¶45-51, available at http://www.justicescholars.org/pegc/archive/Al-Qosi_v_Bush/al-qosi_petition_20040808.pdf [hereinafter *al Qosi Petition*].

147. *Rasul Complaint*, *supra* note 146, ¶¶6, 37-64; *al Qosi Petition*, *supra* note 146, ¶¶45-63; see also Proffer of Facts in Support of Defendant's Suppression Motions, *United States v. John Phillip Walker Lindh* (E.D. Va. filed June 13, 2002), available at <http://news.lp.findlaw.com/hdocs/docs/Lindh/uslindh61302dstat.pdf> (alleging, among other things, that in early December 2001 Lindh was subjected to confinement in a metal shipping container while being bound naked to a stretcher with duct tape; was kept naked in this uninsulated, outdoor container for nearly two days; and that a bullet lodged in Lindh's leg was not removed for 3 weeks while interrogations proceeded).

148. Alvarez, *supra* note 25.

149. *Enduring Freedom: Abuses by U.S. Forces in Afghanistan*, *supra* note 18.

150. *Guantánamo: Detainee Accounts*, HUMAN RIGHTS WATCH (n.d.), available at <http://www.hrw.org/backgrounders/usa/gitmo1004/>; *Rasul*, *supra* note 146; *al Qosi*, *supra* note 146.

151. See *Guantánamo: Detainee Accounts*, *supra* note 150; *Rasul*, *supra* note 146; *al Qosi*, *supra* note 146.

pornographic pictures in interrogations, threatened extradition to Morocco or Egypt to be tortured, threatened death by electrocution and hanging, and death threats against family members.¹⁵² Other claims of abuse include forcing detainees to hold stress positions for over six hours, using floodlights to deprive them of sleep, serving rotten food, and forcing prisoners to take unspecified injections.¹⁵³

In Afghanistan in March 2002, according to accounts of two detainees, prisoners were subjected to sleep deprivation by constant bright lights and guards banging on cells.¹⁵⁴ These detainees also describe interrogations in which they were made to stand motionless for long periods of time with lights shining in their eyes and interrogators shouting questions behind them.¹⁵⁵ Others detained in Afghanistan in late 2002 allege that they were shackled naked in standing positions for weeks at a time and subjected to sleep deprivation and beatings.¹⁵⁶ There are stories of naked detainees being doused with cold water while in highly air conditioned cells and pinned to the ground with a chair.¹⁵⁷ Afghanistan detainees have also described being forced to hold their arms over their heads with their shackles draped over the top of a door for two-hour intervals.¹⁵⁸ Two homicides in December 2002 at Bagram have been attributed to blunt force injuries to the prisoners' legs.¹⁵⁹

In light of these accounts, OLC lawyers may have been under pressure not only to be forward-leaning, but also to justify past conduct. That is, they may have been subject to lock-in.

152. *Guantánamo: Detainee Accounts*, *supra* note 150; *al Qosi*, *supra* note 146.

153. *Rasul*, *supra* note 146, ¶¶77, 95-96.

154. *Enduring Freedom: Abuses by U.S. Forces in Afghanistan*, *supra* note 18, at 34.

155. *Id.*

156. *Id.* at 34-38.

157. *Id.* at 35.

158. *Id.* at 35.

159. *Id.* at 43; *see* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1 (providing details of abuse, beatings, and deaths of the detainees based on a "nearly 2,000 page confidential file of the Army's criminal investigation into the case" and noting, among other things, that "the Bagram file includes ample testimony that harsh treatment by some interrogators was routine and that guards could strike shackled detainees with virtual impunity"); Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, §1, at 1 (reporting that "[d]espite autopsy findings of homicide and statements by soldiers that two prisoners died after being struck by guards at an American military detention center in Bagram, Afghanistan, Army investigators initially recommended closing the case without bringing any criminal charges").

C. Personal Views of OLC Lawyers

In addition to the problems of lock-in and client pressure to reach a desired result, there is the danger that government lawyers will inappropriately champion personal views of the “public interest,” substituting their own views for those of elected officials and policymakers. The need to avoid this phenomenon has led most commentators to conclude that in most contexts a government lawyer’s duty of client loyalty is owed to the agency or department that she serves, rather than to a more abstract concept of the public interest.¹⁶⁰

In some instances, the individual views of government lawyers may serve as a counter-balance to client pressure and lock-in. Here, if anything, the personal views of at least one lawyer may have aggravated those problems. One of the primary drafters of the OLC Opinion Memos,¹⁶¹ Deputy Assistant Attorney General John Yoo, had in prior academic writings taken a broad view of executive war power and foreign affairs power.¹⁶² That view is fundamental to much of the analysis in the OLC Opinion Memos. Rather than being swayed by client desire to reach a particular result, Yoo may have been motivated by a desire to see his own theory of broad executive power expressed as government policy in the war on terror.

D. Lack of Transparency

Some former OLC lawyers have emphasized the virtues of transparency. Vetting within the executive branch and ultimate publication of OLC opinions

160. See *supra* text accompanying notes 49-53.

161. R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos; Most Scholars Reject Broad View of Executive’s Power*, WASH. POST, July 4, 2004, at A12 (identifying Yoo as the “principal author of the August memo”); Jeffrey Rosen, *The Struggle over the Torture Memos*, N.Y. TIMES, Aug. 15, 2004, §4, at 5 (describing Yoo as author of “some of the most controversial torture memos”).

162. See, e.g., John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001) (book review) (arguing that the President has broader powers of treaty interpretation than has been commonly understood, including the unilateral authority to terminate treaty obligations); John Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673 (2000) (concluding that the Clinton administration’s claim of unilateral executive war power as a basis for intervention in Kosovo was supported by the Constitution’s text and original understanding); see also Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SECURITY L. & POL’Y 455, 457-458 n.15 (2005) (providing additional background information on Yoo, including citations to other articles by him espousing an extremely expansive role for executive power).

allow for salutary examination and testing of their analysis and conclusions.

With the OLC Opinion Memos, however, the legal analysis justifying the unlawful enemy combatant doctrine remained secret for two years while that doctrine was implemented. In a dramatic demonstration of the power of transparency, the August 2002 OLC Torture Memo was withdrawn shortly after it became public, and the Administration disavowed much of its analysis.¹⁶³ In the nearly two years before it was released, however, the use of CIDT, if not torture, was widespread in Afghanistan and at Guantánamo and, according to the Schlesinger Report, it had migrated to the Abu Ghraib prison in Iraq.¹⁶⁴

The process of creating the OLC Opinion Memos also seems to have been mired in opacity. Perhaps due in part to the time pressures created by rapidly unfolding events in Afghanistan, there appears to have been minimal vetting of OLC analysis within the executive branch. As noted above, the views of State Department and career Judge Advocate General lawyers are conspicuously absent from the draft and final memos that have become public.¹⁶⁵

E. The Stifling of Dissent: The Jesselyn Radack Story

Gauging the climate within the Justice Department in the months following 9/11 for those who were not there necessarily involves some degree of speculation. Certain events, however, suggest an atmosphere not conducive to the expression of divergent points of view, including legal conclusions inconsistent with the emerging unlawful enemy combatant doctrine.

As early as December 2001, numerous surrendering Taliban soldiers held by the Northern Alliance in Afghanistan were turned over to the United States.¹⁶⁶ One of those Taliban soldiers was John Walker Lindh,¹⁶⁷ who had been taken into custody in Afghanistan on December 1, 2001.¹⁶⁸

After U.S. military intelligence officers had interrogated Lindh for nearly a week at a location in Mazar-e Sharif in northern Afghanistan, Lindh was transported to “Camp Rhino,” a temporary Marine base south of Kandahar in

163. See Allen & Schmidt, *supra* note 15.

164. Schlesinger Report, *supra* note 18, at 9, 14, 68.

165. See *supra* text accompanying notes 118-126.

166. See *supra* text accompanying notes 139-145.

167. The author served as co-counsel for Lindh when he was prosecuted by the United States.

168. Jane Mayer, *Lost in the Jihad; Why Did the Government's Case Against John Walker Lindh Collapse?*, NEW YORKER, Mar. 10, 2003, at 55; see also Proffer of Facts in Support of Defendant's Suppression Motions, *United States v. Lindh*, *supra* note 147, at 10.

southern Afghanistan.¹⁶⁹ At Camp Rhino, Lindh was held in a metal shipping container without heat and with minimal light and ventilation.¹⁷⁰ He was initially stripped naked, blindfolded, shackled, and bound with duct tape to a stretcher.¹⁷¹ After nearly two days in that condition, he was interrogated by an FBI agent.¹⁷²

On December 7, 2001, the day of Lindh's transfer to Camp Rhino, Jesselyn Radack was the attorney on phone duty at the Justice Department's Professional Responsibility Advisory Office ("PRAO"), where she had been a Legal Advisor for three years.¹⁷³ Radack took a call from John DePue, a prosecutor in the terrorism and violent crimes section of the Justice Department's criminal division in Washington, D.C.¹⁷⁴ DePue's question concerned Lindh.¹⁷⁵ He knew Lindh's family had retained a lawyer for him,¹⁷⁶ and he asked Radack if the FBI was within its rights to question Lindh in Afghanistan, without Lindh's lawyer present.¹⁷⁷

Radack consulted with a senior legal advisor and e-mailed a response to DePue, advising that the FBI should refrain from interviewing Lindh, since it would be a "pre-indictment, custodial overt interview, which is not authorized by law."¹⁷⁸ She also made other suggestions, including having the FBI agent

169. Proffer of Facts in Support of Defendant's Suppression Motions, *supra* note 147, at 15-17.

170. *Id.* at 18-19.

171. *Id.* at 18.

172. *Id.* at 19-20.

173. Complaint, Radack v. U.S. Dept. of Justice, No. 04-01881 (D.D.C. filed Oct. 28, 2004) [hereinafter Radack Complaint], ¶¶9, 11, available at www.watchingjustice.org/pub/doc_415/Radackcomplaint.pdf. Radack is a Yale Law School graduate who had joined the Department of Justice through the Attorney General's Honor Program. Emily Gold Boutilier, *The Woman Who Knew Too Much*, BROWN ALUMNI MAGAZINE, Mar./Apr. 2004, available at <http://www.brownalumnimagazine.com/storyDetail.cfm?ID=2308>. She had spent four years in the Torts Branch of the Civil Division before joining the PRAO, which was established in 1999 as an independent component of the Department of Justice to advise department lawyers on professional responsibility issues. Radack Complaint, *supra*, ¶¶7-9; see also Eric Lichtblau, *Aftershocks: The Justice Department; Dispute over Legal Advice Costs a Job and Complicates a Nomination*, N.Y. TIMES, May 22, 2003, at 15; U.S. Dept. of Justice, Professional Responsibility Advisory Office, *About PRAO*, available at www.usdoj.gov/prao/index.html.

174. Boutilier, *supra* note 173.

175. *Id.*

176. *Id.*

177. Laurie Abraham, *Anatomy of a Whistleblower*, MOTHER JONES, Jan./Feb. 2004, at 62.

178. E-mail from Jesselyn A. Radack to John DePue (Dec. 7, 2001, 1:06 PM), available at <http://msnbc.msn.com/id/3067190/site/newsweek/>.

ask Lindh if he wanted the lawyer his parents had retained to represent him, or possibly conducting an undercover interview.¹⁷⁹

Radack learned on December 10, 2001, that the FBI had proceeded to question Lindh despite her advice.¹⁸⁰ Radack told DePue that the interview “may have to be sealed or only used for national security purposes.”¹⁸¹ DePue responded “Ugh.”¹⁸² Radack continued to research the situation until December 20, 2001, when her supervisor told her that the PRAO was no longer involved in the case.¹⁸³

Shortly thereafter, Radack received from her supervisor an unscheduled performance review, which questioned Radack’s judgment and ability to do her job.¹⁸⁴ The review did not mention the Lindh case specifically, but it complained that Radack had given advice prematurely, before the response could be approved or the office could refine its position.¹⁸⁵ Her supervisor gave her the option of finding another job, in order to prevent this review from being placed in her personnel file.¹⁸⁶ Given these unfriendly circumstances, Radack resigned her position effective April 5, 2002.¹⁸⁷

On March 7, 2002, before Radack left the PRAO, she received an e-mail from Randy Bellows, one of the prosecutors in the Lindh case.¹⁸⁸ Bellows was seeking Justice Department documents regarding Lindh’s questioning in order to respond to discovery requests in the case.¹⁸⁹ Bellows had two of Radack’s e-mails to DePue and inquired whether there were more.¹⁹⁰ Radack recalled having filed at least a dozen e-mails between her and DePue but could find only three when she checked her file.¹⁹¹ With the help of technical support staff, Radack was able to recover fourteen e-mails that had apparently been purged from the file.¹⁹²

179. *Id.*

180. Boutilier, *supra* note 173.

181. E-mail from Jesselyn A. Radack to John DePue (Dec. 10, 2001, 11:29 AM), available at <http://msnbc.msn.com/id/3067190/site/newsweek/>.

182. E-mail from John DePue to Jesselyn Radack (Dec. 10, 2001, 1:54 PM), available at <http://msnbc.msn.com/id/3067190/site/newsweek/>.

183. Boutilier, *supra* note 173.

184. *Id.*

185. *Id.*

186. Abraham, *supra* note 177, at 63.

187. Radack Complaint, *supra* note 173, ¶25.

188. Boutilier, *supra* note 173.

189. Abraham, *supra* note 177, at 62.

190. Radack Complaint, *supra* note 173, ¶16.

191. Boutilier, *supra* note 173.

192. *Id.*

Radack began her new job with a private law firm in April of 2002.¹⁹³ In June 2002, Radack heard a report on the Lindh case indicating that the Department of Justice had taken the position that Lindh had waived his right to counsel at the time of his interrogation in Afghanistan.¹⁹⁴ Believing this statement to be false, in light of the e-mails she had exchanged with DePue, Radack contacted a *Newsweek* reporter and gave him a copy of the e-mails.¹⁹⁵ When *Newsweek* published the e-mails on-line, the judge in the Lindh case ordered an investigation of the leak, and the Justice Department began a criminal investigation of Radack.¹⁹⁶

Whatever the wisdom or propriety of Radack's disclosure of internal Justice Department communications to a news magazine, her story suggests a climate at the Department of Justice in the months following 9/11 that stifled any point of view not consistent with the emerging unlawful enemy combatant doctrine. The advice she gave as a lawyer at the PRAO was, at least by her account, her conscientious attempt to provide the best view of the law under narrow time constraints.¹⁹⁷ Because she gave that advice to another Justice Department lawyer, she was forced out of her position at the Justice Department after seven years of otherwise exemplary service.¹⁹⁸ Her advice, whether or not it represented the best view of the law, was apparently not sufficiently forward-leaning.

CONCLUSION

The OLC Opinion Memos were written under the extreme pressure of a perceived crisis – an apparently unprecedented threat to national security from

193. Radack Complaint, *supra* note 173, ¶26.

194. Boutilier, *supra* note 173.

195. *Id.*

196. Radack Complaint, *supra* note 173, ¶¶33-35. As a result of the investigation, Radack was forced to take leave from her firm in October 2002. Boutilier, *supra* note 173. The criminal investigation was closed in September 2003, but in October 2003, the Department of Justice turned over its investigative report to the District of Columbia and Maryland bar authorities, suggesting that Radack may have violated the duty of confidentiality. Radack Complaint, *supra* note 173, ¶¶39-40. Radack has taken the position that, under the applicable rules of professional responsibility, she had the right to disclose the e-mails as a whistleblower. *See* Whistleblower Protection Act, 5 U.S.C. §2302(b)(8) (2000). The Maryland bar decided not to take any action against Radack. In October 2004, she filed suit against the Department of Justice, claiming that the department willfully violated her rights under the Privacy Act by disclosing the investigative report. Radack Complaint, *supra* note 173, ¶1.

197. Boutilier, *supra* note 173.

198. Abraham, *supra* note 177 (reporting that Radack performed “admirably” in the Justice Department’s Honor Program and in the following seven years leading up to her forced resignation from the PRAO).

ideologically-motivated terrorists willing and able to engage in suicide missions. This certainly was not the first time that questionable legal views were formulated in times of national emergency. In the crisis atmosphere following the Japanese attack on Pearl Harbor, the Supreme Court itself ratified the exclusion and relocation of thousands of Japanese-Americans, many of whom were citizens, from the West Coast.¹⁹⁹

Protecting the rule of law in the face of serious threats to national security is not an easy task. Principles of professional responsibility are most severely tested and also most crucially important at such times of great stress on our legal system.

Examining the process that created the OLC Opinion Memos in the light of relevant prior professional responsibility guidance and commentary is helpful in understanding how that process was flawed. The record of performance by executive branch lawyers in this episode provides, in turn, a useful perspective from which to consider the ongoing debates within the profession over proper guidance for lawyers who advise the government.

Certain principles that apply to any lawyer who advises a client on the limits of legal conduct are pertinent in this context. A client who is genuinely seeking advice is ill-served by single-minded advocacy of a particular position, whether that position reflects the response hoped for by the client or the lawyer's personal views. A lawyer whose client solicits legal advice has a professional duty to provide a balanced, fair, and thorough assessment of the issues posed, including contrary precedent and opposing points of view. She also has a duty to identify and bring to the client's attention relevant legal issues and practical concerns that bear on the client's question, even if not directly posed by it.

Measured solely by these standards, the lawyers who prepared the OLC Opinion Memos failed to discharge adequately their professional obligations. They failed to describe significant contrary authority and opposing points of view, including those held by career lawyers within the executive branch, and they advocated novel and extreme interpretations of statutory and treaty law without identifying them as such. The extreme nature of their advice is evidenced by the fact that the Administration promptly withdrew the August 2002 OLC Torture Memo after it became public.

Viewed from the perspective of the OLC's unique mission, the failure of the Opinion Memos to present a balanced view of the issues is even more

199. *Korematsu v. United States*, 323 U.S. 214 (1944); see also Peter H. Irons, *Fancy Dancing in the Marble Palace*, 3 CONST. COMMENT. 35, 39-43 (1986) (in arguing against *Korematsu*, Solicitor General Charles Fahy intentionally misled the Court by declaring that Japanese-Americans posed a danger to national security).

troubling. Because the OLC exercises the Attorney General's statutory opinion power to declare what the law is on behalf of the executive branch, the OLC's client is best understood as the executive branch as a whole. Given the constitutional duty of the executive branch to faithfully execute the law, OLC lawyers, even more than other lawyers, have a professional duty to honor and protect the rule of law itself. Whether or not one accepts the quasi-judicial view of the OLC's role, the pre-9/11 admonition of former OLC head Randolph Moss that the OLC has a duty to provide the best view of the law rings particularly true in the context of the issues addressed by the OLC Opinion Memos. Concluding that the President was essentially unconstrained by either domestic or international law in the detention and interrogation of terrorism suspects, the OLC Opinion Memos advised, in effect, that the current threat of terrorism justified abrogation of the rule of law. To advise the President, as the OLC Opinion Memos did, that he was not bound in the exercise of his Commander-in-Chief powers by international treaty obligations, customary international humanitarian law, or U.S. law prohibiting torture fell far short of OLC's obligation to present a well-considered view of the law.

Circumstantial evidence suggests that a combination of factors – including pressure from the client to be forward-leaning, the personal views of a key OLC lawyer, a lack of intra-branch (let alone public) vetting, and a climate that stifled dissenting points of view – hindered OLC lawyers from fulfilling their professional responsibilities. Institutional virtues of independence and transparency, challenged even in more stable times, appear to have succumbed to the crisis atmosphere that enveloped the Justice Department and the White House in the months following 9/11.

It is also possible that the OLC Opinion Memos were never intended to provide advice, but rather were conceived of as support and justification for a policy favoring the detention and interrogation of terrorism suspects that was already underway or to which the Administration was already committed. That is, the lawyers who prepared the memos may have been victims of what Dean Koh has described as lock-in. Beyond that, it is conceivable that the memos were designed, at least in part, to provide a record of advice that would help to insulate Administration officials and those under their command from future charges that might result from implementation of the unlawful enemy combatant doctrine.²⁰⁰ This explanation is even more troubling. Resistance

200. According to a press report, the August 2002 OLC Torture Memo was "sought by the C.I.A. to protect its employees from liability," and C.I.A. lawyers "were furious about the decision [to invalidate it]." Douglas Jehl, David Johnston & Neil A. Lewis, *C.I.A. Is Seen as Seeking New Role on Detainees*, N.Y. TIMES, Feb. 16, 2005, at A1.

to this kind of misuse of the Attorney General's opinion power, as difficult as it may be in times of crisis, is crucial if the rule of law is to be maintained despite pressures to abandon it.

A lawyer's greatest service to a client is sometimes having the courage to say "no." This is especially true when the lawyer's client is the executive branch of the government of the most powerful nation on earth.

