

**The National Security Council Legal Adviser:
Crafting Legal Positions on Matters of War and Peace**

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“[C]onstitutional democracy . . . means that all decisions are made according to law. And that means that sound Executive process must incorporate timely and competent legal advice.”
– James E. Baker¹

Executive branch lawyers play a critical role in both the United States foreign policy and national security processes. In the area of international law interpretation and application, the importance of lawyers in key agencies has long been appreciated.² Recognition of the lawyer’s role in the national security process, however, has historically received much less attention, in part due to the novelty of national security law as a distinct legal field.³ In recent years, however, the role of executive branch lawyers in key areas relevant to national security has attracted considerable scholarly and media attention. Likewise, several top executive branch lawyers played a central role in crafting controversial national policies in the War on Terror, spurring a

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¹ James E. Baker, *National Security Process and a Lawyer’s Duty: Remarks to the Senior Judge Advocate Symposium*, 173 MIL. L. REV. 124, 125 (2002); *see also* JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 310 (2007).

² *See generally, e.g.*, Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT’L L. 633 (1962); Frank M. Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A. J. 33 (1971).

³ *See generally* Peter Raven-Hansen, Stephen Dycus & William C. Banks, *A Brief History of the Field of National Security Law*, in NATIONAL SECURITY LAW: FIFTY YEARS OF TRANSFORMATION: AN ANTHOLOGY 31 (Jill D. Rhodes ed., 2012).

very public debate, all of which sharpened scrutiny about the proper function of lawyers in the national security decision process.⁴

Much of the academic discussion and legal scholarship has focused primarily on the lawyer's role from the perspective of a few key offices, particularly the U.S. Department of State Office of the Legal Adviser (generally referred to as "L"),⁵ the U.S. Department of Justice Office of Legal Counsel (OLC),⁶ and the White House Counsel's Office.⁷ In reality, lawyers participating in the national security legal process exist across a large number of departments and agencies within the Executive Branch.⁸ Legal advice regarding issues of national security must be coordinated from among the different actors, digested, and presented to decision-making elites. It is precisely here, where national security law and policy converge, that we find the

⁴ JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 129–30 (2007) (“[N]ever in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11.”).

⁵ See, e.g., Bilder, *supra* note 2; Current Development, *The Role of the Legal Adviser of the Department of State*, 85 AM. J. INT’L L. 358 (1991); Ashley Deeks, *Inside “L”: Some Thoughts on the Office of the Legal Adviser*, 2 CHI. J. INT’L L. 503 (2001); Harold H. Koh & Aaron Zelinsky, *Practicing International Law in the Obama Administration*, 35 YALE J. INT’L L. ONLINE 4 (2009); Harold H. Koh, *The State Department Legal Adviser’s Office: Eight Decades in Peace and War*, 100 GEO. L. J. 1747 (2012). The Office of the Legal Adviser within the U.S. Department of State in particular has received notable attention in the pages of legal scholarship, facilitated in part by the extensive interest the American Society of International Law has historically taken in studying the role of legal advisors in the foreign affairs process. James Nafziger, *Law in the U.S. Foreign Relations Process: Opening the Channels*, Remarks at the American Society of International Law Annual Meeting (Apr. 7, 1989), in 83 AM. SOC’Y INT’L L. PROC. 407, 408 (1989) (noting the 25th anniversary of the Society’s study in this area).

⁶ See, e.g., Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217 (2013); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000).

⁷ See, e.g., MaryAnne Borrelli, Karen Hult & Nancy Kassop, *The White House Counsel’s Office*, 31 PRESIDENTIAL STUD. Q. 561 (2001); Jeremy Rabkin, *At the President’s Side: The Role of the White House Counsel in Constitutional Policy*, 56 L. & CONTEMP. PROBS. 63 (1993).

⁸ Beyond the legal offices at the Departments of Justice and State, the role of general counsels in other executive branch departments, as well as those who serve as legal advisors to our military command, have received much less attention, although this too is beginning to change. See, e.g., Stephen Preston, *General Counsel, Central Intelligence Agency, CIA and the Rule of Law*, Remarks at Harvard Law School (Apr. 10, 2012), available at: <http://www.cfr.org/rule-of-law/cia-general-counsel-stephen-prestons-remarks-rule-law-april-2012/p27912>; Jeh Johnson, *General Counsel, Dep’t of Defense, National Security Law, Lawyers, and Lawyering in the Obama Administration*, Dean’s Lecture at Yale Law School (Feb. 22, 2012), available at: <http://www.cfr.org/defense-and-security/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>; see also William G. Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 U. CHI. J. INT’L L. 431 (2003).

Legal Adviser to the National Security Council (NSC), a critical yet little-known player in the national security legal process of the executive branch.⁹

Despite the development of a robust academic literature on the national security process and executive branch legal decision-making, insufficient attention has been paid to the role the NSC Legal Adviser plays in the process of crafting national security legal advice for clients at the highest levels of government.¹⁰ This article seeks to address this gap by providing a historical overview and critical analysis of the role of the Legal Adviser to the National Security Council, thereby contributing new knowledge to the wider body of national security law scholarship.¹¹

Part I reviews the need for a National Security Legal Adviser, tracing a debate that began in the Department of State during the early 1970s and ended in the presidential recommendations of the Tower Commission in the wake of the Iran–Contra affair and the official creation of the office in 1987. Part II discusses the primary functions and responsibilities of the NSC Legal Adviser, including the provision of legal advice to the President and the NSC on national security matters, the interpretation of foreign, domestic, and international law, and the review of legislative proposals affecting national security. This section also provides a “day in the life” perspective of the work of the Legal Adviser, drawing on written anecdotes and interviews with

⁹ See Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a “They,” Not an “It,”* 96 MINN. L. REV. 194, 250 (2011) (noting that the position of NSC Legal Adviser “has received little scholarly or media attention.”).

¹⁰ While the NSC Legal Adviser has received less scholarly attention in comparison to other high-profile executive branch lawyers working in the national security process, a notable exception is found in Judge James E. Baker’s excellent book on national security law and process. In his chapter on National Security Lawyering, Baker—who previously served in the role of NSC Legal Adviser under President Clinton—provides the most thorough account of the job that currently exists in the literature. See JAMES E. BAKER, *The National Security Lawyer*, in IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 307, 310–25 (2007).

¹¹ This topic was initially conceptualized from remarks made during an address at the University of Virginia School of Law by a former NSC Legal Adviser. See Mary DeRosa, Luncheon & Keynote Address at the Fourth Annual Seminar on Teaching National Security Law: Lawyers in the National Security Process (Sept. 28, 2013) (on file with author) (describing the roles and functions of the National Security Council Legal Adviser and remarking on the need for greater knowledge and discussion of the process by which national security legal advice is provided to high-level, executive branch decision makers).

past NSC Legal Advisers. Because “the high sensitivity and security classification of the NSC’s work and organization limit available sources,”¹² the use of firsthand accounts of individuals who have experienced the office from within provides particularly valuable insight not otherwise available.

The role of the NSC Legal Adviser in coordinating the interagency legal process is also considered. Although not formally charged with the coordination of national security legal processes among the various executive agencies, in practice it has become the responsibility of the NSC Legal Adviser to routinely convene an interagency “Lawyers Group” to ensure that presidential decisions on matters of national security are subject to interagency legal review. Here, the development, evolution, costs, and benefits of the Lawyers Group are examined. Members of the Lawyers Group frequently include the Department of State Legal Adviser, the General Counsel of the Department of Defense, the Central Intelligence Agency General Counsel, the General Counsel of the Office of the Director of National Intelligence, and the Legal Adviser to the Chairman of the Joint Chiefs of Staff, among others.¹³

Part III undertakes a critical analysis of substantive issues associated with the office of the NSC Legal Adviser. The first such issue is the work of the NSC Legal Adviser in relation to the White House Counsel’s Office. The role of the NSC Legal Adviser, as well as the scope of its relationship with White House Counsel, has varied with each administration. In the Obama administration, it has become common for the NSC Legal Adviser to serve concurrently as White House Deputy General Counsel. This practice of “wearing two hats” raises significant concerns about overly politicizing the role of the NSC Legal Adviser and eroding the

¹² RICHARD A. BEST, CONG. RESEARCH SERV., RL 30840, THE NATIONAL SECURITY COUNCIL: AN ORGANIZATIONAL ASSESSMENT 1 (2011).

¹³ DeRosa, *supra* note 11.

independence of the office. Next, the competing issues of secrecy and transparency are explored. Barriers of public access to national security legal advice are reviewed, along with the role of public perception and concerns about government lawyers providing “secret” legal advice and interpretations. Finally, the need to create institutional memory for NSC Legal Advisers in future administrations is addressed, along with some possible options for doing so.

I. Historical Background and Creation of the Office

A. Introduction to the National Security Council and Staff

The National Security Council (NSC) was first established by the National Security Act of 1947 “to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and other departments and agencies of the Government to cooperate more effectively in matters involving the national security.”¹⁴ The statutory members of the NSC include the President, the Vice President, the Secretary of State, the Secretary of Defense, and, starting in 2007, the Secretary of Energy.¹⁵ The Director of National Intelligence and the Chairman of the Joint Chiefs of Staff, while not formal members, are statutorily designated advisors to the Council.¹⁶ Additional individuals attend NSC meetings by invitation or as appropriate based on the issue presented.¹⁷

Driving the national security policy process on a daily basis are the individuals who serve on the National Security Council staff. The NSC staff consists of the Assistant to the President for National Security Affairs (APNSA), more commonly known as the National Security

¹⁴ National Security Act of 1947 § 402, 50 U.S.C. § 402 (2006).

¹⁵ BEST, *supra* note 12, at 6, 26.

¹⁶ See JAMES E. BAKER, *IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES* 105 (2007). In addition to the statutory members and advisors, Presidents have also named additional individuals to participate as members of the NSC during their administrations. *Id.* at 106.

¹⁷ *National Security Council*, WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/nsc/>.

Advisor, and “the 50 or so area and functional specialists who are appointed at the pleasure of the president and who are charged with coordinating analysis, offering policy recommendations for the president, and providing the staffwork for formal council meetings.”¹⁸ While not statutory members of the NSC, individuals on the NSC staff work directly for the President under the direction of the National Security Advisor.¹⁹ Members of the staff provide direct support to the NSC in policy coordination and development and work closely with officials in other executive branch departments and agencies.²⁰

Since its creation, the National Security Council has served as a tool for the President to coordinate and manage the military and foreign policy process, though the degree to which it has been used for that purpose has varied dramatically from one administration to another.²¹ It was not until the Administration of George H. W. Bush that the model developed under then National Security Advisor Brent Scowcroft, consisting of a simple principal/deputies committee structure with Scowcroft acting as honest broker, “became so successful that it managed to overwhelm the impulse that had previously existed from administration to administration to toss out their predecessor’s system and invent a new way.”²²

¹⁸ AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* 253 n.1 (1999). For a historical review of the NSC staff’s evolution through various presidential administrations, see generally CHRISTOPHER C. SHOEMAKER, *THE NSC STAFF: COUNSELING THE COUNCIL* (1991).

¹⁹ ALAN G. WHITTAKER, SHANNON A. BROWN, FREDERICK C. SMITH & ELIZABETH MCKUNE, *THE NATIONAL SECURITY POLICY PROCESS: THE NATIONAL SECURITY COUNCIL AND INTERAGENCY SYSTEM* 14 (National Defense Univ. 2011).

²⁰ *Id.* at 29–30.

²¹ Under President Eisenhower, for instance, the NSC and its staff maintained an organized institutional structure with clear lines of authority. BEST, *supra* note 12, at 8. In contrast, the NSC under President Kennedy went largely unutilized, with the President instead opting for small groups of personal advisors and ad hoc task forces. *Id.* at 10. During the height of the Cuban Missile Crisis, Kennedy relied chiefly on his ad hoc EXCOMM committee rather than the NSC. See ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 13–24 (1974) (discussing the process of interagency legal and policy decisions during the crisis).

²² See DAVID ROTHKOPF, *RUNNING THE WORLD: THE INSIDE STORY OF THE NATIONAL SECURITY COUNCIL AND THE ARCHITECTS OF AMERICAN POWER* 267 (2004) (“Instead, because the next national security advisor, Anthony Lake, and those who followed him, Sandy Berger and Condoleezza Rice, all saw its merits, they have stuck with it, with

The National Security Council system's organization and function over the years has also proven to be flexible and, in large measure, dependent on the preferences and operational style of each President.²³ It is the practice of each new President to issue a Presidential Directive setting out the national security organizational structure as well as the fundamental policy process that will ultimately define the roles and mission of the NSC staff during that administration.²⁴ Upon taking office in 2009, President Obama followed this tradition, issuing a directive to merge the National Security Council staff and the Homeland Security Council staff into a single "National Security Staff" (NSS).²⁵

B. The Need for a National Security Council Legal Adviser

Arguments in favor of creating a legal adviser's office at the NSC can be traced back to the early 1970s. In 1973, John Norton Moore, who subsequently became the Counselor on International Law to the U.S. Department of State, published an article in *Foreign Affairs* making the case for a stronger role for law and lawyers in the national security process.²⁶ One of

slight variations, and the principals and deputies committee structure is at the center of the foreign policy formation process in the U.S. government today.”).

²³ BEST, *supra* note 12, at 26.

²⁴ BAKER, *supra* note 16, at 106 (“In practice, each president will define his own national security process within the constitutional and statutory framework of decision-making. This is usually accomplished at the outset of an administration by a presidential directive. Foremost, such a directive will include the president’s concept for the National Security Council and corresponding NSC process.”).

²⁵ Press Release, Statement by the President on the White House Organization for Homeland Security and Counterterrorism, White House Office of the Press Secretary (May 26, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-by-the-President-on-the-White-House-Organization-for-Homeland-Security-and-Counterterrorism/. In February 2014, the name was formally changed to the National Security Council staff (NSC staff), reverting to the historic name used by the organization from 1947 until its merger with the Homeland Security Council in 2009. Caitlin Hayden, *NSC Staff, the Name is Back! So Long, NSS*, THE WHITE HOUSE BLOG (Feb. 10, 2014), <http://www.whitehouse.gov/blog/2014/02/10/nsc-staff-name-back-so-long-nss>.

²⁶ See John N. Moore, *Law and National Security*, 51 FOREIGN AFF. 408, 409 (1973) (“National security decisions must consider a range of component issues . . . Legal considerations, like political, military, and economic considerations, are relevant to each of these issues. Yet there are no international legal specialists on the increasingly important staff of the National Security Council even though that staff now comprises over 50 substantive officers.”).

several recommendations he made was to create a legal adviser who would serve as part of the National Security Council staff.²⁷

In parallel with the publication of the *Foreign Affairs* article, during the early 1970s, a number of discussions on the idea of an NSC legal adviser were taking place within the Legal Adviser's Office at State, largely driven by suggestions from Professor Moore while serving as the Counselor on International Law. While recognizing that the chief legal officer responsible for interpretations and advice on international legal matters is the Legal Adviser at the Department of State, the principal reason for recommending the creation of a legal adviser's office within the NSC system grew from an awareness of the reality that the NSC staff dealt with a number of national security legal issues with which the Legal Adviser's Office at State was not directly involved.²⁸ Not all parties at State shared the view that an NSC legal adviser was a good idea, however. Substantial concerns were raised that such a position "would take away from the role of the State Department Legal Adviser," and the office found itself split on the issue.²⁹

Such resistance at State is somewhat understandable given the atmosphere of interagency politics during this period. At the time the proposal was put forth, a noticeable wariness had developed over the National Security Council's "accumulation of decisionmaking, then decision-executing, power" in the realm of foreign affairs at the State Department's expense.³⁰ The prominent role of then National Security Advisor Henry Kissinger, who overshadowed and

²⁷ *Id.* at 419 (proposing the creation of the position of Counselor on National Security Law to the NSC Staff).

²⁸ John N. Moore, Law in the U.S. Foreign Relations Process: Opening the Channels, Remarks at the American Society of International Law Annual Meeting (Apr. 7, 1989), in 83 AM. SOC'Y INT'L L. PROC. 407, 421 (1989); see also BRADLEY H. PATTERSON, THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND 66 (2001) ("National security policy questions are steeped in legal issues: the limits of congressional oversight, the proper wording for presidential findings to authorize covert actions, the boundaries of presidential war powers, the interpretation of conditions imposed on treaty ratifications, the judgment as to whether or not a space interceptor would be permitted under the Anti-Ballistic Missile Treaty, and so forth.").

²⁹ Moore, *supra* note 28, at 421.

³⁰ Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran–Contra Affair*, 97 YALE L.J. 1255, 1269 (1988).

ultimately replaced Secretary of State William P. Rogers in 1973, no doubt also contributed to a feeling of power erosion at the State Department during this time.³¹ Thus, one can understand the reluctance of the Office of the Legal Adviser to facilitate this process through a recommendation it perceived as turning over more of its own turf to the NSC. Yet keeping a legal adviser off the NSC staff would not in itself prevent further erosion of State Department influence in foreign policy decision making and was therefore not a legitimate reason to oppose the establishment of a legal adviser within the structure of the national security staff. Quite the opposite, the growing influence of the NSC and its staff only heightened the need for systematic legal input into its internal processes.

To determine whether a recommendation to create such an office should be made to the President, State Department Legal Adviser John R. Stevenson convened an informal debate on the issue between Professor Moore, who favored an NSC Legal Adviser, and then senior Deputy Legal Adviser George Aldridge, who opposed it.³² Stevenson backed the Moore position and made a formal recommendation to the White House, through a memorandum drafted by the Office of the Legal Adviser and sent through the Secretary of State, urging the creation of a legal adviser's position on the National Security Council staff.³³

Unfortunately, the memorandum likely landed on the desk of then White House Counsel John Dean who, as many will recall, was heavily occupied with other matters during the spring

³¹ *See id.* (describing the effect of Kissinger's secretly negotiated missions to Vietnam, China, Berlin, and the Soviet Union); *see also National Security Council Structure and Functions*, NIXON PRESIDENTIAL LIBRARY & MUSEUM, available at <http://nixon.archives.gov/forresearchers/find/textual/nsc/structure.php> ("President Nixon maintained a close relationship with his National Security Advisor, Henry Kissinger. Dr. Kissinger increased the size of the NSC staff from 12 to 34. . . . Under Dr. Kissinger's direction, . . . [t]he White House became the foreign policymaker, greatly reducing the Department of State's participation.").

³² Interview with John N. Moore, Director, Center for National Security Law, University of Virginia School of Law, in Charlottesville, Va. (Oct. 30, 2013) [hereinafter Moore Interview] (on file with author).

³³ *Id.*

of 1973, as the White House became increasingly consumed by the turmoil of Watergate.³⁴ Thus, this early recommendation for the creation of a legal adviser to the National Security Council was apparently never considered at the White House. The idea would not be picked up again until over a decade later, in the aftermath of the Iran–Contra affair, when again it would be pushed by then Ambassador Moore.³⁵

C. Iran–Contra and the Creation of the NSC Legal Adviser’s Office

Although technically the NSC Legal Adviser did not exist as a freestanding office until much later, a legal position was established within the National Security Council system on a part-time basis in the late 1970s.³⁶ Zbigniew Brzezinski first named NSC Executive Secretary Robert M. Kimmitt to serve in this capacity, a role that required him to essentially wear two hats for several years.³⁷ In addition, during the 1980s, Paul B. Thompson served as Military Assistant to the National Security Advisor as well as NSC General Counsel.³⁸ Thus, while it is true that

³⁴ For further insight into John Dean’s role in the events surrounding Watergate, see generally JOHN DEAN, *BLIND AMBITION: THE WHITE HOUSE YEARS* (1976).

³⁵ Upon concluding the year as Counselor on International Law to the Department of State, Professor Moore was offered the opportunity to become the first Legal Adviser to the National Security Council, which would have led to the creation of the office years earlier. At that time, however, Professor Moore had been offered the chance to become the U.S. Ambassador to the Law of the Sea and Chairman of the National Security Council Interagency Task Force on the Law of the Sea, an opportunity he ultimately felt he could not decline. Moore Interview, *supra* note 32.

³⁶ See Moore, *supra* note 28, at 418; see also Telephone Interview with Paul S. Stevens, President & CEO, Invest. Co. Inst. (Dec. 11, 2013) [hereinafter Stevens Interview] (on file with author) (“Previously . . . the NSC had something called the General Counsel, but very often it was one of the senior staff members, usually the executive secretary, that held a title also as General Counsel.”).

³⁷ Moore, *supra* note 28, at 422. Kimmitt subsequently left his position within the NSC to serve as the legal advisor to the Treasury Department. *Id.* He went on to serve as U.S. Ambassador to Germany and Deputy Secretary of the Treasury. See Press Release, WilmerHale, Former Deputy Treasury Secretary Robert M. Kimmitt Returns to WilmerHale (May 5, 2009), available at <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=100743>.

³⁸ Telephone Interview with Nicholas Rostow, Dir., Ctr. Strat. Research, Inst. Nat’l Strat. Stud., Nat’l Defense U. (Nov. 22, 2013) [hereinafter Rostow Interview] (on file with author); see also *Profile of Paul Thompson*, UNDERSTANDING THE IRAN–CONTRA AFFAIR, http://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/profile-thompson.php.

legal positions existed on the NSC staff prior to the creation of the office of the Legal Adviser,³⁹ the individuals serving in these roles had always concurrently held other staff positions, effectively serving in both a client and lawyer capacity on the NSC staff.⁴⁰

During the 1980s, the NSC staff went through another period of change. The new Administration of President Reagan initially sought to downgrade what was perceived as an overly powerful role for the APNSA under previous administrations.⁴¹ This resulted in a weak and dysfunctional NSC process in the early years of the Reagan administration.⁴² Following the departure of Richard V. Allen as National Security Advisor in 1982 and the incoming of Judge William Clark as his successor, the NSC staff expanded its influence and responsibility.⁴³ Yet while the staff of the NSC grew in size and power, it continued to lack any formal, systematic legal input.⁴⁴

What resulted was a systematic failure to take legal perspectives into consideration on matters of national security. This set the stage for the development of the Iran–Contra scandal, in which high-level administration officials were determined to have violated laws and executive orders. The controversy involved the sale of arms to Iran in contravention of U.S. policy, as well as the diversion of proceeds from the arms sale to provide support to the contra rebels in

³⁹ A search of the limited files made available electronically in the archives of the Reagan Presidential Library also yielded the following individuals, listed under the areas of NSC ‘Legal Advisor’ or ‘Legal Affairs’: Grant S. Green, Peter W. Rodman, Jonathan R. Scharfen, and Peter R. Sommer. *See White House Staff and Office Files, 1981–1989*, REAGAN PRESIDENTIAL LIBRARY & MUSEUM, available at <http://www.reagan.utexas.edu/archives/textual/smofmain.html#.Uq-9lZGrmDg>.

⁴⁰ Stevens Interview, *supra* note 36.

⁴¹ *See* ROTHKOPF, *supra* note 22, at 213–14.

⁴² *Id.*

⁴³ ZEGART, *supra* note 18, at 92.

⁴⁴ Moore Interview, *supra* note 32.

Nicaragua, in clear violation of the Boland Amendment ban on aid to military activities in Nicaragua.⁴⁵

At the time of the events surrounding Iran–Contra, the legal responsibilities of NSC staff lawyers were usually limited to specific functions such as responding to information disclosure requests.⁴⁶ Moreover, lawyers serving dually in legal and staff positions were not routinely sought out for their legal advice on national security matters.⁴⁷ Indeed, in the years prior to the establishment of a Legal Adviser’s office on the staff of the National Security Council, “it is fair to say that there was no, or very little, day-to-day legal advice in the White House on national security issues.”⁴⁸ President Reagan’s White House Counsel would later recall that “[o]ne of the real problems with the Iran–Contra episode was that not only was it not well-lawyered, but that it was not lawyered in most respects.”⁴⁹

By the late 1980s, with the events of the Iran–Contra affair in public view, it became clear that the system needed to change.⁵⁰ Having championed the idea during the 1970s, and

⁴⁵ LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS xiii (1993).

⁴⁶ Moore Interview, *supra* note 32; DeRosa, *supra* note 11. Until 1996, the NSC was subject to the requirements for agency disclosure of information under the Freedom of Information Act (FOIA). *See* *Armstrong v. Executive Office of the President*, 90 F.3d 553, 567 (D.C. Cir. 1996) (holding that the NSC is not an agency for FOIA purposes).

⁴⁷ PATTERSON, *supra* note 28, at 66 (“In 1985, hunting for legal advice that would support their desire to supply the Nicaraguan contras with arms, NSC deputy assistant John Poindexter and staff member Lieutenant Colonel Oliver North went not to the junior officer who at the time was responsible for giving legal advice to the NSC staff but to ‘an odd source’: a lawyer working for the president’s Intelligence Oversight Board, a group that is independent of the NSC. According to that officer, the restrictions in the Boland Amendment did not apply to the NSC staff. This was the advice they wanted—and the rest is history.”); *see also* Harold H. Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 516 (1993) (“To my knowledge, the only two legal opinions sought by the executive branch as the affair began were a controversial opinion by the CIA’s general counsel suggesting that the President could make an intelligence finding retroactively and a cursory analysis of the applicability of the Boland amendments (which Oliver North hid in his White House safe) that was authored by an attorney who had failed the bar examination four times.”) (citations omitted); Fox Butterfield, *Key Contra Ruling Claimed by Novice*, N.Y. TIMES, June 7, 1987.

⁴⁸ DeRosa, *supra* note 11.

⁴⁹ *See* Koh, *supra* note 47, at 516 n.15 (citing interview by Vicki Quade with A.B. Culvahouse, Jr., Counsel to the President).

⁵⁰ For a brief survey of the evolution of the NSC system under President Reagan before and after Iran–Contra, see generally Paul S. Stevens, *The Reagan NSC: Before and After*, 19 PERSP. POL. SCI. 118 (1990); *see also* CONSTANTINE C. MENGES, *INSIDE THE NATIONAL SECURITY COUNCIL: THE TRUE STORY OF THE MAKING AND*

seeing a new opportunity to establish a place for legal advice and expertise on the National Security Council, Professor John Norton Moore wrote to the Tower Commission, urging them to consider the creation of a full-time legal office among the recommendations made to President Regan.⁵¹ Upon review, many of the failures that had occurred “were seen in part—maybe in large part—to have resulted from this lack of systematic availability of legal guidance” at the NSC,⁵² and Professor Moore’s recommendation was subsequently included in the final Tower Commission Report.⁵³

Thus, on March 4, 1987, the President announced his intended reforms from the Oval Office in a televised address to the nation. In his speech, the President stated that he was “adopting in total the Tower report’s model of how the NSC process and staff should work,” and that he had “created the post of NSC legal adviser to assure a greater sensitivity to matters of law.”⁵⁴ On March 31, 1987, the President issued National Security Decision Directive (NSDD) 266, implementing the reforms proposed by the Tower Commission:

The NSC staff shall include a Legal Advisor whose particular responsibility it will be to provide legal counsel to the National Security Advisor, the Executive Secretary, and the NSC staff with respect to the full range of their activities, and to assist the National Security Advisor in ensuring that legal considerations are fully addressed in the NSC process and in interagency deliberations. The NSC Legal Advisor shall be accorded access to all information and deliberations as may be required for these purposes, and shall advise the National Security Advisor and Executive Secretary as appropriate on all matters within his responsibility. He shall work cooperatively with the Counsel to the President, the

UNMAKING OF REAGAN’S FOREIGN POLICY (1988) (providing a more in-depth look at the organization and development of national security policy processes in the Reagan White House).

⁵¹ Moore Interview, *supra* note 32.

⁵² DeRosa, *supra* note 11; *see also* Moore Interview, *supra* note 32 (making the same observation).

⁵³ REPORT OF THE PRESIDENT’S SPECIAL REVIEW BOARD (TOWER COMMISSION REPORT) Part V 6 (1987) (“The Board recommends that the position of Legal Adviser to the NSC be enhanced in stature and in its role within the NSC staff.”); *see also* DeRosa, *supra* note 11 (describing John Norton Moore as “responsible for the creation of the office.”).

⁵⁴ Address to the Nation on the Iran Arms and Contra Aid Controversy, 1 PUB. PAPERS 209 (Mar. 4, 1987), *available at* <http://www.reagan.utexas.edu/archives/speeches/1987/030487h.htm>.

Legal Adviser of the Department of State, and with senior counsel to all other NSC members, advisors, and participants.⁵⁵

D. The First NSC Legal Adviser

Embodied in a Presidential Directive, the position of the NSC Legal Adviser was now formally established. Like the Office of the Legal Adviser at the U.S. Department of State, on which the new office and position was modeled, the NSC Legal Adviser's title was to be spelled with an "e."⁵⁶ Established by statute in 1931, the Office of the Legal Adviser of the State Department itself was originally based on the Legal Adviser of the British Foreign Office.⁵⁷ The English spelling was thus purposely carried over upon the creation of the new NSC Legal Adviser.

Although the existence of the office was now official, a number of questions remained for incoming National Security Advisor Frank Carlucci, who had been directed by President Reagan "to take the necessary steps" to fully adopt the reforms outlined in the Tower Commission Report.⁵⁸ Carlucci was faced with the initial task of staffing the new Legal Adviser's office. One of the issues that needed to be dealt with involved the appropriate size of the office and whether it should have additional staff. Should he appoint a single lawyer to serve as the Legal Adviser, or should the Legal Adviser have the assistance of several deputy lawyers in the office?⁵⁹ In much the same way that John R. Stevenson had done at the Department of State nearly fifteen years earlier, Carlucci sought advice on this issue by convening an informal debate between Professor John Norton Moore, who supported a broader staff, and John

⁵⁵ National Security Decision Directive 266, *Implementation of the Recommendations of the President's Special Review Board* (1987), available at <http://www.reagan.utexas.edu/archives/reference/Scanned%20NSD266.pdf>.

⁵⁶ Rostow Interview, *supra* note 38.

⁵⁷ Koh & Zelinsky, *supra* note 5, at 5.

⁵⁸ Address to the Nation on the Iran Arms and Contra Aid Controversy, *supra* note 54.

⁵⁹ Moore Interview, *supra* note 32.

Rhineland, former Deputy Legal Adviser at the Department of State, who wished to limit the office to a single individual.⁶⁰

As a general matter, determining the appropriate size of the NSC staff requires that a careful balance be struck. The staff must be large enough to have sufficient expertise to address the broad range of national security issues that arise, yet remain small enough to avoid becoming a new bureaucracy in its own right.⁶¹ Such a balance is similarly necessary with regard to the NSC Legal Adviser's office. Ultimately, it was determined that the office should remain small but be staffed by more than a single attorney. It would comprise both a Legal Adviser and a Deputy Legal Adviser. In 1987, Paul Schott Stevens⁶² became the first official Legal Adviser to the National Security Council,⁶³ and Nicholas Rostow became the first Deputy Legal Adviser.⁶⁴

But the work of the new Legal Adviser and Deputy had in fact begun even prior to formally assuming their respective roles. Working together, Stevens and Rostow lent their hands in drafting Decision Directive 266 that formally established the office.⁶⁵ Upon beginning their new positions, they continued to focus their attention on preparing and implementing a series of

⁶⁰ *Id.*

⁶¹ CHRISTOPHER C. SHOEMAKER, *THE DECISIONAL DILEMMA: STRUCTURE, FUNCTION, AND THE NSC STAFF* 112 (U.S. Army War College 1989).

⁶² A graduate of the University of Virginia School of Law, Stevens had previously been a student in Professor John Norton Moore's National Security Law course at UVA, the first law school course of its kind in the nation. Moore Interview, *supra* note 32.

⁶³ Press Release, Appointment of Eight Special Assistants to the President for National Security Affairs (Feb. 11, 1987), available at <http://www.reagan.utexas.edu/archives/speeches/1987/021187e.htm> (announcing the appointment of eight members of the NSC staff as Special Assistants to the President for National Security Affairs, including Paul Schott Stevens as NSC Legal Adviser, reporting to National Security Advisor Frank Carlucci); see also *Former NSC Legal Adviser Paul Stevens Named New Standing Committee Chair*, ABA NAT'L SECURITY L. REP. 1 (1995) ("[H]e served as the first Legal Adviser to the National Security Council in 1987.").

⁶⁴ Rostow Interview, *supra* note 38.

⁶⁵ *Id.*

other National Security Decision Directives on behalf of President Reagan.⁶⁶ Reflecting on the importance of the new role in 1988, Stevens observed the following:

The President has charted a legal advisor's office as an important new component of the NSC staff. The counsel that office provides to the National Security Advisor, the insight it is accorded into the process of policy deliberations, and the relationship it maintains with the interagency legal community—all these have helped to ensure, as the President intended, “greater sensitivity to matters of law” in the workings of the NSC.⁶⁷

Stevens' time as the Legal Adviser, while historically significant, was short-lived. In December of that same year, Stevens became the NSC Executive Secretary and was succeeded by his Deputy Legal Adviser Nicholas Rostow, who had also served as Counsel to the Tower Commission during his tenure as special assistant to the Legal Adviser of the State Department.⁶⁸ Rostow would maintain the role as the NSC Legal Adviser until April 1993.⁶⁹

II. Functions and Responsibilities of the Legal Adviser

A. The Work of the Legal Adviser

The primary function and responsibility of the NSC Legal Adviser is to provide legal advice to the President, the National Security Council, and the NSC staff on critical matters

⁶⁶ This includes NSDD 276 outlining the NSC interagency process and NSC 286 on the approval and review of special activities (i.e., covert action). Paul S. Stevens, *Room for “Maneuver”*: Some Policy Issues in the Iran–Contra Affair, 11 HOUS. J. INT’L L. 159, 159 n.1 (1988). The text of NSDD 276 has been declassified in full while NSDD 286 remains classified in part. See *National Security Decision Directives, 1981–1989*, REAGAN PRESIDENTIAL LIBRARY & MUSEUM, available at

<http://www.reagan.utexas.edu/archives/reference/NSDDs.html#.UpjZd5GrmDh>.

⁶⁷ Stevens, *supra* note 66, at 160 (footnote omitted).

⁶⁸ Press Release, Appointment of Charles Nicholas Rostow as Special Assistant to the President for National Security Affairs (Dec. 14, 1987), available at <http://www.reagan.utexas.edu/archives/speeches/1987/121487b.htm>. (“The President today announced the appointment of Charles Nicholas Rostow as Special Assistant to the President for National Security Affairs at the White House. He will also serve as Legal Adviser to the National Security Council.”).

⁶⁹ In 1993, the role was assumed by Alan J. Kreczko. Rostow Interview, *supra* note 38.

affecting national security.⁷⁰ The role frequently requires the interpretation of both foreign and domestic law as well as review of any legislative proposals that may substantially affect national security interests.⁷¹ Former NSC Legal Adviser James E. Baker describes the office as follows:

At the NSC, . . . counsel traditionally coordinate the provision of advice to meetings of the Principals and Deputies Committees, among other tasks, and, where appropriate, attend such meetings to field questions and identify issues. . . . In addition, NSC counsel provide internal legal advice to the president, national security adviser, and NSC staff as well as review and write memoranda to the president, issue spotting and discussing the legal issues raised.⁷²

In cases where legal policy is also national security policy, the NSC Legal Adviser must be prepared to weigh in on policy choices, advising clients on the implications of specific options available within what might be an array of legally permissible alternatives.⁷³

In addition to advising and assisting on national security law matters, the Legal Adviser to the National Security Council is also responsible for other legal functions traditionally associated with agency general counsels, including aspects of fiscal law, personnel issues, and ethics advice.⁷⁴ These responsibilities also include drafting and reviewing legal documents,

⁷⁰ DeRosa, *supra* note 11 (describing the roles and responsibilities of the NSC Legal Adviser); *An Interview with NSC Legal Adviser Alan Kreczko*, ABA NAT'L SECURITY L. REP. 2 (1995) [hereinafter Kreczko ABA Interview] (describing the mission and role of the office within the Clinton NSC and stating that the most important role of the NSC Legal Adviser is to "provide legal advice to the National Security Advisor and NSC staff on national security issues under consideration.").

⁷¹ DeRosa, *supra* note 11.

⁷² BAKER, *supra* note 16, at 312; *see also* John Bellinger, *The Obama Administration's National Security Legal Team*, LAWFARE (Sept. 4, 2013), <http://www.lawfareblog.com/2013/09/the-obama-administrations-national-security-legal-team/> ("The NSC Legal Adviser . . . coordinates national security legal processes (including the preparation of war powers reports), serves as the national security lawyer for the President and the National Security Advisor, and is often the only staff lawyer to attend NSC meetings . . .").

⁷³ BAKER, *supra* note 16, at 313 ("Application of national security law involves the rapid review and identification of legal issues embedded in policy options, policy decisions, and policy statements.").

⁷⁴ James E. Baker, C.J., C.A.A.F., *The Role of the NSC Legal Adviser*, Remarks at the 21st National Security Law Institute (June 10, 2013) [hereinafter Baker, *Role of NSC Legal Adviser*] (on file with the Ctr. for Nat'l Security L., U. Va. Sch. L.) (explaining that the NSC Legal Adviser, in addition to formally advising and assisting the President and his principals, also serves an equivalent function of an agency general counsel).

reviewing and commenting on proposed legislation, and responding to legal inquiries from other components in government.⁷⁵

Described as “the hardest-working but least-known member of the Administration’s national security legal team,”⁷⁶ the role of NSC Legal Adviser is highly demanding and carries an enormous amount of responsibility. The Legal Adviser can typically be expected to “work[] 16–18-hour days, seven days a week.”⁷⁷ Endurance is therefore an absolutely essential trait for any NSC Legal Adviser, who must be capable of carrying out the same task at the same level of performance at both 9:00 a.m. and 3:00 a.m.⁷⁸

As is the nature of national security practice in general, lawyers in this role must also be able to fulfill their duties under considerable temporal and institutional pressures. Thus, being the Legal Adviser to the National Security Council demands more than a brilliant legal mind. In the type of environment in which the NSC Legal Adviser and other senior national security lawyers operate, personality is just as important as the ability of one’s intellect.⁷⁹ The skill of personality management, both of one’s own and that of others, is thus essential.⁸⁰

To succeed in the position, the lawyer must also be able to adapt to rapid, combat-style decision-making. Although the federal government is filled with many extremely intelligent attorneys, “not all lawyers are capable of making a decision on operational timelines.”⁸¹ As characterized by former NSC Legal Adviser James E. Baker, national security lawyers have to be

⁷⁵ BAKER, *supra* note 16, at 313.

⁷⁶ Bellinger, *supra* note 72.

⁷⁷ *Id.*; *see also* DeRosa, *supra* note 11 (describing endless, frantic phone calls and regular meetings with lawyers from all of the other relevant national security offices within the executive branch).

⁷⁸ *See* BAKER, *supra* note 16, at 314.

⁷⁹ *Id.* at 313.

⁸⁰ James E. Baker, *Process, Practice, and Principle: Teaching National Security Law and the Knowledge that Matters Most*, 27 GEO. J. LEGAL ETHICS 163, 179 (2014) (“Ego subordination and its inverse, personality management, are critical traits if one believes in the meaningful application of law and process.”).

⁸¹ James E. Baker, *National Security Process and a Lawyer’s Duty: Remarks to the Senior Judge Advocate Symposium*, 173 MIL. L. REV. 124, 129–30 (2002); *see also* BAKER, *supra* note 16, at 313.

prepared to pull the figurative trigger when necessary: “[Y]ou will not have enough time, you will not know all the law, you will not know all the facts. What you will know is you have to decide *now*.”⁸²

NSC Legal Advisers, like the wider body of the National Security Council staff on which they serve, also represent a variety of backgrounds and professional experiences. Lawyers serving in the NSC Legal Adviser’s office are drawn from different areas of government and carry unique legal expertise in areas relating to foreign, international, and military law. The experiences of previous Legal Advisers have included positions at the Departments of Justice, State, Defense, Treasury, and the CIA, as well as a number of special congressional committees. James E. Baker, who served as the NSC Legal Adviser under President Clinton, explains that going into the U.S. Marine Corps provided perhaps the best training for becoming a national security lawyer by teaching him how “to step outside of [his] own personality and fulfill the mission, which is to speak up at a Principals meeting if need be.”⁸³

Like the role of the NSC itself, which has historically shifted from administration to administration to accommodate the style and needs of the President whom it serves, the roles and responsibilities of the Legal Adviser’s job have also changed over time. The role varies, for instance, depending on whether it is viewed as facilitating the interagency process or as a source of rival legal advice, and on the degree to which the White House Counsel assumes a national security role.⁸⁴ Ultimately, the function and, more importantly, the degree of access to the President as the ultimate client, will be determined by the role that the President and his National

⁸² Baker, Role of NSC Legal Adviser, *supra* note 74 (providing a typical example of what he calls the “5-minute issue” that national security lawyers such as the NSC Legal Adviser will face).

⁸³ *Id.*; *see also* Baker, *supra* note 81, at 129 (describing his view that “a Judge Advocate should always serve in the NSC legal office.”).

⁸⁴ BAKER, *supra* note 16, at 312. The relationship between the NSC Legal Adviser and the White House Counsel is discussed *infra* Part III.A.

Security Advisors desire the NSC Legal Adviser to fulfill.⁸⁵ In the Clinton administration, for example, the NSC Legal Adviser played the central role of providing national security legal advice within the Administration.⁸⁶ In contrast, during the George W. Bush administration, the NSC Legal Adviser's office was no longer the singular source from which coordinated legal advice on national security matters emanated.⁸⁷

The position of NSC Legal Adviser also varies in its responsibility to fulfill other discretionary roles assigned by the particular administration under which the Legal Adviser serves. One such example is the role of factual ombudsman, ensuring that all relevant, known facts be presented to the decision maker. This includes ensuring the decision maker's awareness of instances when certain facts are not known or when disagreement about certain facts or policy choices exists within the lower bureaucratic ranks.⁸⁸ This is, in part, a matter of the lawyer fulfilling his or her ethical duties.⁸⁹ Nonetheless, the extent to which the NSC Legal Adviser will, or should, perform such a role is a core question to be determined by each administration.

B. Coordinating the Interagency Legal Process

One of the most critical roles of the NSC Legal Adviser is the coordination of interagency legal advice on national security matters. As explained by former NSC Legal Adviser Alan Kreczko, “[m]ore and more foreign policy issues require coordination through the NSC process. Many of these issues have [a] legal component, whether constitutional, statutory, international, or all three. The NSC principal or staffer who is chairing that policy coordination

⁸⁵ *Id.* at 311 (“Each president, agency head, and commander will adopt his or her own approach to legal advice, ranging from active engagement with their lawyers and an understanding of the law to avoidance.”).

⁸⁶ *See* PATTERSON, *supra* note 28, at 67 (“Is it indispensable for the national security assistant to have his own legal adviser? The Clinton administration thought so.”).

⁸⁷ *See infra* Part II.B.

⁸⁸ Baker, *Role of NSC Legal Adviser*, *supra* note 74; *see also* Baker, *supra* note 81, at 179.

⁸⁹ Baker, *supra* note 81, at 182 (“By ethics, I mean a commitment to doing the right thing the right way. . . . That means, for example, if someone ought to know something, they should be told, whether the law requires it or not.”).

needs a source of coordinated legal advice on those issues.”⁹⁰ This process, known informally as the Lawyers Group, is primarily designed to ensure that presidential decisions on matters of national security are subject to interagency legal review.

The Lawyers Group process was first established by a classified Presidential Directive providing for interagency legal review of decisions on covert action.⁹¹ It set out a formal process whereby a group of top agency lawyers was required to meet to discuss any legal issues related to proposed covert actions. In addition to the National Security Council Legal Adviser, the directive specified that members of the group would include the Central Intelligence Agency General Counsel, the Department of State Legal Adviser, the General Counsel of the Department of Defense, the Legal Adviser to the Chairman of the Joint Chiefs of Staff, and the Department of Justice Office of Legal Counsel.⁹²

In practice, the function and purpose of this group has varied from one administration to another. While initially directed to review legal issues relating to covert actions, the subject matter addressed by the Lawyers Group has expanded over time. Because national security issues frequently involve matters of concern to a number of departments and agencies, during the 1990s, the NSC Legal Adviser often led interagency studies on legal issues in order to provide principals with a consensus of legal advice and options.⁹³

⁹⁰ Kreczko ABA Interview, *supra* note 70, at 7.

⁹¹ DeRosa, *supra* note 11 (“The Lawyers’ Group is actually set out formally in a classified Presidential Directive with respect to the covert action process.”).

⁹² *Id.* The General Counsel of the Office of the Director of National Intelligence is now also included as a regular member. *Id.*

⁹³ Kreczko ABA Interview, *supra* note 70, at 2.

Today, the Lawyers Group may be called on to meet and discuss any legal issue related to national security that will ultimately be going to the President for a decision.⁹⁴ They include, for example, legal issues related to operational, cyber, treaty, foreign aid, war powers, intelligence, and surveillance subjects.⁹⁵ The group also fields legal questions that arise in the context of global and regional subject matters significant to U.S. foreign policy and national security.⁹⁶ An issue may also be pulled and sent to the Lawyers Group for consideration at any point during the national security policymaking process, whether at the level of the Interagency Policy Committee (IPC), Deputies Committee (DC), or Principals Committee (PC).⁹⁷ When this occurs, the NSC Legal Adviser is responsible for convening the general counsels from the necessary agencies in order to talk through the various issues and reach a consensus about the legal questions presented.⁹⁸ The NSC Legal Adviser then conveys the legal advice formulated through this process to the White House. The Legal Adviser to the National Security Council thus acts as an important conduit whereby legal advice can flow from the various agency counsels directly into the national security policy process.⁹⁹ In doing so, Baker has noted, the office is “an important avenue by which agency counsel can provide meaningful input into presidential decisionmaking . . . [as well as] the interagency legal community’s best opportunity

⁹⁴ DeRosa, *supra* note 11 (“The [Presidential D]irective requires this group to meet to discuss legal issues related to covert action, but at least in the two administrations that I’ve worked in, this Lawyers Group, or subgroups of it, have been used regularly to discuss the full spectrum of national security legal issues.”).

⁹⁵ *Id.*

⁹⁶ *Id.* (providing examples that include legal issues on U.S. national security interests related to Syria, Libya, Somalia, and Egypt, among others).

⁹⁷ *Podcast Episode #8: Brigadier General Richard Gross on the Role of the Legal Adviser to the Chairman of the Joint Chiefs of Staff*, LAWFARE (Apr. 9, 2012) [hereinafter *Gross, LAWFARE*] (describing how the Lawyers Group, run by the NSC Legal Adviser, considers issues within the context of the larger interagency national security policy process).

⁹⁸ *Id.*

⁹⁹ DeRosa, *supra* note 11 (“An office that small couldn’t possibly be the source of expertise on all of these issues, and therefore the role of the Legal Adviser is first to identify and anticipate what issues are going to need to go through this process and then to coordinate and develop the legal advice he or she will give to the President and the National Security Advisor and others, and then give that advice.”).

to have ‘eyes on’ the presidential memo or meaningful input into a Principals or Deputies Committee meeting.”¹⁰⁰

There are many benefits to having such a process. Most important, and perhaps most obvious, is that such a process results in providing elite decision makers with better legal advice. In particular, the simple upside of the Lawyers Group is that the President ultimately receives better legal advice on matters of national security.¹⁰¹ As former NSC Legal Adviser Alan Kreczko explains, “with more lawyers working an issue, bringing different perspectives, I think we get better legal conclusions.”¹⁰² Similarly, former NSC Legal Adviser Mary DeRosa states that “there is just no question about it in my mind, that the legal advice is better if it is developed with input from a broader group, with different perspectives and a broader expertise.”¹⁰³

Because decision makers rely on legal advice and interpretations when making key policy choices affecting national security, having a process that generates better legal advice also leads to better national security decisions and ultimately, better national security outcomes.¹⁰⁴ Moreover, because legal opinions can provide a powerful means of operational accountability for intelligence and military actors in the field,¹⁰⁵ it is vital that they be subjected to proper scrutiny. In addition to the improved decision making that flows from the Lawyers Group, another benefit is the greater legitimacy attributed to decisions that are subject to a process of interagency coordination and review.¹⁰⁶ Having consensus and support from other agency lawyers on a

¹⁰⁰ Baker, *supra* note 81, at 128.

¹⁰¹ DeRosa, *supra* note 11.

¹⁰² Kreczko ABA Interview, *supra* note 70, at 2.

¹⁰³ DeRosa, *supra* note 11.

¹⁰⁴ BAKER, *supra* note 16, at 1–2 (observing that “good process results in better decisions” and that “the good faith application of law results in better security.”).

¹⁰⁵ GOLDSMITH, *supra* note 4, at 23 (“[A]fter 9/11, [John] Yoo . . . wrote opinion after opinion approving every aspect of the administration’s aggressive antiterrorism efforts. These opinions gave the counterterrorism officials the comfort of knowing that they could not easily be prosecuted later for the approved actions.”).

¹⁰⁶ DeRosa, *supra* note 11.

particular legal question, Kreczko notes, can “fortify a general counsel who may be being pressed on his or her legal conclusion for policy reasons.”¹⁰⁷

On the other hand, the process of interagency legal coordination on matters of national security is not always easily achieved in practice. Indeed, such a process has important downsides that must also be weighed. For one thing, the legal questions considered by the NSC-led interagency Lawyers Group often involve extremely sensitive issues; a larger group means a larger possibility for disclosure of sensitive information. Although the Lawyers Group maintains a strong record of discretion, there is nevertheless a general reluctance for allowing highly sensitive issues to be discussed in a broader group setting.¹⁰⁸

It also takes time to convene the interagency Lawyers Group to address an issue, and it can quickly complicate the process of achieving a collective legal view when agency counsel fundamentally disagree on an issue.¹⁰⁹ In such cases, the NSC Legal Adviser has in the past requested a formal opinion from the Office of Legal Counsel at the Department of Justice, which has the ability to provide authoritative advice in response to legal issues when agency counsels are unable to agree.¹¹⁰ The OLC’s role in settling interagency squabbles is usually viewed as determinative, and its opinions are considered binding on the rest of the executive branch.¹¹¹ It

¹⁰⁷ Kreczko ABA Interview, *supra* note 70, at 2.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Gross, LAWFARE, *supra* note 97. Even in the absence of disagreement, the Lawyers Group will sometimes request a legal opinion from OLC in order to have it on record. *Id.*

¹¹¹ Walter E. Dellinger et al., Principles to Guide the Office of Legal Counsel (2004), *reprinted in* Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1603 app. 2 (2007) (“OLC’s legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President.”); *see also* Morrison, *supra* note 6, at 1464 (“OLC’s legal advice is treated as binding within the Executive Branch until withdrawn or overruled.”). The controversial role of the OLC during the George W. Bush administration has led some commentators to question whether this is a valuable or proper role for OLC to play. *See, e.g.*, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 143 (2010) (criticizing the role of a “politicized” OLC and a “superpoliticized” White House and proposing the creation of a supreme executive tribunal with the authority to conclusively rule on legal questions within the executive branch); Neal Katyal, *Internal Separation of Powers: Checking Today’s Most*

has previously been noted, however, that the relationship between OLC and White House lawyers is unique in comparison to that of other agency clients.¹¹²

This highlights a basic tension that exists between the role of the NSC Legal Adviser as the coordinator of the national security interagency legal process and the authority of OLC, delegated by the Attorney General as the executive branch's top lawyer—to issue binding legal opinions. Even if OLC is properly viewed as having the last word on certain legal issues, should this also be the case when participating in informal discussions for the purpose of reaching a consensus on a difficult national security or international legal issue? The role of OLC in this context is generally not well settled and is a complication that arises with a fair degree of frequency in the context of the Lawyers Group process.¹¹³ It also raises the question of what relationship, if any, the NSC Legal Adviser should have with the Attorney General.¹¹⁴

Client perceptions about the need for timeliness in making decisions can also be an extremely difficult barrier to overcome. For many policymakers, it is not the Lawyers Group itself that they oppose, but rather the time it would take to resolve any potential legal objection or

Dangerous Branch from Within, 115 YALE L. J. 2314, 2337 (2006) (arguing in favor of removing from OLC the function of adjudicating interagency legal disputes).

¹¹² Morrison, *supra* note 6, at 1468 (“The White House is not just any other client, and so the nature of—and risks posed by—communications between it and OLC on issues OLC is analyzing deserve special attention.”).

¹¹³ DeRosa, *supra* note 11; *see also* Rao, *supra* note 9 at 246 (“In domestic matters, if OLC’s opinion is sought, its ability to issue binding interpretations for the executive branch is relatively unchallenged, but it faces greater competition from other agencies with regard to international law. For instance, OLC participates in the interagency process run by the National Security Council legal advis[e]r, in which agencies can work through their differences about the interpretation and application of international law. A number of legal disputes are resolved informally in this process. If agreement cannot be reached, OLC might be called upon to resolve a dispute between agencies about the proper application of international law. Yet the State Department legal adviser and counsel from other agencies will often resist this role for OLC and press their own institutional competence, expertise, and authority in matters of foreign and military legal policy.”).

¹¹⁴ This is ultimately an institutional and policy choice to be made by each administration, but a look to past practice can be useful in determining how the relationship between the NSC Legal Adviser and the Department of Justice should be conducted. In the Clinton administration, for example, National Security Advisor Anthony Lake and Deputy National Security Advisor Sandy Berger agreed from the beginning that NSC Legal Adviser James E. Baker would serve as the informal ambassador to the Department of Justice and Attorney General Janet Reno. *See* Comments at Investiture Proceedings of Judge James E. Baker, 54 M.J. LXIX–LXXVIII (2000).

disagreement.¹¹⁵ This reluctance to welcome lawyers into the decision-making room is partly a reflection of concerns about “lawyer creep,” that is, “the legal version of ‘mission creep,’ whereby one legal question becomes seventeen, requiring not one lawyer but forty-three to answer.”¹¹⁶ This can be especially true in military contexts, when issues are often presented for decision on much shorter timelines.¹¹⁷ On a regular day, taking the time to vet a legal issue through the Lawyers Group might seem like an unnecessary delay of business.¹¹⁸ In times of actual crisis, one legal scholar has noted, “focusing on legality can be viewed as twiddling one’s thumbs while Rome burns.”¹¹⁹ In the face of resistance, the Legal Adviser must, as part of his or her duty, have the ability to convince the national security client that the process makes sense and adds value.¹²⁰ The lawyer who can explain how legal values are also national security values, and how good legal process permits both “the faithful application of the law and the accomplishment of the security objectives,” is the one who will be routinely invited back into the room where national security decisions are made.¹²¹

It is of course ultimately the choice of the President to determine how the national security process will be run and what players will be involved.¹²² Yet the risks of foregoing

¹¹⁵ BAKER, *supra* note 16, at 124.

¹¹⁶ *Id.* at 314.

¹¹⁷ See JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 140 (2012) (“Consultation with a lawyer before firing a weapon can obviously only go so far. A pilot in the sky or a soldier monitoring a checkpoint or clearing a village will not always have time to seek legal advice before using fire . . .”).

¹¹⁸ Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 *INDIANA L. J.* 1297, 1298 (2006) (“From the viewpoint of the executive, law can seem to be an inconvenient obstacle to the executive’s ability to get things done.”).

¹¹⁹ *Id.*

¹²⁰ BAKER, *supra* note 16, at 124 (“Process need not be antithetical to timely decision, operational timelines, or to secrecy. Process must find the right balance between speed and strength, secrecy and input. But process can always meet deadlines.”).

¹²¹ *Id.* at 323–24.

¹²² WHITTAKER ET AL., *supra* note 19, at 12 (“[O]ne fundamental principle underlies the actual operation of the national security structures of all Presidents: the operation of the national security policy process is the result of what the President decides. Those who wish to understand the operations of the NSC and its NSS staff must recognize that regardless of organizational charts or procedural memos produced by each administration, the actual

process can lead to grave consequences, and Presidents eschew good process at their peril.¹²³ The George W. Bush administration, for example, opted for a less inclusive legal policy process centered within the office of the Vice President’s Legal Advisor.¹²⁴ Although the formal NSC Lawyers Group continued to meet regularly to review legal issues related to sensitive intelligence matters, following the attacks of 9/11, an ad hoc group of influential administration lawyers, known as the “war council,” simultaneously began to meet in secret to review military legal issues.¹²⁵ In doing so, the Administration displayed a notable reluctance to seek out different legal views, and many discussions, especially with regard to military legal issues, were confined to this tight circle of executive branch lawyers.¹²⁶

In particular, the Administration’s legal interpretation of permissible methods of interrogation, leaked in 2004 as part of the infamous OLC torture memo controversy,¹²⁷ became

processes are shaped by what the POTUS wants; the authorities he delegates to the various principals, staffs, and organizations; and how his staff conducts its business according [to] their judgments about what the President most needs in terms of policy development, implementation and decision support.”).

¹²³ Ivo H. Daalder & I.M. Destler, *In the Shadow of the Oval Office: The Next National Security Adviser*, 88 FOREIGN AFF. 114, 129 (2009) (“The importance of an effective policy process cannot be underestimated. Its absence, history shows, can be truly disastrous.”).

¹²⁴ DeRosa, *supra* note 11 (describing the factors at play in the Bush administration as a “perfect storm” that came together to make a truly consultative process like the Lawyers’ Group impossible). Prior to the experiences of the Bush administration, the legal advisor to the Vice President did not participate actively in national security legal issues. BAKER, *supra* note 16, at 59.

¹²⁵ Email from John B. Bellinger III, Partner, Arnold & Porter LLP, to author (June 11, 2014, 08:39 EST) (on file with author). These lawyers included the Vice President’s Legal Counsel David Addington, President Bush’s White House Counsel Alberto Gonzales and his deputy Timothy Flanigan, Department of Defense General Counsel William Haynes, and OLC’s John Yoo. GOLDSMITH, *supra* note 4, at 22.

¹²⁶ GOLDSMITH, *supra* note 4, at 22 (“The ‘War Council’ . . . met every few weeks . . . [to] plot legal strategy in the war on terrorism, sometimes as a prelude to dealing with lawyers from the State Department, the National Security Council, and the Joint Chiefs of Staff who would ordinarily be involved in war-related interagency legal decisions, and sometimes to the exclusion of the interagency process altogether.”); MICHAEL P. SCHARF & PAUL R. WILLIAMS, *Lawyering the Treatment of Detainees in the War on Terrorism*, in SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 181, 182–83 (2010) (“Rather than vet questions related to the interpretation of international law through the legal departments of all the relevant agencies, much of the legal work related to the war on terrorism was done by a self-styled “war council” . . . Notably absent from the group were the State Department Legal Adviser, William Taft, and National Security Council (NSC) Chief Counsel, John Bellinger . . .”).

¹²⁷ See Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Asst. Attorney General, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A*, Aug. 1, 2002, available at <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>.

perhaps one of the clearest examples of coordination and process failures in the national security legal process during this time. Rather than seek diverse input and coordinated legal review of its interpretations, the White House undertook deliberate efforts to prevent the OLC memos from being subject to interagency legal review.¹²⁸ In this instance, as with others before it,¹²⁹ the choice to forego an inclusive process resulted in some very unfortunate outcomes. Many feel that “the torture debacle . . . might have been avoided had the executive systematically welcomed different views and fostered dissent in the legal decision-making process.”¹³⁰ As indicated by former NSC Legal Adviser Nicholas Rostow,

[I]f they had had a decent process, that mistake never would have happened and the consequences would not be what they are. But they didn’t want a process. They didn’t want to hear from the Judge Advocate Generals. They didn’t want to hear from Colin Powell and his lawyer. There were people they liked, who agreed with them, and there were people they didn’t like because they didn’t agree with them. And they kept them out of meetings.¹³¹

In the case of the Administration’s decision to set up military tribunals, John Bellinger, who served as the Legal Adviser to the National Security Council at the time that decision was made, recounts the following:

A small group of administration lawyers drafted the president’s military order establishing the military commissions, but without the knowledge of the rest of the government, including the national-security adviser, me, the secretary of state, or even the C.I.A. director. And even though many of the substantive problems

¹²⁸ GOLDSMITH, *supra* note 117, at 97 (describing the White House’s insistence that OLC’s August 2002 legal opinions interpreting the torture statute not be shown to lawyers at the State Department as a major departure from bureaucratic protocol).

¹²⁹ An interesting parallel can be drawn between the Bush White House’s reliance on John Yoo for legal interpretation to the exclusion of other staff lawyers experienced in national security and international law practice, and Reagan NSC staffers’ decision to turn to Bretton Sciaroni, a novice lawyer from the President’s Intelligence Oversight Board, as the only source of legal justification for providing the military aid to Nicaraguan Contras that Congress had explicitly prohibited. See Ken Silverstein, *America’s Fixer in Cambodia*, SALON (Oct. 31, 2011), http://www.salon.com/2011/11/01/americas_fixer_in_cambodia/ (“Like John Yoo and other conservatives on whom the Bush administration relied for the flimflam needed to justify torturing terrorism suspects in violation of the Geneva Convention, Sciaroni was a loyalist who the Reagan administration knew would reach the conclusion it wanted.”).

¹³⁰ Pillard, *supra* note 118, at 1297–98.

¹³¹ Rostow Interview, *supra* note 38.

with the military commissions as created by the original order have been resolved by Congress in response to the Supreme Court's decision in the *Hamdan* case, we have been suffering from this original process failure ever since.¹³²

The function of the National Security Council Legal Adviser as a mechanism for incorporating coordinated independent legal advice into the national security policymaking process was thus subverted. While it is the President's choice whether to use the NSC Legal Adviser in a coordinating capacity or not, it is a role that future administrations should consider carefully before setting aside.¹³³

III. Contemporary Issues

A. Wearing Two Hats

Because the office of the National Security Council Legal Adviser exists within the greater structure of the Executive Office of the President alongside other White House lawyers, its role and function in relation to the White House Counsel can be difficult to define and indeed has varied from administration to administration.¹³⁴ Some have noted that the relationship between the NSC Legal Adviser and the White House Counsel's office depends in part on the level of interest of a particular White House Counsel in national security legal issues.¹³⁵

¹³² Cullen Murphy & Todd S. Purdum, *Farewell to All That: An Oral History of the Bush White House*, VANITY FAIR (Feb. 2007), <http://www.vanityfair.com/politics/features/2009/02/bush-oral-history200902> (quoting interview with John Bellinger).

¹³³ BAKER, *supra* note 16, at 100 (“[P]ractice suggests that there are ingredients organic to good process, notwithstanding a tendency of successive administrations to cast themselves in contrast to their predecessors. Administrations ignore these core ingredients at their peril and the public's peril.”).

¹³⁴ *Id.* at 311 (“Traditionally, lawyers for the president engaged in national security law have included the counsel to the president and the National Security Council's legal adviser. Practice varies as to the relative role and weight of each and the extent to which other White House lawyers, such as the deputy White House counsel, are involved in national security decision-making, if at all.”).

¹³⁵ DeRosa, *supra* note 11 (discussing the changing relationship of the Legal Adviser vis-à-vis the White House Counsel in successive administrations and explaining that there are also “just differences in interest levels of White House Counsels”); Kreczko ABA Interview, *supra* note 70, at 6 (“[T]he particulars of the relationship vary somewhat with the interests of the Counsel. Lloyd Cutler, for example, had a particular interest in intelligence matters; Ab Mikva, in legislative and constitutional matters; and Bernie Nussbaum, in Presidential prerogative.”).

Upon the creation of the office in 1987, one of the first things NSC Legal Adviser Paul Stevens and Deputy Legal Adviser Nicholas Rostow set about to do was to establish a relationship of independent coordination with the office of the Counsel to the President.¹³⁶ Indeed, Rostow credits his and Stevens' ability to establish and maintain the independence of the NSC Legal Adviser's office vis-à-vis the Counsel to the President in part to their personal relationship with then Counsel to the President Arthur B. ("A. B.") Culvahouse, with whom they both got along very well.¹³⁷

The official title of the Legal Adviser, which has likewise varied over time, provides some insight into the relationship between these two offices. When the office was first created, the Legal Adviser was officially known as the Special Assistant to the President and Legal Adviser to the National Security Council, a title reflective of the reporting structure associated with the role.¹³⁸ The Legal Adviser was to report directly to the National Security Advisor.¹³⁹ This structure persisted through the Clinton administration.¹⁴⁰ A 1995 interview of then NSC Legal Adviser Alan Kreczko conducted by Paul Stevens provides insight on the office's continued ability to function independently during its first decade of existence:

Stevens: Typically, the NSC Legal Adviser has a very close working relationship with the White House Counsel and his staff. The matters in which they work overlap in many important respects. How would you characterize this relationship currently?

Kreczko: We have been very fortunate in our relationship with the White House Counsel; each has been extremely supportive of our work. As a general matter,

¹³⁶ Rostow Interview, *supra* note 38.

¹³⁷ *Id.*; *see also* Stevens Interview, *supra* note 36 (recalling that he was very fortunate that during most of his time as NSC Legal Adviser, A.B. Culvahouse was Counsel to the President, and stating that they were able to form a very strong working relationship).

¹³⁸ *See* Stevens Interview, *supra* note 36 (recalling his official title and reporting structure).

¹³⁹ *Id.*

¹⁴⁰ *See* BAKER, *supra* note 16, at 379 n.2 ("During the Clinton Administration the legal advisor reported to the national security advisor, and operated independent from, but in coordination with, the counsel to the president, the president's senior legal advisor."); DeRosa, *supra* note 11 ("[I]n my experience during the Clinton Administration, the NSC Legal Adviser's office was entirely separate . . . [A]t that time it wasn't any kind of direct report.").

our work overlaps less than you might expect. The Counsel has expected the NSC lawyers to handle the national security legal work in the White House, keeping him informed of significant legal issues we are working. In particular, if a policy issue with a significant legal component is going to the President, we ensure that the Counsel concurs in our characterization of the legal issues.¹⁴¹

During the Administration of George W. Bush, the reporting structure associated with the NSC Legal Adviser shifted dramatically. With the new official title of Senior Associate Counsel to the President and Legal Adviser to the National Security Council, the Legal Adviser was now required to report directly to both the National Security Advisor and the White House Counsel's Office.¹⁴² This practice was continued into the Obama administration,¹⁴³ though the position was again renamed to the current title of Deputy White House Counsel and National Security Council Legal Adviser.¹⁴⁴

Although the change initiated by the Bush administration represented the first time the NSC Legal Adviser was placed in such a dual appointment structure,¹⁴⁵ other lawyers in the office of the NSC Legal Adviser had in fact previously been required to wear two hats. During the George H.W. Bush administration, National Security Advisor Brent Scowcroft agreed to allow White House Counsel C. Boyden Gray to dually appoint Rostow's deputy, Stephen

¹⁴¹ Kreczko ABA Interview, *supra* note 70, at 6; *see also* Rostow Interview, *supra* note 38 (noting that his successor, Alan J. Kreczko's relationship with then White House Counsel Bernard W. Nussbaum contributed to a very good division of labor between foreign and national security legal policy and domestic legal policy matters).

¹⁴² John B. Bellinger, *The Path to L*, in SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 33, 34 (Michael P. Scharf & Paul R. Williams eds., 2010) (“[I]n January 2001, I was recommended to and selected by then-Counsel to the President Alberto Gonzales and then-National Security Advisor Condoleezza Rice to serve as Legal Adviser to the NSC, with a joint appointment in the White House Counsel's Office as Senior Associate Counsel to the President.”).

¹⁴³ Daniel Klaidman, *Avril Haines, The Least Likely Spy*, NEWSWEEK (June 26, 2013), <http://mag.newsweek.com/2013/06/26/avril-haines-the-least-likely-spy.html> (profiling Avril D. Haines, who was then serving as the NSC Legal Adviser, and describing White House Counsel Kathryn Ruemmler as “Haines's current boss”).

¹⁴⁴ DeRosa, *supra* note 11.

¹⁴⁵ *Id.* (describing the dual-reporting situation of the NSC Legal Adviser initiated during the Bush administration as the first time the NSC Legal Adviser was required to report through the White House Counsel's Office).

Rademaker.¹⁴⁶ Thus, from 1989 to 1992, Rademaker held simultaneous appointments as Associate Counsel to the President and Deputy Legal Adviser to the National Security Council.¹⁴⁷ Rostow recalls that although he remained independent as the NSC Legal Adviser, maintaining an overall ability to focus on foreign and national security law and legal policy issues, Rademaker was frequently asked by the Counsel to the President to perform duties typical of a White House Associate Counsel.¹⁴⁸

Determining the proper role of the National Security Council Legal Adviser in relation to the White House Counsel's office has proven to be a particular point of contention, and views vary significantly on whether the NSC's lawyer should wear the "dual hat" of Legal Adviser to the National Security Council and Deputy White House Counsel.¹⁴⁹ Former NSC Legal Advisers have themselves come out on quite opposite sides of the question. On one hand, wearing two hats has the potential advantages of providing more legitimacy to the position, allowing it to be taken more seriously and giving the NSC Legal Adviser greater access to relevant White House players. Having a seat on the team at the White House Counsel's Office may also work to reduce the potential for institutional competition that could otherwise arise. From Mary DeRosa's perspective, for instance, "it elevated the role of the NSC Legal Adviser to have it as a Deputy White House Counsel," and it provided an effective process for working together with the Counsel's office on high profile, national security legal issues.¹⁵⁰

¹⁴⁶ Rostow Interview, *supra* note 38.

¹⁴⁷ *Biography, Stephen G. Rademaker*, U.S. DEP'T OF STATE ARCHIVE, <http://2001-2009.state.gov/r/pa/ei/biog/12813.htm> (last updated Oct. 3, 2005).

¹⁴⁸ Rostow Interview, *supra* note 38.

¹⁴⁹ BAKER, *supra* note 16, at 379 n.2 ("During the Bush administration the legal advisor reported directly to the counsel. The role of the legal advisor in this latter function has varied from administration to administration depending on, among other factors, the personality of participants and the extent to which the office is perceived by agencies as facilitating national security process, as John Norton Moore has argued for a long time, or as a source of potential rival legal advice.").

¹⁵⁰ DeRosa, *supra* note 11.

On the other hand, there are also potential dangers associated with the NSC Legal Adviser sharing an appointment in a highly political office such as the White House Counsel. Some have noted, for instance, that doing so creates a substantial risk of eroding the independence of the position and politicizing the role of the NSC Legal Adviser in the national security process.¹⁵¹ Having the NSC Legal Adviser report to the White House Counsel can therefore compromise his or her ability to provide objective national security legal advice and operate free from the influence of partisan considerations.¹⁵²

Even without actual erosion, direct association still risks the appearance of political influence, which can undermine the Legal Adviser's credibility in the eyes of career attorneys within the general counsel's offices of executive branch agencies.¹⁵³ As noted above, one of the most important roles of the NSC Legal Adviser's office is to serve as a mechanism for incorporating coordinated, independent legal advice into the national security policymaking process.¹⁵⁴ Without the confidence of his or her agency counterparts, the NSC Legal Adviser will have a much more difficult time running the interagency Lawyers Group process effectively.

In the end, views will differ as to how the office of the National Security Council Legal Adviser should be structured, and what its relationship with the White House Counsel—or for that matter, with the Office of the Counsel to the Vice President—should be. Moreover, a model

¹⁵¹ Moore Interview, *supra* note 32; *see also* Rostow Interview, *supra* note 38 (describing the Counsel to the President as a “hyper-political” position, and Associate Counsels as “hyper-political” legal advisors, as well as expressing his view that the NSC Legal Adviser should be independent from the White House Counsel's office).

¹⁵² Stevens Interview, *supra* note 36 (observing the need for the legal function to have some independence of judgment and to be exercised according to professional standards); *see also* PATTERSON, *supra* note 28, at 67 (2001) (“General Scowcroft, who signed the 1987 review board report but who then served as President Bush's security adviser . . . indicat[ed] that he thought it better for the NSC to rely on the White House counsel. However, that office's almost total preoccupation, in 1998–99, with the Monica Lewinsky scandal and with its aftermath—the impeachment imbroglio—is a signal that this question has two sides to it.”).

¹⁵³ *See* Morrison, *supra* note 6, at 1467 (“Rightly or wrongly, the White House Counsel's analysis is likely to be treated as an exercise of political will, not dispassionate legal analysis.”).

¹⁵⁴ *See supra* Part II.B.

that works well in one administration may prove ineffective under a different administration with a different set of people. Indeed, to quote Baker, “[l]aw and process provide an opportunity for success, but do not guarantee result,” as even the best process in the world can be defeated with the wrong personalities.¹⁵⁵

B. Transparency, Legitimacy, and Open Government

In recent years, executive branch lawyers have been subject to unprecedented scrutiny. Criticism of the executive branch and its constant “obsession with secrecy” has created a perception that national security decision makers are actively hiding legal interpretations from public view.¹⁵⁶ Beginning with the leak of the OLC torture memos in 2004, public perceptions and concerns about government lawyers providing “secret” legal advice and interpretations are still running high. Recent examples include the public outcry that followed the June 2013 leak by Edward Snowden, which revealed a classified interpretation of the F.I.S.A. business records provision of the PATRIOT Act,¹⁵⁷ the heightened publicity surrounding the legality of U.S. drone policy,¹⁵⁸ and the Administration’s internal legal justifications for targeting U.S. citizens abroad.¹⁵⁹

¹⁵⁵ BAKER, *supra* note 16, at 309.

¹⁵⁶ DeRosa, *supra* note 11; *see also* Louis Fisher, *Why Classify Legal Memos?*, NAT’L L.J. (July 14, 2008), http://www.loc.gov/law/help/usconlaw/pdf/olc_secret_memos.pdf (“A society cannot remain faithful to the rule of law when governed by secret legal memos, especially those that promote broad and unchecked presidential power. . . . Legal memos are legitimately held secret when needed to protect national security interests, such as identifying a covert agent. They can easily be made public after redacting names and sensitive references. No plausible case can be made for withholding legal reasoning.”).

¹⁵⁷ *See* Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN, June 5, 2013; *see also* Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, July 6, 2013.

¹⁵⁸ *See* Adam Entous, Siobhan Gorman & Evan Perez, *U.S. Unease over Drone Strikes: Obama Administration Charts Delicate Legal Path Defending Controversial Weapons*, WALL ST. J., Sept. 26, 2012.

¹⁵⁹ *See* Sarah Knuckey, *Transparency on Targeted Killings: Promises Made, but Little Progress*, JUST SECURITY (Oct. 1, 2013), <http://justsecurity.org/2013/10/01/transparency-targeted-killings-promises-made-progress/>. Calls for greater transparency in the targeting of American citizens eventually resulted in the release on June 23, 2014 of a DOJ memo outlining the Obama administration’s legal basis for the 2011 targeted drone killing of U.S. citizen Anwar al-Awlaki in Yemen. *See* Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, N.Y. TIMES, June 23, 2014. The release came after the DOJ, in an effort to smooth the Senate

Such controversies highlight the difficult environment in which the NSC Legal Adviser and other national security legal practitioners work. The competing needs of secrecy and transparency create an ongoing tension between compelling sets of values, with public trust often hanging in the balance. To be sure, calls for greater transparency and disclosure of national security legal advice raise a number of complex issues that make it difficult to achieve these goals in practice. For one thing, the advice that the NSC Legal Adviser renders to clients is not usually captured in formalized legal opinions that can be easily scrubbed for potential release. The legal process in the National Security Council environment relies just as much, if not more, on informal mechanisms as it does on formal practices. Legal advice may not always be documented, occurring informally as decisions are made in a meeting, over the phone, or after pulling the lawyer aside in the hallway.¹⁶⁰

Moreover, as Baker points out, “[m]uch of this informal advice is not transparent, covered as it is by three opaque lenses: security classification, the deliberative process, and attorney–client privilege, all of which in the case of presidential practice coalesce around the rubric of executive privilege.”¹⁶¹ Like other government attorneys, advice rendered to agency clients by the NSC Legal Adviser is provided within the context of a traditional attorney–client relationship and relates to contemplated action at the pre-decisional stage, disclosure of which

confirmation process of the memo’s author, David Barron, to a seat on the First Circuit, decided not to appeal a Court of Appeals ruling requiring the memo to be disclosed under the Freedom of Information Act (FOIA). *Id.* The memo was released with court-approved redactions to protect classified national security information while allowing for the disclosure of the administration’s legal reasoning. *Id.* The result of the FOIA suit, filed jointly by the American Civil Liberties Union (ACLU) and reporters from the *New York Times*, is an example of how pressure from Congress and the courts, supplemented by the forces of mainstream media and politically active NGOs, continue to push the executive branch toward greater transparency and accountability in legal decisions affecting national security. *See generally* GOLDSMITH, *supra* note 117 (arguing that contemporary legal and political checks on the expansion of presidential authority in the years after 9/11 represent a process whereby executive authority is made accountable and national security policies are refined and legitimized).

¹⁶⁰ BAKER, *supra* note 16, at 64.

¹⁶¹ *Id.* at 66.

could compromise the integrity of the policymaking process and discourage candid communication between attorneys and their clients. As such, much of the NSC Legal Adviser's work would be exempt from public disclosure under Exemption 5 of the Freedom of Information Act (FOIA).¹⁶² Unlike other government attorneys, however, the office of the NSC Legal Adviser, by virtue of its position on the National Security Council staff and attachment to the White House, is altogether exempt from normal agency record and reporting requirements under the statute, making public disclosure even less likely.¹⁶³ For the NSC Legal Adviser and other White House lawyers, the doctrine of executive privilege provides a powerful protection against disclosure of communications with and advice given to the President.¹⁶⁴

The goal of transparency is even more complicated by the fact that most of the legal advice and opinions provided by the NSC Legal Adviser concern highly sensitive matters. Despite claims that “although the government does have the right to keep national security secrets, it does not get to have secret law,”¹⁶⁵ divorcing legal analysis from the sensitive and

¹⁶² See 5 U.S.C. § 552(b)(5).

¹⁶³ See *Armstrong v. Executive Office of the President*, 90 F.3d 553, 567 (D.C. Cir. 1996) (holding that the NSC is not an agency for Freedom of Information Act (FOIA) purposes and thus is not subject to the record-keeping or production requirements of FOIA).

¹⁶⁴ A number of scholars have addressed the complex ethical issues that government lawyers face. See, e.g., Steven Calabresi, *The President, the Supreme Court, and the Constitution: A Brief Positive Account of the Role of Government Lawyers in the Development of Constitutional Law*, 61 L. & CONTEMP. PROBS. 61 (1998); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987). However, a scholarly view that identifies the government lawyer's client as the employing agency “makes no sense, if for example, the lawyer is seconded to the National Security Council.” BAKER, *supra* note 16, at 379 n.8. Recently, the academic literature has extended the discussion to include ethics dilemmas from the perspective of national security lawyers, a positive development that will no doubt continue to generate valuable guidance for individuals working in this highly complex legal arena. See, e.g., Charles J. Dunlap, Jr., *Ethical Issues of the Practice of National Security Law: Some Observations*, 38 OHIO N.U. L. REV. 1057 (2012); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SECURITY L. & POL'Y 409 (2005); Keith A. Petty, *Professional Responsibility Compliance and National Security Attorneys: Adopting the Normative Framework of Internalized Legal Ethics*, 4 UTAH L. REV. 1563 (2011).

¹⁶⁵ Josh Gerstein, *Obama Administration to Reveal Drone Memo*, POLITICO (May 20, 2014), <http://www.politico.com/story/2014/05/barack-obama-drone-memo-106911.html> (quoting Sen. Mark Udall); see also Amy Davidson, *No More Secrecy for a Memo on Killing Americans*, THE NEW YORKER, Apr. 22, 2014

properly classified factual information on which national security legal issues often turn is not so straightforward. For the National Security Council Legal Adviser, “this is legal advice provided in the context of sensitive, classified programs and when you reveal details of the legal advice you almost inevitably, in almost every case, are revealing something about a classified program. That’s not spin. That’s not an excuse. That is absolutely real. And it is very difficult to deal with.”¹⁶⁶ As a result, when dealing with matters as sensitive as those found at the heart of the national security process, greater disclosure of information simply may not represent a viable policy option.

Nonetheless, at least one former NSC Legal Adviser suggests the creation of a “consistent, forward-looking process” for declassifying national security legal advice.¹⁶⁷ The Department of Justice’s Office of Legal Counsel, for example, has for years followed its own policy of publishing legal opinions,¹⁶⁸ though these opinions concededly represent “only the tip of the iceberg.”¹⁶⁹ Memoranda from executive branch legal offices concerning issues of historical importance to U.S. foreign policy are also occasionally published in the Foreign

(describing “what has become, especially after Edward Snowden’s leak of N.S.A. documents, the crucial point in the debate over civil liberties and security: the government gets to have secrets, but doesn’t get to have secret laws.”).

¹⁶⁶ DeRosa, *supra* note 11.

¹⁶⁷ *Id.*

¹⁶⁸ The decision to publish certain OLC legal opinions was made in 1977 by Attorney General Griffin Bell. *See* Eric Messinger, *Transparency and the Office of Legal Counsel*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 239, 250 (2014); *see also* Koh, *supra* note 47, at 515 (describing how OLC decided to publish its opinions as a means of confronting “the danger that it will support political action with a legal opinion that cannot be publicly examined or tested.”); *see also* *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057, 2096 (2012) (“As a result of the decision to publish, the legal justification for many important government decisions is available for examination, allowing interested parties outside the government to challenge OLC’s reasoning and incentivizing OLC to take extra care because of the knowledge that any mistakes may be publicly discussed in the media and within academia.”).

¹⁶⁹ John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 376 (1993) (referring to the filing cabinets in OLC’s library filled with “largely unpublished opinions dating from the time of OLC’s creation in 1932.”); *see also* Messinger, *supra* note 168, at 250 (“[W]hile there are twenty-six volumes of OLC opinions published, through 2002, the OLC has not published its opinions regularly or comprehensively, especially regarding present legal controversies.”).

Relations of the U.S. Series (FRUS).¹⁷⁰ In 2013, the Department of Justice began publishing a new volume of OLC opinions in order to “make available to other government agencies and to the general public a significant number of legal opinions from a period when opportunities for publication were limited” and “to make available opinions that for prudential reasons could not be published at or near the time of issuance.”¹⁷¹ Creating a similar policy in a legal office that deals exclusively in sensitive matters of national security may be less probable, but not impossible.¹⁷²

Given the incentive structures of the current classification system¹⁷³ and the recognized value in increasing public disclosure,¹⁷⁴ such efforts seem particularly worthwhile. Developing systems whereby declassified national security legal advice is made accessible is also consistent both with current Administration policy on transparency and open government in general,¹⁷⁵ and

¹⁷⁰ Moore Interview, *supra* note 32; *see also, e.g.*, U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1964–1969, VOLUME XXXIII, ORGANIZATION AND MANAGEMENT OF FOREIGN POLICY, U.N. DOC. 132, INFORMATION MEMORANDUM FROM THE LEGAL ADVISER TO THE DEPARTMENT OF STATE (MEEKER) TO SECRETARY OF STATE RUSK (1968), *available at* <https://history.state.gov/historicaldocuments/frus1964-68v33/d132>.

¹⁷¹ U.S. DEP’T OF JUSTICE, 1 SUPPLEMENTAL OPINIONS OF THE OFFICE OF LEGAL COUNSEL viii (Nathan A. Forrester, ed. 2013), *available at* <http://www.justice.gov/sites/default/files/olc/legacy/2013/07/26/op-olc-supp.pdf>.

¹⁷² *Id.* (Over time, the need for confidentiality may recede, and it may become possible to publish opinions that would not have been appropriate to [disclose when issued] . . . because of the proximity in time to the circumstances giving rise to the opinion requests”).

¹⁷³ ELIZABETH GOITEIN & DAVID M. SHAPIRO, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY, BRENNAN CTR. FOR JUST., N.Y.U. SCH. L. 21 (Oct. 5, 2011), *available at* http://brennan.3cdn.net/3cb5dc88d210b8558b_38m6b0ag0.pdf (describing the current classification system as one “in which a multitude of forces pushes in the direction of classification while no force pushes meaningfully in the other direction . . .”).

¹⁷⁴ *See* Morrison, *supra* note 6, at 1467 (“The idea that public disclosure is critical to the legitimacy of executive branch legal interpretation is, by now, quite familiar.”).

¹⁷⁵ Memorandum on Transparency & Open Gov’t from the President to the Heads of Exec. Dep’ts & Agencies, 74 Fed. Reg. 4,685 (Jan. 26, 2009) (“We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration . . . Transparency promotes accountability and provides information for citizens about what their Government is doing . . . My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use.”); *see also* Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to the Heads of Exec. Dep’ts & Agencies, at 1 (Dec. 8, 2009), http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf (setting forth an open government directive instructing executive departments and agencies to “take specific actions to implement the principles of transparency, participation, and collaboration set forth in the President’s Memorandum” on transparency and open government).

with statements by President Obama on the national security legal process in particular.¹⁷⁶ It would also further the objectives of other policy changes¹⁷⁷ and recommendations¹⁷⁸ aimed at creating a more workable set of standards governing the declassification of national security information.

Future administrations may likewise find it to their advantage to increase engagement and expand the public's awareness of the processes by which national security lawyers provide legal advice to executive branch clients, since generally, as has been noted, "effective processes remain important to both the content of legal outcomes and the public's willingness to accept them."¹⁷⁹ In doing so, it may be possible to achieve greater transparency in the handling of national security legal matters without unduly disclosing any substantive material related to sensitive sources and methods.

It is also important for line attorneys and other government employees working within the national security space to be aware of processes like the NSC-led interagency Lawyers Group. Greater transparency of the legal process within and across government can provide a

¹⁷⁶ See President Barack H. Obama, State of the Union Address (Feb. 12, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address> ("I will continue to engage Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and systems of checks and balances, but that our efforts are even more transparent to the American people and to the world.").

¹⁷⁷ See, e.g., Exec. Order No. 13,526, 75 Fed. Reg. 707, 719–20 (Jan. 5, 2010) (establishing a National Declassification Center "to streamline declassification processes, facilitate quality-assurance measures, and implement standardized training regarding the declassification of records determined to have permanent historical value.").

¹⁷⁸ See PUB. INTEREST DECLASSIFICATION BD., TRANSFORMING THE SECURITY CLASSIFICATION SYSTEM 11–27 (2012) (setting out 14 key recommendations for the President on reforming and improving the current classification and declassification systems); see also PRESIDENT'S REVIEW GROUP ON INTELLIGENCE & COMMUNICATIONS TECHNOLOGIES, THE NSA REPORT: LIBERTY AND SECURITY IN A CHANGING WORLD 80 (2014) ("A central goal of our recommendations is to increase transparency and to decrease unnecessary secrecy, in order to enhance both accountability and public trust.").

¹⁷⁹ Pillard, *supra* note 118, at 1299; see also Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 KAN. L. REV. 579, 588–89 (2009) ("[W]hen executive branch legal policy is not disclosed in a meaningful fashion to other parts of the administration, the other branches of the federal government, or to the public, it is clear that the quality of the legal policy, as well as the credibility of the administration's lawyers, suffers greatly.").

deterrent effect and undercut temptations to leak classified information from within.

Unauthorized leaks of sensitive information to the press can and have done serious harm to vital national security and intelligence programs.¹⁸⁰ The U.S. media has become a major source of information for foreign adversaries such as al Qaeda, and the massive data dumps of Bradley Manning and Edward Snowden underscore the ease and scope of disclosure in an era of mass communication technology.¹⁸¹

When agency officials observe the government taking certain actions, without also knowing or understanding that the decisions to take such actions have been subject to rigorous legal review and accountability, perceptions of wrongdoing or illegality are more likely to arise. If operators are not made appropriately aware of the process in which decisions have been approved and levels of accountability imposed, they will be less willing to take risks and more likely to leak, thinking the decision in question is unlawful.¹⁸² Thus, greater engagement and understanding of the legal process not only tempers public mistrust and lends greater legitimacy for government actions, but also realigns the executive branch away from the defensive position in which it continues to find itself: responding to leaks and explaining its decision-making processes to an angry public after the fact.¹⁸³

¹⁸⁰ See, e.g., Jason Leopold, *Pentagon Report: Scope of Intelligence Compromised by Snowden 'Staggering,'* THE GUARDIAN, May 22, 2014. For a general discussion of harms caused by unauthorized leaks of classified information, see generally James B. Bruce, *The Consequences of Permissive Neglect: Laws and Leaks of Classified Information*, 47 STUD. IN INTELLIGENCE 39 (2003).

¹⁸¹ See Michelle Van Cleave, *Myth, Paradox, & the Obligations of Leadership: Edward Snowden, Bradley Manning and the Next Leak*, CTR. FOR SEC POL'Y OCCASIONAL PAPER SERIES, at 1, 2–3 (Oct. 15, 2013), available at <http://www.centerforsecuritypolicy.org/wp-content/uploads/2013/10/Van-Cleave-Occasional-Paper-1011.pdf>; see also *National Security Law in a Changed World: The Twelfth Annual Review of the Field*, ABA NAT'L SECURITY L. REP., at 1, 14 (May 2003) (“Too many in the world today know how we go about our business, mainly through unauthorized disclosure.”) (quoting Timothy R. Sample, Staff Dir., H. Perm. Select Comm. on Intelligence).

¹⁸² Baker, Role of NSC Legal Adviser, *supra* note 74.

¹⁸³ Jack Goldsmith, *The Third Annual Solf-Warren Lecture in International and Operational Law: Reflections on Government Lawyering*, 205 MILITARY L. REV. 192, 201-02 (2010) (“At a minimum, the decision-making process must maintain its integrity. A decision-making process with integrity—one that involves proper consultation with

Increasing the transparency of executive branch national security legal advice also includes meaningful and timely disclosure to Congress, especially in those cases where full public disclosure is not possible due to the sensitive nature of the advice being given.¹⁸⁴ In circumstances where compelling and legitimate national security reasons preclude full disclosure to Congress, the scope can be properly restricted by providing informal, classified briefings to congressional leadership or members of intelligence committees on the opinions of the Lawyers Group and NSC Legal Adviser as well as the legal authority on which they are based.¹⁸⁵

C. Institutional Memory

The NSC Legal Adviser faces a unique set of challenges for preserving institutional memory and long-term continuity of process within the office. In general, Baker points out, the NSC Legal Adviser's roles "are not defined in statute and are, outside the confines of certain narrow spheres, not defined in directive. Rather, these roles are defined by practice and the adoption or modification of past practice by successor officials."¹⁸⁶ In a position that relies heavily on adopting and learning from past practice, newly appointed Legal Advisers need access to these practices so they can adopt what works. This issue is complicated by the fact that the NSC, unlike all other executive branch national security offices, experiences a complete

the right people and a careful opinion with good craft values—will inform how the decision is looked at later, even if the substance of the decision turns out not to have been, from the perspective of hindsight, the right one.”).

¹⁸⁴ See Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1237–39 (2006) (discussing the need for congressional notification and disclosure of executive branch legal interpretations); see also HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN AND SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMS. INVESTIGATING THE IRAN–CONTRA AFFAIR, S. REP. NO. 216, H.R. REP. NO. 433, 100th Cong., 1st Sess. 423 (1987) (“Decisionmaking processes in foreign policy matters, including covert action, must provide for careful consideration of all options and their consequences. Opposing views must be weighed, not ignored. Unsound processes . . . produce unsound decisions. . . . Congress is the partner, not the adversary of the executive branch, in the formulation of policy.”).

¹⁸⁵ See Morrison, *supra* note 184, at 1239 (“In particular, to the extent the executive’s claimed authority rests on certain statutory interpretations, . . . Congress (or at least its leaders) should be told.”).

¹⁸⁶ BAKER, *supra* note 16, at 312.

turnover with each new presidential administration.¹⁸⁷ A change of party makes continuity particularly difficult, as turnover in nearly all key White House staff positions is likely. Thus, in reality, the incoming NSC Legal Adviser will arrive at the White House to find that the slates have been wiped clean. “The safes are empty. Everything’s empty. Why? Because . . . that’s what the Presidential Records Act says to do.”¹⁸⁸ As a result, the incoming NSC Legal Adviser can find himself or herself unnecessarily reinventing the wheel.

In addition to challenges of continuity that result from the office’s attachment to the White House, the NSC Legal Adviser is part of the National Security Council staff. The National Security Council as a whole has been characterized as having organizational features that deter memory development.¹⁸⁹ While this reflects the intended flexibility of the NSC structure as the tool of each President, it also exacerbates the challenge of preserving institutional memory. Because the Legal Adviser to the National Security Council is not a highly publicized player, whose role and functions are widely understood, this lack of strong institutional memory means that sound processes risk falling by the wayside fairly easily.¹⁹⁰

Over the years, the office has informally dealt with the problem of institutional memory and continuity of process in several ways. In particular, a number of NSC Legal Advisers have had the chance to get their feet wet in the position before moving up to assume the role of the Legal Adviser, with at least half of all NSC Legal Advisers initially serving as a Deputy NSC

¹⁸⁷ DeRosa, *supra* note 11.

¹⁸⁸ Baker, Role of NSC Legal Adviser, *supra* note 74.

¹⁸⁹ See Cary R. Covington, *Development of Organizational Memory in Presidential Agencies*, 17 ADMIN. & SOC’Y 171 (1985) (finding that between the National Security Council, the Office of Management and Budget, and the Council on Environmental Quality, the NSC had the least organizational memory, learning capacity, and sense of identity).

¹⁹⁰ DeRosa, *supra* note 11.

Legal Adviser.¹⁹¹ Attorneys new to the office from other areas of government may also contact those who have served in the role previously in order to gain a better understanding of the practices of the office, as well as what worked and what did not.¹⁹² On the whole, however, continuity of process remains a major challenge for the office of the National Security Council Legal Adviser.

In this context, efforts to outline and preserve a documentary record of principles and best practices are particularly valuable. Baker recalls his attempts to mark as “institutional” those documents outlining key processes, in an attempt to preserve institutional memory and promote continuity for the office in the next administration.¹⁹³ Efforts to build institutional memory would be especially valuable in relation to clarifying the roles and practices of the interagency Lawyers Group process, particularly with regard to defining the role of OLC and the methods for resolving disagreements in legal analysis that arise.¹⁹⁴ Entrenched practices would also serve as a form of institutional protection, shielding the NSC Legal Adviser from bending under the pressure of a demanding client.¹⁹⁵

Here, the NSC Legal Adviser might again look to other legal offices such as the OLC for models on which to build. In 2004, for instance, after the fallout from the torture memos, a group of former OLC attorneys compiled a set of model standards for OLC lawyers to follow when

¹⁹¹ Examples include Nicholas Rostow (previously serving as deputy to Legal Adviser Paul Schott Stevens), James E. Baker (previously serving as deputy to Legal Adviser Alan J. Kreczko), Mary DeRosa (previously serving as deputy to Legal Adviser James E. Baker), Daniel Levin (previously serving as deputy to Legal Adviser Nicholas Rostow), Avril Haines (previously serving as deputy to Legal Adviser Mary DeRosa), and Brian Egan (previously serving as deputy to Legal Adviser Avril Haines).

¹⁹² DeRosa, *supra* note 11.

¹⁹³ Baker, Role of NSC Legal Adviser, *supra* note 74.

¹⁹⁴ DeRosa, *supra* note 11 (pointing out that one problem with the Lawyers Group interagency process is that it is not institutionalized and not well-known to many people outside of the small group of executive branch lawyers who have participated in it).

¹⁹⁵ See Morrison, *supra* note 6, at 1463.

providing legal advice.¹⁹⁶ This was followed by an OLC-issued set of “best practices” in 2005.¹⁹⁷ Together, these guidelines have been important in building a record of consensus to help define and preserve the institutional roles and responsibilities of OLC.¹⁹⁸

The institutional memory of the NSC Legal Adviser’s office is also well served through greater promotion and transparency of process. By promoting an engagement and understanding of what the process of the NSC Legal Adviser is, who the other relevant actors are, and how the office functions to produce independent, contextualized, and timely legal advice, the importance of the office will be both clarified and reinforced within the broader framework of the national security policymaking process in which it operates. Likewise, if the benefits of the interagency, legal coordination process run by the NSC Legal Adviser become more widely realized, future administrations may be more likely to use them.

Conclusion

Since 1987, the National Security Council Legal Adviser has played a little-known, yet indispensable role at the center of the U.S. national security policymaking process, working tirelessly behind the scenes, crafting legal advice on matters of war and peace for national security decision makers. In 2013, former NSC Legal Adviser Mary DeRosa spoke at the University of Virginia School of Law about her experiences as the National Security Council Legal Adviser as part of the Fourth Annual Seminar on Teaching National Security Law. In considering possible ways in which the processes she had been describing could be formalized

¹⁹⁶ Dellinger et al., *supra* note 111, at 1603 app. 2.

¹⁹⁷ Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Opinions (May 16, 2005). This memo was subsequently updated in 2010. Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010), *available at* <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>.

¹⁹⁸ *See* Messinger, *supra* note 168, at 250.

and institutionalized for future administrations, DeRosa stated, “the most important thing is to have there be more known out there about this process. To have more written about it, . . . to talk about it more, and to have you . . . teach it in your classes.”¹⁹⁹

This article has sought to provide a useful initial contribution toward that goal. It has examined the origins of a position born out of historical controversy and explored some of the critical challenges that NSC Legal Advisers have faced over the years. Some of these challenges have occurred since the beginning, while others have resulted from changes instituted during a particular administration. Yet despite these challenges, there is little doubt that the office has served the function for which it was created and intended: to promote and strengthen the role of the law in the national security process.

Appendix: National Security Council Legal Advisers

Legal Adviser	Year Began	Year Ended	National Security Advisor
Paul Schott Stevens	1987	1987	Frank Carlucci
Charles Nicholas Rostow	1987	1993	Colin Powell; Brent Scowcroft
Alan J. Kreczko	1993	1996	Anthony Lake
James E. Baker	1997	2000	Sandy Berger
Mary B. DeRosa	2000	2001	Sandy Berger
John B. Bellinger, III	2001	2005	Condoleezza Rice
Daniel B. Levin	2005	2007	Stephen Hadley

¹⁹⁹ *Id.*

Richard D. Klingler	2006	2007	Stephen Hadley
Michael Y. Scudder	2007	2009	Stephen Hadley
Mary B. DeRosa	2009	2011	James Jones; Tom Donilon
Avril D. Haines	2011	2013	Tom Donilon
Brian J. Egan	2013	-	Susan Rice