Professional Responsibility Compliance and National Security Attorneys: Adopting the Normative Framework of Internalized Legal Ethics

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PROFESSIONAL RESPONSIBILITY COMPLIANCE AND NATIONAL SECURITY ATTORNEYS: ADOPTING THE NORMATIVE FRAMEWORK OF INTERNALIZED LEGAL ETHICS

Keith A. Petty*

I. INTRODUCTION

In recent years, headline-making events reminded us that attorneys’ professional responsibilities will be tested in the national security context. The legal foundations of many post-9/11 counterterrorism policies were “sloppily reasoned, overbroad, and incautious,” as a prominent government attorney later recalled.1 Chief among these were the infamous “torture memos”2 drafted by legal advisors in executive branch agencies in 2002 and 2003,3 which authorized controversial interrogation and detention practices in furtherance of the “war on terrorism.” Although the authors of these memos were recently cleared of professional misconduct allegations following a five-year Department of Justice inquiry,4 their adherence to ethical standards has been sharply criticized.5 This Article studies the application of legal ethics in the national security context and seeks to determine why, at times, government legal advisors deviate from ethical practice. Employing the analytical framework of compliance theory—the study of why individuals, organizations, and governments obey the law—this Article then prescribes a normative approach that is best suited to steer them back.

Chief Justice Earl Warren clearly articulated the norms governing the legal profession, stating, “[l]aw . . . floats on a sea of ethics.”6 Today, however, some argue that a “significant gap between what the legal ethics rules require and how

2 See infra notes 273–282 and accompanying text.
3 See infra notes 273–282 and accompanying text.
4 See infra note 282 and accompanying text.
5 See infra Part IV.B.
6 Hugh Smith, Ethics and Intelligence in the Age of Terror, in SECURITY AND THE WAR ON TERROR 156, 156 (Alex J. Bellamy et al. eds., 2008).
lawyers will typically behave” plagues the practice of law. This gap is potentially widened in the practice of national security law, which requires swift, decisive action in furtherance of policy objectives—circumstances that tend to pressure advocates into deviating from ethical behavior. It is during these times of crisis that compliance with professional responsibility obligations is of the utmost importance, since “national security law is dependent on the moral integrity of those who wield its power.”

Even though the “torture memos” have received considerable scrutiny, ethical dilemmas encountered in times of crisis are not new. Legal advice given on controversial issues during the Civil War and prior to the Second World War illustrates this. External pressures on ethical compliance are also not likely to change from one administration to the next, as seen in current debates about the legality of predator drone strikes on suspected terrorists in Pakistan, Afghanistan, and beyond. Nonetheless, the “torture memos” provide a useful model to examine the tensions government legal advisors inevitably face. This Article considers the ethics employed by government attorneys, but it does not attempt to define torture or whether the authors of the torture memos should be subject to punishment.

The traditional models used to determine the ethical obligations of government attorneys do not take into account the additional external pressures on the national security practitioner. One such method is identification of the client, which some argue is the president or the head of the government agency, while others maintain that the client is the government as a whole or the “public interest.” Another approach is to determine the role of the attorney, which ranges from taking an advocacy position to serving as a neutral judge. This Article demonstrates that these approaches fail to adequately account for the fluid nature of legal advice in times of crisis, as both the identity of client and the role of the attorney will change depending on the situation at hand.

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9 *See infra* Part V.B. and notes 381–395 and accompanying text.
11 For further discussion of this issue, see Claire Finkelstein & Michael Lewis, Debate, *Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?*, 158 U. PA. L. REV. PENNUMBRA 195 (2010), http://www.pennumbra.com/debates/pdfs/AuthorizingTorture.pdf; see also José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175 (2006) (discussing the Bush Administration’s torture memoranda, and concluding “international as well as national crimes may have been committed, including by the lawyers themselves.”).
12 *See infra* Part II.B.1.
13 *See infra* Part II.B.2.
In contrast to the traditional models, compliance theory is well suited to examine behavior of government attorneys in relation to the ethical obligations that bind them. By focusing on individual behavior, as influenced by social factors such as organizational culture, approval-seeking from superiors, and time sensitivity, we arrive at a more complete understanding of why government attorneys obey or disobey the rules. This Article is the first to apply compliance theory in the field of professional responsibility, although scholarly studies have utilized this analytical approach in the government regulatory sector, environmental law, and international law.

By employing compliance theory to the behavior of government legal advisors, a three-step process emerges—Internalized Legal Ethics.14 This approach consists of early interaction by the attorney in the advisory process, interpretation of legal and ethical norms, and internalization of these norms into the organizational and individual’s value set. This Article suggests that the process of Internalized Legal Ethics could have averted the deeply flawed reasoning of the Department of Justice’s Office of Legal Counsel (OLC) torture memos by providing instant appraisal of the OLC’s application of relevant norms. Additionally, this approach will serve as a useful guide to legal advisors in future crisis situations because it incorporates the moral considerations of the traditional, but incomplete, methods used to determine the professional responsibilities of government attorneys.

The discussion begins in Part II by addressing previous methods used to define ethical obligations of government legal advisors, including properly identifying the client and the role of the attorney. This Part demonstrates that these models fail to take into account the unique circumstances facing attorneys in national security practice. Part III critically analyzes the factors that tend to lead an attorney to deviate from compliance with ethical obligations in the context of national crises, and, for the first time, discusses these professional responsibilities in terms of compliance theory. Utilizing this model, this Article describes the process of Internalized Legal Ethics in detail. After establishing the analytical framework, Part IV examines the ethical issues underlying the controversial “torture memos.” These legal opinions and surrounding circumstances demonstrate the various externalities that create tension with the lawyer’s professional responsibilities. Many of these externalities are not unique to the field of national security law. Nevertheless, they are brought to light in a specific way when the lawyer, and the nation, are under great stress. Finally, Part V applies the process of Internalized Legal Ethics in a manner that will guide individual practitioners to comply with professional responsibility obligations and will help decision makers pursue a dynamic national security strategy.

14 The concept underlying the process of Internalized Legal Ethics is based in large part on a framework suggested by Harold Koh, which analyzes nation-state compliance with existing legal obligations, known as the “transnational legal process.” Harold Hongju Koh, Why Do Nations Obey International Law?, 106 YALE L.J. 2599 (1997).
II. PROFESSIONAL RESPONSIBILITY AND TRADITIONAL MODELS OF COMPLIANCE

National security crises generate heightened tensions between executing government policy and ethically applying the law. Lawyers must remember that the leaders they advise “first [have a] duty [] to protect the country, not follow the law.”15 Nonetheless, each practitioner is responsible to adhere to our basic principles as lawyers, and to the rule of law as a nation. Yet the precise ethical parameters guiding government legal advisors remain undefined. This Part discusses the traditional normative framework used to assist government legal advisors to identify ethical obligations that arise in the national security context. After describing these approaches, this Part explains why these models fall short of providing an adequately predictive framework to determine compliance with norms of professional responsibility.

A. Origins of Professional Responsibility and Enforcement Mechanisms

The threat of violent attacks against the national interest can be compounded by unethical, unprincipled interpretation of law in times of crisis. This has the potential to undermine the integrity of the rule of law, and many argue that it will not enhance our national security.16 Naturally, concerns relating to the ethical practice of law are not limited to the national security field. Historically, the legal profession has battled the perceived contradiction between legal ethics and legal practice. As one commentator notes, “Plato and Aristotle condemned the advocate because of his ability to make the truth appear false and the guilty appear innocent.”17 It seems this perception has not improved over millennia. Before becoming a Supreme Court justice, while serving as President Franklin D. Roosevelt’s attorney general, Robert H. Jackson said, “I have never hesitated to be a critic of my profession. Its performance of its social obligation is sometimes pretty bad.”18 More recently, in a 2009 Gallup poll only 13 percent of the public

15 GOLDSMITH, supra note 1, at 80–81.
17 JOYCELYN M. POLLOCK, ETHICAL DILEMMAS AND DECISIONS IN CRIMINAL JUSTICE 319 (5th ed. 2007); see also Deborah L. Rhode, The Professionalism Problem, 39 WM. & MARY L. REV. 283, 284–89 (1998) (providing historical examples of the negative perception of lawyers).
18 Robert H. Jackson, Government Counsel and Their Opportunity, 26 A.B.A. J. 411, 412 (1940). He continues by adding that “government counsel is not required to be dull in order to be temperate, nor is he required, in devotion to the ideals of his profession, to be so afraid of public movements and the intellectual or political currents of his time that he fears to indorse anything—except his pay check. We are citizens as well as lawyers.” Id.
rated lawyers’ honesty and ethics as “very high” or “high.” This presents a sharp
dichotomy between those who perceive lawyers as amoral, motivated only by
money, and others who appreciate the ability of lawyers to be virtuous problem
solvers.\textsuperscript{19}

The regulation of the practice of law in the United States can be traced back to
Judge George Sharswood’s lecture series in the mid-seventeenth century, later
published in 1854 as \textit{Professional Ethics}.\textsuperscript{21} After several variations and codes, the
American Bar Association (ABA) Model Rules of Professional Responsibility
were promulgated in 1983 and serve as a reminder that without internal regulation,
the profession will be regulated from the outside.\textsuperscript{22} For those who question the
practicality of regulating legal ethics, there are others who realize that failure to
impose effective enforcement mechanisms within the bar itself will result in the
imposition of suffocating restrictions from an outside body, such as Congress.\textsuperscript{23}
Recognizing the law does not exist in a vacuum, the norms of professional
responsibility are rooted in both “general ideas and practical action,”\textsuperscript{24} and relate
directly to the behavior of individual attorneys.

The current professional responsibility debate is an analysis of best practices
on one hand, and an examination of transgressions from ethical practice on the
other. While this Article focuses on government attorney advisors, national

\textsuperscript{19} Jeffrey M. Jones, \textit{U.S. Clergy, Bankers See New Lows in Honesty/Ethics Ratings},
\textit{Gallup} (Dec. 9, 2009), http://www.gallup.com/poll/124628/Clergy-Bankers-New-Lows-
Honesty-Ethics-Ratings.aspx (last visited Nov. 8, 2011).

\textsuperscript{20} \textit{Pollock}, supra note 17, at 319.

\textsuperscript{21} \textit{George Sharswood, An Essay in Professional Ethics} 77 (Fred B. Rothman &
Co. 5th ed. 1993) (1854). For additional discussion regarding Sharswood’s \textit{Professional
Ethics}, see \textit{Model Rules of Prof’l Conduct} preface, available at
http://www.abanet.org/cpr/mrpc/preface.html (last visited Nov. 8, 2011); Steven K.
Berenson, \textit{Public Lawyers, Private Values: Can, Should, and Will Government Lawyers
Serve the Public Interest?}, 41 B.C. L. Rev. 789, 793 (2000); Bruce A. Green, \textit{Why Should
Prosecutors “Seek Justice?”}, 26 \textit{Fordham Urb. L.J.} 607, 612–13 (1999); Russell G.
Pearce, \textit{Rediscovering the Republican Origins of the Legal Ethics Codes}, 6 \textit{Geo. J. Legal
Ethics} 241 (1992) (discussing Sharswood’s relationship to the field of legal ethics).

\textsuperscript{22} The Preamble to the ABA’s Model Rules of Professional Conduct provides, “An
independent legal profession is an important force in preserving government under law, for
abuse of legal authority is more readily challenged by a profession whose members are not
dependent on government for the right to practice.” \textit{Model Rules of Prof’l Conduct
Preamble and Scope ¶ 11, available at http://www.americanbar.org/groups/
professional_responsibility/publications/model_rules_of_professional_conduct/model_rule
s_of_professional_conduct_preamble_scope.html} (last visited Nov. 8, 2011).

\textsuperscript{23} The Sarbanes-Oxley Act of 2002, which was promulgated in the wake of headline-
grabbing financial scandals, is viewed as a forceful corrective measure to combat abuse in
the financial-legal regulatory markets. See Jesselyn Radack, \textit{Tortured Legal Ethics: The
Role of the Government Advisor in the War on Terrorism}, 77 \textit{U. Colo. L. Rev.} 1, 40

\textsuperscript{24} Smith, supra note 6, at 156.
security lawyers are not the only practitioners to have experienced high-profile examination of their professional responsibilities. Indeed, the private sector has seen a number of financial scandals, which implicate attorneys and their legal advice. Regardless of practice area, all attorneys are subject to professional codes of conduct, which are codified in state licensing jurisdictions. All jurisdictions except California base their ethical codes on the ABA’s Model Rules of Professional Conduct. The nearly 40,000 federal government attorneys are subject to additional ethical obligations above those imposed by the licensing jurisdiction.

1. Predictive Value of Legal Ethics in Times of Crisis

The study of individual compliance with stated norms is valued in part because it helps to predict future behavior. Judge James Baker, previously a special assistant to the president and legal adviser to the National Security Council, described the law as providing a source of “calm and stability at times of crisis, guiding but not compelling decision makers to processes of decision that rapidly identify risks and benefits and fix accountability.” Much like the law, the rules of professional responsibility serve as a “source of predictability,” allowing lawyers to approach high-pressure national crises with the steady hand of experience. In these circumstances, we can deter the unethical practice of law through established processes and enforcement mechanisms, which facilitate compliance with professional responsibility obligations. As discussed in more detail in Parts IV and V below, the ethical framework proposed in this Article will serve as a guide to legal advisors. These Parts argue that, had this framework been applied, it could have effectively prevented the flawed logic of the OLC torture memos.

The legal issues encountered by national security attorneys are numerous and complex. They include the constitutionality of actions taken by the executive branch vis-à-vis Congress and the courts, the legality of highly classified surveillance and other counter-terrorism measures, and the decision to use armed forces.

25 Lincoln Sav. & Loan Ass’n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990) (“What is difficult to understand [in the 1990 Lincoln Savings and Loan scandal] is that with all the professional talent involved . . . why at least one professional would not have blown the whistle.”).
26 Paul D. Paton, Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America, 78 FORDHAM L. REV. 2193, 2229 n.167 (2010).
28 BAKER, supra note 8, at 309.
29 See id. (explaining how legal predictability assists decisionmakers in times of crisis).
force, to name just a few. These issues are the responsibility of various players involved in providing legal advice, including: the attorney general and deputy attorney general; the Office of Legal Counsel within the Department of Justice; the general counsel of agencies such as the Department of Defense (DOD), Department of State (DOS), the Central Intelligence Agency (CIA), the Department of Homeland Security (DHS), as well as the Chairman’s legal advisor. Additionally, counsel to the president, the National Security Council’s legal advisor, and lawyers to the vice president are also engaged in national security legal advice, to varying degrees depending on the administration. The Judge Advocate Generals (JAG) of each service are central players in military law, policy, and the law of armed conflict, which supplements the wartime legal advice of other executive branch agencies. The existence of additional players, such as the lawyers in the Department of Treasury and the Department of Justice’s (DOJ) National Security Division, further indicate that the nature of legal advice will be specific to each agency, but will also overlap—and at times contradict—advice of other executive branch attorneys. Nonetheless, the norms of the profession must always guide this advice.

Many contend that government legal advisors must comport their behavior to higher ethical standards due to a lack of checks on the attorney’s advice by courts or other review mechanisms, and the weight that policy makers give to their legal advisor’s recommendations. National security practice grants the legal advisor necessary flexibility, resulting from the deference given to the executive branch regarding national security decisions, and the confidential, often classified nature of the information at issue. Professor William H. Simon framed the issue of accountability in the following way: “[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for

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30 Id. at 311.
31 Id.
33 BAKER, supra note 8, at 311.
35 Scharf, supra note 16, at 68. Abe Sofaer, State Department Legal Adviser in the Reagan and Bush administrations, related an instance in 1985 when he advised against bombing Libya in relation to its support of terrorist attacks on airlines in Rome and Vienna that year. Policy makers heeded his warning that the legal basis for this action had not yet been established, and that peaceful options had not been exhausted. Id.; see Michael P. Scharf & Paul R. Williams, Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Advisor (2010) (compiling interviews and round-table discussions with OLC attorneys).
substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she need assume for substantive justice.  

This formulation suggests that government legal advisors must at least have heightened ethical awareness because there are few checks on their legal advice and advisory opinions. The authors of the torture memos, working for the OLC, must be acutely aware of these risks, since OLC opinions are rarely reviewed by outside agencies and are binding within the Executive branch.  

The typical method of holding lawyers to account through state bar authorities is less useful in the national security setting, argues Professor David Kaye, former State Department attorney. He states:  

Criminal liability is, of course, a possibility where a lawyer, like any other official, provides advice with the intention of furthering criminal activity. But the general presumption has to be that lawyers, even those providing bad or wrong advice, are doing so with a good faith belief in the correctness of their position. . . . For the career lawyer, bad ethical behavior in providing legal advice could, and should, be an element in his advancement; for the politically appointed lawyer, such behavior may cut short an otherwise promising public career. 

But some view the internal agency regulatory approach as flawed, arguing that attorneys like Jay Bybee (now a federal judge) were not accountable for overseeing the drafting of OLC legal memos that arguably authorized the use of torture on detainees held during the “war on terror.” But before lawyers will be sanctioned, the ethical obligation must be identified. The following section discusses traditional approaches to defining the professional responsibility obligations of government legal advisors and demonstrates why they are insufficient to prevent future transgressions from ethical practice.

37 Trevor W. Morrison, Stare Decisis in the Office of Legal Counsel, 110 Colum. L. Rev. 1448, 1451 (2010).
38 Kaye, supra note 32, at 597; see also Goldsmith, supra note 1, at 11. Professor Goldsmith recalls that after reading the so-called torture memos when he became head of the Department of Justice’s Office of Legal Counsel, “I also worried, more selfishly, that dirtying my hands with this mess would stain my professional reputation no matter how I acted.” Id.
39 Id. at 22.
40 See, e.g., Radack, supra note 23, at 37, 46 (arguing Jay Bybee was not democratically accountable for the main torture memorandum).
B. Previous Models of Identifying Professional Responsibility Obligations

Rules of professional conduct,\textsuperscript{41} court cases,\textsuperscript{42} and scholarship\textsuperscript{43} illustrate the heightened ethical obligations of government attorneys. Each of these sources, however, are either directed toward the ethics of federal prosecutors and civil litigators, or couched in vague, aspirational terms. There is a paucity of guidance in professional codes to government attorneys serving in advisory positions.\textsuperscript{44} Nonetheless, the majority of scholarship analyzing the professional responsibility of government attorneys involves (a) identifying the client, and (b) identifying the attorney’s role. Resolution of these issues will help clarify the ethical norms to be applied in a given situation. As this section demonstrates, these issues are a starting point for compliance with norms of professional responsibility but have less predictive value in terms of ethical legal advice. This Article supplements these approaches with a more complete view of what drives legal advisors to, or away from, ethical practice.

1. Identifying the Client

Many consider identification of the client as a preliminary step in determining to whom an attorney owes an ethical obligation.\textsuperscript{45} The Supreme Court views

\textsuperscript{41} See Model Rules of Prof’l Conduct R. 3.8 cmt.1 (2011), available at http://www.abanet.org/cpr/mrpc/rule_3_8_comm.html (last visited Nov. 8, 2011) (providing that a “prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

\textsuperscript{42} Radack, supra note 23, at 12 nn.73 & 74 (collecting cases).

\textsuperscript{43} See generally Berenson, supra note 21 (arguing that the government attorney has a heightened role to serve the public interest, distinct from the client-based model of private attorneys); Jackson, supra note 18 (discussing the unique nature of the government attorney); Orly Lobel, Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance, 77 Fordham L. Rev. 1245 (2009) (studying competing loyalties of the corporate and government lawyers and encouraging internal reporting and regulatory mechanisms over more overt reporting of organizational misconduct); Radack, supra note 23 (examining “agency” and “public interest” approaches to government lawyers’ ethics in the context of the War on Terror); Elisa E. Ugarte, The Government Lawyer and the Common Good, 40 S. Tex. L. Rev. 269 (1999) (discussing the government lawyer’s client and attorney-client privilege issues in the wake of presidential scandals of the late 1990s).

\textsuperscript{44} Berenson, supra note 21, at 797 n.40; see also Catherine J. Lancetot, The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions, 64 S. Cal. L. Rev. 951, 967 (1991).

loyalty to the client as the attorney’s paramount professional responsibility. The client-based model, while appropriate in the private-practice setting, may be less appropriate for government attorneys. The actors influencing the national security agenda can be understood as “a nexus of competing and contradictory actors which influence [government] behavior, including bureaucratic subsets within the executive branch, political subsets within the Congress, Supreme Court and lower court judges in the judicial branch, and nongovernmental organizations outside the government.”

Geoffrey P. Miller argues that the notion of “client” in government practice is “misleading because it invokes relationships between private lawyers and people who use their services that have little in common with the role of the government attorney.” Model Rule 1.13 explains that an attorney “employed or retained by an organization represents the organization acting through its duly authorized constituents.” The comment to this rule, however, clarifies that “[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context.” The torture memos, and the ethical problems related to the memos, were in large part the result of legal advisors seeking to fulfill the desires of their perceived “client,” further demonstrating the ineffectiveness of this approach to gauge ethical compliance.

Nonetheless, an analysis of the client identification step reveals several possible

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47 Scharf, supra note 16, at 61.


51 DEP’T OF JUSTICE, OFFICE OF PROF’L RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 198, 251–57 (2009) [hereinafter OPR REPORT] (discrediting the legal analysis underlying the torture memos and finding that John Yoo and Jay Bybee committed professional misconduct). David Addington, former Counsel to Vice President Richard Cheney, testified before the House Judiciary Committee that: “In defense of Mr. Yoo, I would simply like to point out that [he did] what his client asked him to do.” Id. at 198.
clients for executive branch legal advisers: the attorney’s agency, the agency head, the branch of government for which the attorney works, the government as a whole, and the public interest.52

(a) Agency/Agency Head as Client

Similar to the private practice model, the agency approach focuses on the client’s objectives.53 The founders of modern legal ethics, including Monroe Freeman and Geoffrey Hazard, applied an agency approach, which is akin to a “client-centered model of mainstream legal ethics.”54 The Model Rules for Federal Lawyers and the Restatement (THIRD) of the Law Governing Lawyers similarly place an emphasis on the agency model but leave room for considering the interests of the government more broadly.55 In United States v. AT&T,56 the DC District Court recognized that the identity of the government attorney’s client is not settled, but it “clearly includes the attorney’s own agency.”57 The ABA Model Rules include the agency, but suggest that the client “may also be a branch of government . . . or the government as a whole.”58

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52 Roger C. Cramton, The Lawyer as Whistleblower: Confidentiality and the Government Lawyer, 5 GEO. J. LEGAL ETHICS 291, 296 (1991) (providing several alternatives to the government attorney’s client, including the public, the government as a whole, the branch of government in which the lawyer is employed, the particular agency or department in which the lawyer works, and the responsible officers who make decisions for the agency); see also BAKER, supra note 8, at 318 (“[C]andidates [include] the president, the agency, the agency head, the public interest, and the Constitution.”).

53 See, e.g., William H. Simon, Visions of Practice in Legal Thought, 36 STAN. L. REV. 469, 469 (1984) (“Both the client’s interests and the constraints of the system are seen as constituted prior to the lawyer’s activity.”).

54 Radack, supra note 23, at 6–7; see also MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 79–96 (1975); MONROE H. FREEMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 71–82 (3d ed. 2004); GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 141 (1978).

55 See MODEL RULES OF PROF’L CONDUCT FOR FED. LAWYERS R. 1.13 (FBA 1990); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000) (“No universal definition of the client of a governmental lawyer is possible. . . . Those who speak for the governmental client may differ from one representation to another. The identity of the client may also vary depending on the purpose for which the question of identity is posed.”).


57 Id. at 617.

58 MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 9 (2011). This comment also provides that “when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.” Id.
Some suggest that a non-agency approach to the legal advisor’s attorney-client relationship is both unethical and undemocratic. Professor Geoffrey Miller claims “an agency attorney acts unethically when she substitutes her individual moral judgment for that of a political process which is generally accepted as legitimate.” This theory maintains that the elected official and her political appointees may serve in part because of the specific legal views they bring to the position. There is increased democratic accountability when the ultimate responsibility for an action rests with elected officials and their appointees. According to Richard Nixon’s attorney general, Elliot Richardson, “[a]dvice to a president needs to have the political dimension clearly in view, without a regard for any pejorative attached to the word political.” Also, the real influence that lawyers have in policy decisions belies the argument that they should serve as disinterested advisors to the policy makers. Miller concludes “the attorney’s duties run to the officer who has the power of decision over the issue.”

Professor Kaye suggests that identifying the client for the legal advisor is of significant importance. He argues that the alternative, the “public interest” view, is unrealistic. He states emphatically that “[t]he agency lawyer works for his or her agency and has to serve his or her agency’s interests, and the bureaucratic structure should be designed to withstand that kind of client relationship.”

(b) The Government and the Public Interest as Client

A significant number of commentators in recent years have moved away from the agency model of the government attorney-client relationship. Many suggest that the legal advisor represents the government as a whole and through it the

59 Jeffrey Rosenthal, Who Is the Client of the Government Lawyer?, in ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS 13, 24 (Patricia E. Salkin ed., 1999) (“[T]he government lawyer is ethically bound to represent the agency by whom he or she is employed.”).

60 Radack, supra note 23, at 7 (discussing arguments against the non-agency approach).

61 Miller, supra note 48, at 1294.

62 Radack, supra note 23, at 8–9.

63 See NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789–1990, at 27 (1992); see also GOLDSMITH, supra note 1, at 34 (agreeing and describing Goldsmith’s experience demonstrating the same).

64 Miller, supra note 48, at 1298.

65 Kaye, supra note 32, at 595.

66 Id.

67 Michael Stokes Paulsen, Who “Owns” the Government’s Attorney-Client Privilege?, 83 MINN. L. REV. 473, 487–492 (1998) (concluding that the “client” of an attorney-adviser at the federal level is the government as a whole); see also MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 9 (2011) (providing that “[a]lthough in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole”).
public interest. Former attorney general Griffin Bell wrote that “[a]lthough our client is the government, in the end we serve a more important constituency: the American people.” According to some, the government advisor’s obligation runs to the Constitution, and possibly even “the rule of law itself.”

The public interest model gives weight to the courts and third parties, while the agency is valued only to the extent it coincides with the public interest. This model has the support of some former government attorneys, and it may provide constraints on the government lawyer with few outside checks. Advocates of the public interest approach find support in the “heightened” standard required of government attorneys long applied by the courts. Specifically, cases such as Berger v. United States, frequently cited for the ethical obligations of prosecutors, may apply to other government attorneys as well.

In a survey of more than twenty government attorneys, it was found that the “attorneys almost universally agreed that their role was different from that of private attorneys because a concern for the public interest informed all of their

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68 Leading ethics scholars supporting the public interest model include, Ethics in Practice: Lawyers’ Roles, Responsibilities, and Regulation 42–54 (Deborah L. Rhode ed., 2003); David Luban, Legal Ethics and Human Dignity 200–05 (Gerald Postema ed. 2007); Berenson, supra note 21; Radack, supra note 23. A similar value-oriented approach has been endorsed by Douglas Letter, Lawyering and Judging on Behalf of the United States: All I Ask for Is a Little Respect, 61 Geo. Wash. L. Rev. 1295, 1297 (1993); Ralph Nader & Alan Hirsch, A Proposed Right of Conscience for Government Attorneys, 55 Hastings L.J. 311, 313–14 (2003); Simon, supra note 36, at 1090 (arguing that lawyers should have discretion to decide what clients to represent and how to represent them, and exhorting lawyers to “seek justice.”); Ugarte, supra note 43, at 274–278; Note, Rethinking the Professional Responsibility of Federal Agency Lawyers, 115 Harv. L. Rev. 1170, 1182–91 (2002).

69 Bell, supra note 45, at 1069.

70 Dehn, supra note 50, at 83; see also Alvarez, supra note 11, at 220 (“[G]overnment attorneys owe their allegiance, as their oath demands, only to the rule of law or the U.S. Constitution.”).

71 Radack, supra note 23, at 9–10.

72 Id. at 10 & n.13. But see infra Part II.B.1.c., citing several former government attorneys supporting the agency-client approach and others taking a more fluid approach.

73 There are few formal checks on a government advisor’s legal opinions, unlike litigators or corporate attorneys whose positions may be tested by an adversary or neutral judge.

74 Radack, supra note 23, at 12 nn.73–74.

75 295 U.S. 78 (1935).

76 Id. at 88; see also Douglas v. Donovan, 704 F.2d 1276, 1279–80 (D.C. Cir. 1983) (“As officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation. . . . This is especially true for government attorneys, who have special responsibilities to both this court and the public at large.”).
Moreover, “[a]lthough government attorneys do advocate forcefully for the positions of the government officers and agencies that they represent, their responsibility to the general public is always in the background and at times affects the manner in which they represent their clients.” Beyond the interests of the public, some argue that this model requires attorneys to “pay attention to their own moral convictions.”

(c) Practitioners’ Perspectives

Practitioners have varied perspectives about who is the client of the government legal advisor. Professor Michael P. Scharf conducted an empirical study of the role of former State Department Legal Advisers. Their comments about client identification are revealing. For some, the government as a whole and public interest models are most compelling. Davis Robinson, State Department Legal Adviser under President Reagan, noted that the agency head is the client, along with the president when there are disagreements between the principle and the president. He adds, “[b]ut then you’ve also got a duty to the Senate . . . . You’ve got a duty to the public. It’s an extremely difficult question to answer and one that [legal advisors] should lose sleep over.”

Some take the agency approach described above. For example, Edwin Williamson, State Department Legal Adviser in the first Bush Administration, argued that the client is the agency head, and that only through the agency head does the legal advisor serve the president. According to Professor Kaye, “[i]t is not the job of each lawyer to determine the collective interests and values of the American public in each case.” Nonetheless, he also emphasizes the lawyer’s role to speak up “in the face of contemplated action that may violate strongly held norms, values or legal principles.”

Others took a situational approach, arguing for agency loyalty first, but if there is a disagreement, the duty may run to the government and then the public interest. Conrad Harper, State Department Legal Adviser under President Clinton, agreed that on a daily work-level basis the client is the principle of the agency, but

78 Id. at 197–98.
79 Radack, supra note 23, at 14.
80 See generally Scharf, supra note 16, at 45–49 (explaining the need for and methodology of the empirical study).
81 Id. at 65–67; see also SCHARF & WILLIAMS, supra note 35, at 151–54.
82 Scharf, supra note 16, at 66.
83 Id.
84 Kaye, supra note 32, at 595. But see Radack, supra note 23, at 9–13, 33–39 (arguing that the public interest must be taken into account by the government legal advisor, particularly in “morally perilous” cases).
85 Kaye, supra note 32, at 595.
in the event of a fundamental disagreement with the principal, the duty is with the president. Disagreements with him could require “resignation on the one hand, but on the other there is the notion that there may be obligations to the Senate as representative of the sovereignty—because, of course, in our system the sovereignty is with the people.” Similarly, Herb Hansel of the Carter administration notes that in nearly all of a legal advisor’s daily tasks, the government attorney works for the agency head or other supervisors. But when there are significant disagreements “the public interest is in the mind of the lawyer, and this applies to all lawyers that serve the public.”

Michael Matheson, who served in both the Bush and Clinton administrations, saw past the lawyer/client relationship. He equates the government lawyer as having parallel ethical obligations to other public servants. The legal advisor has a duty to give honest legal advice and not to change it based upon what the client may expect or desire. So I would say that in that sense, a government lawyer has a duty to the entire body of the public even though he obviously has direct working relationships with a hierarchy in his own agency.

Abe Sofaer, State Department Legal Adviser in the Reagan and Bush administrations, stated that the issue of who is the client arose very dramatically during the Iran-Contra episode. I was working to try to stop the lies that were going on—the stonewalling that was going on in the Reagan administration about Iran-Contra. . . . And [Secretary of State] Schultz was led at a meeting to ask me point-blank . . . “Who do you represent, Sofaer? Are you my lawyer? Whose lawyer are you?”

Sofaer responded that his client was the president of the United States “and through him, the people of the United States and the Congress of the United States.”

David Andrews of the Clinton administration agreed with Edwin Williams, who sees the agency head as the client. He added that if there are “privilege and confidentiality problems” then one must remain silent, unless of course one feels “a duty to resign, then it arises from the obligation to the people.” In this context

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86 SCHARF & WILLIAMS, supra note 35, at 151–54.
87 Scharf, supra note 16, at 65–67; see also SCHARF & WILLIAMS, supra note 35, at 153.
88 Scharf, supra note 16, at 67.
89 Id. at 66.
90 Id. at 65.
91 Id.
92 Id. at 65–67; SCHARF & WILLIAMS, supra note 35, at 154.
the issue of confidentiality arose, and some government attorneys felt restrained from sharing misrepresentations by the government because of the attorney-client privilege.93 However, “[a]t some point, depending on how serious the case is, one’s obligations may run in fact to the sovereignty.”94 This opinion highlights that the identity of the legal advisor’s client is fluid.95 The “client” with authority to decide a particular issue will vary according to context.96 As discussed in more detail below, the client-centered approach, standing alone, fails to predict adequately the ethical behavior of government legal advisors. It must therefore be examined in light of external factors influencing individual compliance.

2. Identifying the Attorney’s Role

In order to define the ethical norms applicable in government service, some “find the answer in identifying the contextual role of the lawyer, as advisor, advocate, counselor, or judge.”97 Professor Steven K. Berenson states, “it may be the case, given the numerous and sometimes conflicting duties placed upon lawyers for government entities, that identification of the client is not critical, or even helpful, in determining the government lawyer’s appropriate professional role.”98

Some argue that the government legal advisor should act as a judge, rendering neutral, detached legal advice;99 others see the lawyer as an advocate promoting the aims of the decision maker.100 Under the advisory model, the government attorney renders advice on legally available options, a role analogous to a private attorney “guid[ing] the client to the client’s preferred outcomes.”101 Additionally, there are growing demands that the government legal advisor serve exclusively as a

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93 Conrad Harper of the Clinton administration discussed Herb Wexler’s trouble with fundamental misrepresentations about the Japanese relocation cases, having worked in the Department of War and then the Justice Department. He remained silent for many years due to his perceived duty to keep his client’s confidence. Scharf, supra note 16, at 66.
94 Id.
95 Leong, supra note 77, at 184.
96 BAKER, supra note 8, at 320.
97 Id. at 7. In addition, ABA Model Rules of Professional Conduct 1.7 and 2.4 allow lawyers to have single clients, act on behalf of multiple clients, or act as third-party neutrals in the case of arbitrators or mediators.
98 Berenson, supra note 21, at 799–800 (noting that it is less useful to identify the client than to demonstrate that the government attorney has some obligation to the public interest that is greater than that of a private attorney).
99 BAKER, supra note 8, at 318 n.12 (naming advocates of the judicial model).
100 See Gerald Fitzmaurice, Legal Advisers and Foreign Affairs, 59 AM. J. INT’L L. 72, 73 (1965) (the job of the government attorney is to give impartial counsel); Scharf, supra note 16, at 65 (“The Government wants its international lawyer to promote rather than judge the aims of the administration.”).
101 BAKER, supra note 8, at 318.
representative of the public interest. The public interest model mirrors the “gatekeeper” model of corporate counsel, which requires a duty to the agency client and the public interest. This approach has taken shape in the last decade because of high profile corporate financial scandals and the subsequent passage of the Sarbanes-Oxley Act. Under the “gatekeeper” role of the attorney advisor, the attorney’s ability to report within the client’s organizational hierarchy will assist him in fulfilling his ethical obligations. Furthermore, some argue that imposing clear duties on attorneys—e.g., the duty to report misconduct—will reinforce ethical norms. This averts the dynamic in which “lofty ideals” of ethics are applauded, but ignored.

C. Why These Models Fall Short

The client identification approach and efforts to define the legal advisor’s role add little predictive value to ethical compliance. Initially, the client of the government attorney will vary depending on the circumstances. As recognized by practitioners, on a day-to-day basis the client is the agency. But zealous advocacy of an agency-client is not always appropriate because, unlike the litigator or the corporate attorney, there is no adversary or neutral judge to rebut the government advisor’s position. As stated by the DC Circuit Court, “the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.”


103 See generally John C. Coffee, Jr., Gatekeepers: The Professions and Corporate Governance 2 (2006) (applying the “gatekeeper” analogy to the corporate context); Lobel, supra note 43, at 1263 (discussing a paradigm shift in the attorney’s obligation to act as a gatekeeper who monitors ethical behavior while also advocating for their client); Note, Government Counsel and Their Obligations, 121 HARV. L. REV. 1409, 1415–16 (2008) [hereinafter Government Counsel] (borrowing the analogy of a corporate lawyer as a “gatekeeper” when arguing for a clearer definition of the government attorney’s client in the wake of the Enron scandal and the passage of the Sarbanes-Oxley Act). This idea is not new. See Louis D. Brandeis, The Opportunity in the Law, 39 AM. L. REV. 555, 559–61 (1905) (“For nearly a generation the leaders of the bar with few exceptions . . . have erroneously assumed that the rule of ethics to be applied to a lawyer’s advocacy is the same where he acts for private interests against the public as it is in litigation between private individuals.”).

104 See Government Counsel, supra note 103, at 1415–16.

105 See supra Part II.A.1 (discussing the importance of predictive value).

106 In re Lindsey, 158 F.3d 1263, 1272–73 (D.C. Cir. 1998).
On the other hand, identifying with an abstract client, such as the public interest, does not assist compliance. The initial concern is the abstract nature of identifying what is precisely in the public interest when rendering legal advice.\textsuperscript{107} Some argue that the "public interest . . . is a vague and meaningless abstraction,"\textsuperscript{108} and "there are as many ideas of the 'public interest' as there are people who think about the subject."\textsuperscript{109} Others insist that the "public interest" is an unintelligible guidepost for government attorneys.\textsuperscript{110} Application of such an abstract concept is challenging. For example, one commentator would require "lawyers to assess their conduct in light of all the societal interests at issue in particular practice contexts."\textsuperscript{111} It is fair to inquire critically whether these interests include the ever-divided public, or the political position of the democratically elected party that purportedly speaks on behalf of the electorate.\textsuperscript{112}

Some have greater concerns than clarity, arguing that a lawyer’s “subjective sense” of the public interest would allow the legal adviser to sabotage agency policy, resulting in “disorganized, inefficient bureaucracy, and a public distrustful of its own government.”\textsuperscript{113} This could result in an unaccountable legal advisor upsetting the democratic separation of powers.\textsuperscript{114} “Nothing systemic empowers government lawyers to substitute their individual conceptions of the good for the priorities and objectives established through governmental processes” of election, appointment, confirmation, and legislation.\textsuperscript{115} Moreover, the idea of representing the government as a whole is flawed. The separation of powers grants a "needed stability through a dynamic tension of opposing forces."\textsuperscript{116} It is not the place of the agency lawyer to advocate on behalf of Congress or the Supreme Court, since Congress has sufficient institutional protection mechanisms, such as the power of the purse, oversight, investigation, and impeachment, and the Court can rule against executive or congressional action in a case before it.

Advocates of the public interest model tend to reference some of the most heavily scrutinized and criticized legal opinions issued in the wake of 9/11, such as

\begin{itemize}
\item \textsuperscript{107} Berenson, \textit{supra} note 21, at 802–05 (arguing on behalf of the public interest model, but here outlining its opponents’ argument that it is unintelligible and therefore cannot sufficiently guide conduct).
\item \textsuperscript{108} William Josephson & Russell Pearce, \textit{To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?}, 29 HOW. L.J. 539, 564 (1986).
\item \textsuperscript{109} Miller, \textit{supra} note 48, at 1294–95.
\item \textsuperscript{110} See Fred C. Zacharias, \textit{Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?}, 44 VAND. L. REV. 45, 48–49 (1991) (discussing prosecutors’ vague duty to “do justice” under the code of professional responsibility).
\item \textsuperscript{111} \textit{Ethics in Practice: Lawyers’ Roles, Responsibilities, and Regulation} 18. (Deborah L. Rhode ed., 2000).
\item \textsuperscript{112} Lanctot, \textit{supra} note 44, at 1005–06.
\item \textsuperscript{113} Miller, \textit{supra} note 48, at 1294–95.
\item \textsuperscript{114} Berenson, \textit{supra} note 21, at 806.
\item \textsuperscript{115} Miller, \textit{supra} note 48, at 1295.
\item \textsuperscript{116} \textit{Id.} at 1296.
\end{itemize}
the torture memos discussed in detail in Part IV below, eschewing the agency-centered approach. The flaw in this reasoning is that following the public interest in the case of the torture memos may not have altered the way government attorneys handled counter-terrorism policy. As Professor Jack Goldsmith, former head of the Department of Justice Office of Legal Counsel, recalls, “[t]he consistent refrain from [the bi-partisan 9/11 Commission], Congress, and pundits of all stripes was that the government must be more forward-leaning against the terrorist threat: more imaginative, more aggressive, less risk-averse.”

Public interest model advocates may also place undue emphasis on sources, including cases, codes, and commentary describing the heightened responsibilities for government attorneys. These sources, however, relate to federal prosecutors and government civil litigators, with little to no reference to attorney advisors. Unlike their peers, legal advisors “do not relate their conduct back to specific theories of ethical responsibility and conflict of interest analysis, as a government or private practitioner might do in criminal practice.” Moreover, the courts have not fully embraced one model over the other. In fact, in cases of governmental attorney-client privilege, the courts have maintained that the government agency is the client, but that attorneys must temper this advocacy role by seeking advancement of the public interest.

Even if the public interest model is not the most accurate approach for identifying ethical norms, it is certainly a motivating factor behind all public service. To this end, ABA Model Rule 2.1 is directly on point, and directs advisors to “exercise independent professional judgment and render candid advice. In rendering advice a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” Rule 2.1 and its commentary take into account issues related to the public interest, but otherwise lack specificity. This reinforces the unique role served by the government legal advisor, as well as the need for greater flexibility in advisory positions.

Beyond client identification, casting the legal advisor in a specific role fails to take into account the nature of the job. For example, zealous advocacy may not be

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117 Goldsmith, supra note 1, at 74 (describing the pressure faced by administration officials to prevent future terrorist attacks following 9/11).
118 See Radack, supra note 23, at 10–11, 12 nn.73–74.
119 Baker, supra note 8, at 318–19 (“When the assistant secretary asks whether the United States can provide aid [under the Foreign Assistance Act], the question is not, who is the client? – it is whether the Act authorizes such aid and, if so, subject to what substantive and procedural thresholds. Likewise, judge advocates in the field do not ask, who is the client? – they ask, which commander has the authority to issue the lawful order to attack?”).
120 See, e.g., In re Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005); In re Lindsey, 158 F.3d 1263, 1272–73 (D.C. Cir. 1998); In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920–21 (8th Cir. 1997).
appropriate where there is seldom a check on the executive branch attorney’s opinion—particularly little judicial review. Legal opinions generated from the OLC are treated as binding on the executive branch, and if unchecked have significant impacts on individual rights. Democratic accountability could also suffer under this model, where the President makes decisions in secret without consulting Congress. As a result, the “advocacy model of lawyering inadequately promotes the legality of executive action.” Discussing his role as head of OLC, Professor Goldsmith notes, “[l]egal advice to the President from the Department of Justice is neither like advice from a private attorney nor like a politically neutral ruling from a court. It is something inevitably, and uncomfortably, in between.”

The public-interest role of the legal advisor raises issues similar to those found in the public-interest-as-client methodology. Simply put, who determines what actions a public interest representative should take? Also, in a system of checks and balances, the executive branch attorney should be vigilant of the Executive’s needs; Congress and the Courts have means and methods to protect their own prerogatives. Finally, arguing against non-advocacy approaches, some suggest that unelected government attorneys should not compete with or advocate against the interests of an elected official, who voters elected into office in part due to her legal agenda.

Nonetheless, simply sitting back and defending the President’s view of facts and law is not zealous or diligent representation. Former head of OLC, William Barr agrees, stating, “[b]eing a good legal advisor [to the President] requires that I reach sound legal conclusions, even if sometimes they are not the conclusions that some may deem to be politically preferable.” However, once the decision maker acts, then the lawyer becomes an advocate. “He clears talking points for use with the Congress, the media, and foreign governments, conscious that the talking points, as opposed to the advice rendered in advance of decision, will shape outside perspectives on the validity of US assertions of authority.”

Moving beyond the issue of client or role identification, Judge Baker argues that the national security practitioner should be prepared to play each of the roles required of the position. “Constitutional fidelity requires faithful legal analysis. That means good faith application of the law, including good faith application of constitutional structure and principle.” Public officials, including attorneys in the

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122 See, e.g., Morrison, supra note 37, at 1464–65 & n.58.
123 Radack, supra note 23, at 37.
124 GOLDSMITH, supra note 1, at 35.
125 See BAKER, supra note 8, at 321.
126 William P. Barr, Attorney General’s Remarks, Benjamin N. Cardozo School of Law, November 15, 1992, 15 CARDozo L. REV. 31, 35 (1993); see also GOLDSMITH, supra note 1, at 33–34 (agreeing with Barr’s view, but finding it hard to implement).
127 See BAKER, supra note 8, at 322.
128 Id.
129 Id. at 320.
130 Id. at 7.
executive branch, and the uniformed judge advocates, take an oath to preserve, protect, and defend the Constitution. Judge Baker laments that, “scant attention is paid in the scholarly literature to the national security lawyer’s responsibility to uphold and defend the Constitution as the source of ethical duty.”

Recognizing that in various crisis situations the role of the attorney may change, and that the identity of the client may shift are important steps toward compliance with ethical norms. The fluid nature of these normative principles necessarily requires a paradigmatic shift in the way we approach the legal ethics of government attorneys. The moral and legal considerations underlying the traditional ethics models remain intact. But each of these approaches, standing alone, fails to account for factors that influence the behavior of individuals in national security advisory positions. In the following Part, this Article proposes applying compliance theory—describing why actors behave in accordance with specified norms—to reexamine government attorneys’ professional responsibility obligations. A thorough assessment of the theoretical framework clarifies the process through which legal ethics are practiced. Compliance theory provides a more nuanced, but intuitive process to guide the ethical practitioner.

III. COMPLIANCE THEORY AND LEGAL ETHICS

The traditional methods of determining the ethical obligations of government legal advisors only touch upon the national security practitioner’s rationale for complying with norms of professional responsibility. They fail to account for contextual and situational influences that shape attorney behavior. This Part introduces a comprehensive approach to resolve the many unanswered questions beyond norm identification. A behavioral-studies approach addresses the nature of

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individual compliance and provides a framework for discussing how and why attorneys follow the rules.

A. Defining the Theories of Compliance

The study of norms, and observed conduct in relation to those norms, shapes the basis of compliance theory. These studies are the foundation of research into individual, corporate, and political behavior. Whether an individual has a duty to obey the law, how to enforce government regulatory schemes in the private sector, and whether government officials are faithfully executing the laws are all examined in this field. This Article is the first to utilize compliance theory in terms of professional responsibility.

The norms at issue in this compliance study include the government attorney’s legal, ethical, and moral duties. When codified, ethical duties approach “behavior from both a philosophical and practical standpoint.” Moral duties, some argue, are intuitive, conscience-driven evaluations of right and wrong in human interactions. Professor Anita L. Allen articulated the convergence of morals and ethics when she stated, “[e]thical standards adopted by lawmakers, business and professional associations are often specialized applications of general moral standards.” Problems of professional ethics, then, are really problems of compliance, not ignorance of expectations.

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137 See Hill, supra note 134, at 52.


139 See, e.g., Dickinson, supra note 136, at 9; Scharf, supra note 16.

140 Radack, supra note 23, at 32.

141 Id.


143 See, e.g., BANKS MCDOWELL, ETHICS AND EXCUSES: THE CRISIS IN PROFESSIONAL RESPONSIBILITY 6 (2000).
Harold Koh, the State Department Legal Adviser, describes four competing theories of behavioral compliance. These include coincidence, identification/conformity, compliance, and obedience/internalization. Under the coincidence model, there is no causal relationship between norms and obedience. It is by chance that behavior matches a given norm. The identification/conformity model suggests that people loosely conform conduct to rules, but not because they feel a legal or moral obligation to do so. This has also been described as “identification or affiliation,” which “occurs when an individual accepts influence to establish or maintain a satisfying relationship” without necessarily adopting the organization’s values as his or her own. A similar theoretical framework was adopted by Herbert Kelman, who utilizes an approach he calls identification, meaning that an actor “adopt[s] induced behavior in order to be like the influencer, or because it is associated with a desired relationship.” The compliance model explains that actors follow rules in order to gain rewards or to avoid punishment. In terms of legal practice, this model describes ethics as a system of “voluntary compliance relying on internal sanctions such as guilt or on less compulsory sanctions like the loss of respect or contempt from fellow citizens.” The obedience/internalization model suggests a value-oriented approach to behavioral compliance. This theory explains that an actor is in true

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144 Koh, supra note 14, at 2600 n.3.
145 Id.
146 Id.
149 Koh, supra note 14, at 2600 n.3; see also Herbert C. Kelman, Compliance, Identification, and Internalization: Three Processes of Attitude Change, 2 J. CONFLICT RESOL. 51, 52–53 (1958). Kelman’s work has been widely adopted in “influence” literature. See, e.g., ELLIOT ARONSON, THE SOCIAL ANIMAL 29–33 (2004); Charles O’Reilly, Corporations, Culture, and Commitment: Motivation and Social Control in Organizations, CAL. MGMT. REV., Summer 1989, at 9, 18.
150 Koh, supra note 14, at 2600 n.3; see also O’Reilly & Chatman, supra note 148, at 493; see also SECURING COMPLIANCE: SEVEN CASE STUDIES (Martin L. Friedland ed., 1990) (discussing various policy approaches designed to achieve compliance via punishments and rewards); Benedict Kingsbury, The Concept of Compliance as a Function of Competing Conceptions of International Law, 19 MICH. J. INT’L L. 345, 364 (1998).
151 MCDOWELL, supra note 143, at 56 (arguing that problems of professional ethics are really problems of compliance, not ignorance of judicially acknowledged expectations).
compliance when he internalizes a rule as part of his “own internal value system.”

Legal theorists, such as Roscoe Hill and H. L. A. Hart, moved forward from mere observations of conduct in relation to stated norms to describe why individuals obey the law. They agree that, “the certification of something as legally valid is not conclusive of the question of obedience.” Where theorists once understood the validity of a law (i.e., one that originates from a fair rule-making process) to correlate directly to compliance with that legal norm, the compliance theory school looks beyond facial validity and attempts to explain why individuals adopt their behavior to the norm at issue. Additionally, merely observing external behavior of individuals and whether it conforms to a stated norm explains “how” individuals comply, but does not clarify “why” the norms are obeyed. This inquiry is resolved when the individual internalizes the standard at issue and adopts it as her own. Herein lies the heart of true compliance, and the final stage of a framework this Article refers to as the process of Internalized Legal Ethics. The three stages of compliance, described in detail below, are interaction, interpretation, and internalization. These are rooted in the legal theory of H.L.A. Hart, and Harold Koh adopted them in his analysis of government compliance with international law.

Writings of organizational theorists instruct the successful internalization of ethical norms within government agencies. They argue that it is important for a
successful organization to have members base their actions on more than mere compliance. An essential behavior in organizational theory is role *transcension*, meaning that innovation and cooperation are necessary for members to assist the organization’s proper functioning. Among the various roles of national security practitioners—advocate, judge, advisor, or public-interest representative—they must constantly operate at a level of role *transcension*. Their job deals with the constant need for innovation, cooperation, and, more importantly, may require them to engage in each of these roles at various times depending on the factual circumstance at hand.

It is at this stage of the compliance process that the higher standard, often equated with the public interest model, becomes relevant to the government legal advisor. As such, the analysis involves not just observations of conduct, but internalization of interpreted norms. This should not, however, be confused with a strict public interest-based model of advocacy. Government service necessarily involves the public interest. However, the value-oriented legal approach runs the risk—when that value is not simply to follow an interpreted ethical norm—of “connecting process and context with an overriding set of normative values,” which means that a specific law or obligation could be overridden “if it is not ‘in accord with a fundamental goal of the [legal] community.’”

Theorists who emphasized the value-oriented approach to government behavior later regretted this model, which can be used to “override the constraints of law” in favor of self-interest or policy objectives. This allows policy to trump legal and professional norms, and “by subordinating law to policy, [this] approach virtually dissolves the restraints of rules and opens the way for partisan or subjective policies disguised as law.” The case study of John Yoo and Jay Bybee’s legal opinions for OLC demonstrates that the law and professional considerations were likely set aside for policy objectives. Therefore, an ethics-based process will serve to guide the legal advisor to compliance with obligations of professional responsibility, and deter subordination of those ideas with her own subjective values.

**B. Organizational Influence and Individual Compliance**

Every attorney is responsible for the legal advice he gives and the extent to which that advice complies with professional responsibility obligations.

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158 *Id.*
159 *See supra* Part II.B.2.
 Nonetheless, the organizational structure and culture of a government agency can either facilitate or discourage the ethical practice of law.\textsuperscript{164}

Promulgating rules of professional responsibility alone does not guarantee compliance with these ethical obligations. Law students are required to take a course on professional responsibility and later pass the Multistate Professional Responsibility Exam (MPRE). But the values and behaviors learned in ethics training will sometimes be contradicted and even disparaged as soon as young attorneys enter practice.\textsuperscript{165} As Judge Baker stated, “[l]aw and process provide an opportunity for success, but do not guarantee a result. Leadership, culture, personality, and sometimes good luck are as important as law.”\textsuperscript{166} This underscores that, beyond the individual, organizational culture plays an important role in the compliance process.

The tension between “loyalty to the organization and loyalty to the greater good” is embedded in the profession of law.\textsuperscript{167} Loyalty to the national security bureaucracy in the US government exposes these tensions.\textsuperscript{168} When numerous executive agency legal advisors are involved in national security practice, such as those at the DOD, CIA, DOS, and DOJ, among others, the structure of the organization matters in fostering a culture that adheres to professional responsibility obligations.

As a subset of compliance theory, organizational design explains that “the structure of an organization and its institutional culture will have distinct impacts on the efficacy of the organization and the likelihood that actors in it will conform to external norms of behavior.”\textsuperscript{169} Professor Gregory McNeal states, “[o]rganizational culture is a response to external factors and is exhibited most strongly in an organization’s need to survive.”\textsuperscript{170} The organization’s culture will not only play a role in terms of shaping organizational behavior,\textsuperscript{171} it will also

\begin{footnotes}
\footnotetext[164]{W. Bradley Wendel suggests that the causal factors of unethical conduct are best described in terms of the “decisionmaking environment” and that greater emphasis should be placed on the institutional aspects that affect attorney behavior. W. Bradley Wendel, \textit{Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (A Response to Professor Hatfield)}, 104 NW. U. L. REV. 58, 63 (2009).}
\footnotetext[165]{POLLOCK, \textit{supra} note 17, at 322.}
\footnotetext[166]{BAKER, \textit{supra} note 8, at 309.}
\footnotetext[167]{Lobel, \textit{supra} note 43, at 1268.}
\footnotetext[168]{See, e.g., JAMES Q WILSON, \textit{BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT} 45 (1989) (“War is the greatest test of a bureaucratic organization.”); Kaye, \textit{supra} note 32 (discussing war as a difficult test for “that subset of warfighters—and those throughout the government who support them—who are responsible for the provision of legal advice”).}
\footnotetext[169]{Dickinson, \textit{supra} note 136, at 3–4 (analyzing compliance with international law from the perspective of organizational theory, concluding that JAG Corps as an institution fosters an environment where legal advisors urge compliance with international law).}
\footnotetext[170]{Gregory S. McNeal, \textit{Organizational Culture, Professional Ethics and Guantanamo}, 42 CASE W. RES. J. INT’L L. 125, 149 (2009).}
\footnotetext[171]{\textit{Id.} at 127.}
\end{footnotes}
shape the desires of the individual. For example, largely because of organizational studies, officials in the government regulatory sector are increasingly concerned with practical methods for inducing individual and institutional normative behavior. If the social environment is one of a desire for rule compliance that will become the individual’s internal value set as well. Professor McNeal states, “organizational culture may be shaped by many factors, some of which may include societal culture, technologies, markets, competition, personality of founders, and personality of leaders.”

Organizational theorists suggest, therefore, that we examine the potential link between organizational structure and compliance. This should become a focus rather than promulgating additional laws and regulations. The introduction of Compliance mechanisms may happen at various levels within the organizational culture, to include: a) shared assumptions and philosophies “which represent basic beliefs about reality, human nature, and the way things should be done”; b) organizational cultural values which tend to persist over time and reflect “collective beliefs, assumptions, and feelings about what things are good, normal, rational and valuable”; c) shared behaviors, such as “norms, which are more visible and somewhat easier to change than values”; and d) cultural symbols such as “words, . . . gestures, and pictures or other physical objects that carry a particular meaning within a culture.”

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174 *Id.* (“There is growing empirical evidence that institutional culture and design will have a significant impact on the likelihood that individuals will engage in unlawful behavior.”).

175 McNeal, *supra* note 170, at 127; Gregory S. McNeal, *Organizational Theory and Counterterrorism Prosecutions: A Preliminary Inquiry*, 21 Regent U. L. Rev. 307, 326 (2009); see also Jay M. Shafritz, J. Steven Ott & Yong Suk Jang, *Classics of Organization Theory* 353 (2005) (“An organization’s culture is shaped by many factors, including, for example, the societal culture in which it resides; its technologies, markets and competition; and the personality of its founder(s) or dominant early leaders.”).


177 Don Hellriegel & John W. Slocum, Jr., *Organizational Behavior* 419 (2007); McNeal, *supra* note 170, at 128; see also E.H. Schein, *Organizational Culture and Leadership* 94–97 (1992) (describing the abstract, culturally-derived assumptions that affect a group’s internal integration); Cristina B. Gibson & Mary E. Zellmer-Bruhn, *Metaphors and Meaning: An Intercultural Analysis of the Concept of Teamwork*, 46 Admin. Sci. Q. 274, 274 (2001) (describing research revealing different metaphors used to describe team cultures, and the resulting patterns of different “expectations about team roles, scope, membership, and objectives” between teams using different metaphorical constructs.).
As a practical example, the OLC operates within the executive branch with “little or no oversight or public accountability.” Nonetheless, “the office has developed powerful cultural norms about the importance of providing the President with detached, apolitical legal advice, as if OLC were an independent court inside the executive branch.”

Reporting mechanisms and “compliance personnel” are central to an organization’s ability to facilitate ethical compliance. Professor Laura Dickinson stresses the importance not only of having a compliance unit, but one that is able to report noncompliance up the chain of command separate from the operational employee chain. She argues that these elements contribute to enhanced legal compliance, and are most likely to be effective

“If (1) these agents are integrated with other, operational employees; (2) they have a strong understanding of, and sense of commitment to, the rules and values being enforced; (3) they are operating within an independent hierarchy; and (4) they can confer benefits or impose penalties on employees based on compliance.”

Professor Orly Lobel argues that internal ethical reporting mechanisms are beneficial for several reasons. In the public and private sector, it removes the Hobson’s choice between “whistleblowing” and keeping quiet and allowing unethical behavior to continue. Furthermore, it serves as an internal appraisal mechanism for ethical practice, which also relieves some of the burden on government regulators. In this sense, the organization compliments “standard-setting and enforcement activities.”

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178 Goldsmith, supra note 1, at 33.
179 Id.; Memorandum from Walter E. Dellinger et al. to John Ashcroft, Attorney Gen. et al., Principles to Guide the Office of Legal Counsel (Dec. 21, 2004) [hereinafter OLC Principles], reprinted in Dawn E. Johnsen, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power, 54 UCLA L. Rev. 1559, app. 2 (2007) (stating that the OLC should provide “an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired policies.”).
180 Dickinson, supra note 136, at 8; see also Serge Taylor, Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform 94 (1984) (“Norms of autonomy and influence can conflict: we do not want the analysts to be integrated and influential at the cost of being co-opted, nor do we want them to be so autonomous as to be irrelevant to policy decisions.”); Edward L. Rubin, Images of Organizations and Consequences of Regulation, 6 Theoretical Inquiries L. 347, 373–74 (2005) (listing factors that influence the effectiveness of a compliance program).
181 Lobel, supra note 43, at 1258 (describing the argument that a potential whistleblower may suffer such severe retaliation for reporting misconduct that they feel effectively unable to decide to expose unethical behavior).
182 Id. at 1267.
C. External Factors Influencing Compliance with Ethical Norms

An effective organizational structure may assist the ethical interpretation of legal norms. But individuals, not organizations, practice law. Individual compliance with ethical obligations can only become habitual through internalization. As Judge Baker stated:

Law is a human endeavor that is dependent on the human factor. We are a nation of laws, but we are also a nation of men and women, or if you like a nation of law and lawyers. It is men and women who write the law, interpret the law, and decide whether to uphold the law. Where national security is at stake, the human influence is manifest.

It follows that subjective values and external factors—separate and distinct from security concerns—impact the study of ethical compliance in national security practice. While external pressures to deviate from ethical practice are not isolated to national security law, these tensions present themselves in unique ways in an area many describe as requiring heightened responsibility. Lawyers trained in the traditional models of client-identification and role-determination should focus on behavioral influences that corrupt ethical judgment. External influences that legal advisors must be mindful of include: approval seeking within the agency; political and ideological allegiances; influence and interpretation; moral clarity of the underlying norms; time sensitivity; the nature of the crisis; and mechanisms to report misconduct.

1. Approval Seeking and Personal Interest

Among the primary pressures for attorneys to deviate from ethical compliance in government service is desire to please the decision maker and seek professional gain. Government attorneys in the national security setting “compete for power, prestige, and influence,” and, if successful, may even see their legal advice become policy. “Lawyers with blind spots engendered by ideology, aspirations for career

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183 BAKER, supra note 8, at 309–10.
184 See id.
185 See Lincoln Caplan, Commentary: Lawyers’ Standards in Free Fall; The Amoral Memo on Torture is Just One Example, L.A. TIMES, July 20, 2004, at B13 (discussing the Enron financial scandal of the early 21st Century and how legal ethics succumbed to pressure from the marketplace); see also MCDOWELL, supra note 143, at 6–7 (discussing the competitive nature of the professional environment and how this can be a pull away from ethical conduct, placing a particular emphasis on the drive for financial gain through excessive, unnecessary products and services).
186 Wendel, supra note 164, at 62.
advancement, or intoxication with making an impact, may systematically overestimate the probability of success.\footnote{188} 

In this competitive culture, attorneys’ career ambitions can overtake considerations of professionalism.\footnote{189} Interagency rivalry, while effective in interpreting an underlying norm, can also generate a departure from compliance. For example, when legal advisors within the national security infrastructure turn advice into an adversarial system among interagency peers, “it does not serve policymaking well.”\footnote{190}

Self-interests are also at stake here. Failure to adhere to questionably lawful policies could remove government lawyers from consideration for politically appointed positions, which brings with it “the possibility of successive appointments with greater responsibility, or even a position in the federal judiciary.”\footnote{191} This argument follows “rational choice and other economic theories, . . . contend[ing] that government attorneys will act to pursue their own individual self interests, which often conflict with—rather than advance—the public interest.”\footnote{192} This is supported by a study of US Attorneys’ offices concluding that lawyers seek Assistant US Attorney positions in order to boost their careers as opposed to serving the public good.\footnote{193}

The external pressure of approval seeking can have a perverse effect on ethical compliance. In fact, in order to achieve policy objectives, legal advisors have recommended that in certain circumstances it is permissible to ignore the law and act extra-legally.\footnote{194} Dean Robert Post wrote that lawyers “must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their

\footnote{188} \textit{Id.} at 663; \textit{see also} \textsc{William A. Niskanen, Bureaucracy: Servant or Master?} 20–23 (1973) (discussing government employees as self-interested utility maximizers, motivated by such factors as “salary, perquisites of the office, public reputation, power, patronage, . . . and ease of managing the bureau”).

\footnote{189} Berenson, \textit{supra} note 21, at 808–10; \textit{see also} Jonathan R. Macey & Geoffrey P. Miller, \textit{Reflections on Professional Responsibility in a Regulatory State}, 63 \textsc{GEO. WASH. L. REV.} 1105, 1115–20 (1994) (describing several reasons why the public-sector attorney will place his/her own interests ahead of the public interest, including: lack of the market forces present in the private sector resulting in over litigiousness and career building; young attorneys seeking experience are more likely to litigate cases than in the private sector; attorneys considering careers in the private sector may offer favorable treatment to firms appearing before them at the expense of the public interest; and agency attorneys will work to expand the influence of their agency over others in order to increase their agency’s importance).

\footnote{190} Kaye, \textit{supra} note 32, at 596.

\footnote{191} McNeal, \textit{supra} note 170, at 148 (citations omitted).

\footnote{192} Berenson, \textit{supra} note 21, at 808.

\footnote{193} \textit{See James Eisenstein, Counsel for the United States: U.S. Attorneys in the Political and Legal Systems} 174 (1978); Berenson, \textit{supra} note 21, at 808.

\footnote{194} \textit{See Goldsmith, \textit{supra} note 1, at 80–81} (noting also that in order to do so ethically, the decision maker, in this case the President, must make any extra-legal actions known publicly and subject himself to the mercy of Congress and the American people).
horizontal commitment to general professional norms and standards.” 195 In the
military context, the system of compliance breaks down at times and “loyalty to a
particular commander or unit sometimes trumps the lawyer’s commitment to
broader public values.” 196 This same tension is analogous to the corporate sector—
balancing the goal of managerial trust and client loyalty. 197 In any context,
approval seeking and personal interests are formidable externalities affecting
ethical practice.

2. Political and Ideological Allegiances

In a similar vein to approval seeking, political and ideological allegiances can
generate a departure from ethical compliance. 198 It is a truism in Washington that
“any President, and any Attorney General, wants his immediate underlings to be
not only competent attorneys, but to be politically and philosophically attuned to
the policies of the administration.” 199 However, aligning your cabinet and top legal
advisory positions to those who share policy positions has the potential to foster an
environment of ethics-clouding ideological allegiances. Professor Goldsmith
recalls being asked, somewhat aggressively, during his initial interview for the top
job at the OLC whether he was a loyal Republican, 200 indicating an organizational
culture that rewards party faithfulness over candid, independent legal advice.
Professor Kaye articulated the issue as follows:

[P]rofessional networks and friendships may have an inordinate power,
for better or worse, to influence the content of the legal advice provided
or the way in which it is provided . . . . These kinds of networks and
relationships are normal and important, but they should always be
integrated into an interagency framework that encourages lawyers to get
advice from all relevant quarters. When they work outside an established
decision-making framework, the opportunity for miscommunication and
poor advice can increase.” 201

197 William H. Simon, After Confidentiality: Rethinking the Professional
198 See generally Peter Margulies, True Believers at Law: National Security Agendas,
(discussing the distortive effect of ideological agendas on sound legal advice about national
security, and recommending measures that rely on the values of transparency and tailoring
of legal advice to meet national security dilemmas and adhere to the law).
199 William H. Rehnquist, The Old Order Changeth: The Department of Justice
200 GOLDSMITH, supra note 1, at 26.
201 Kaye, supra note 32, at 593–94; see also Neil A. Lewis, A Conservative Legal
Group Thrives in Bush’s Washington, N.Y. TIMES, Apr. 18, 2001, at A1 (discussing the
This serves neither national security objectives, nor compliance with the ethical standards of practice. Nonetheless, the ABA Model Rules permit incorporating political objectives into the interpretation of legal provisions. As previously noted, Model Rule 2.1 provides, “[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”

3. Influence and Interpretation

The external factors that pressure attorneys to deviate from ethical compliance can be particularly strong for junior attorneys. It is clear that “in some contexts, a subordinate lawyer will often comply with unethical instructions . . . .” But superior orders are no defense for unethical behavior, unless the supervisor’s instructions are a “reasonable resolution of an arguable question of professional duty.” Professor Scharf provides empirical evidence to the compliance debate. Based on interviews with former State Department Legal Advisers, it was “suggested that to maintain their clout within the Department it was important for [the Legal Adviser] to be seen as trying to find a solution for every difficulty rather than a difficulty for every solution.”

The novice might receive this bit of wisdom as instruction to interpret every legal norm to conform to the policy makers’ agenda. This is not so. The attorney must give candid, independent legal advice, but be willing to provide alternative, creative recommendations to problems that do not have a clear-cut answer. This is particularly important in areas such as national security practice, where many of the legal norms are unsettled or fairly subject to different interpretation. Robert Jackson identified this issue when he stated, “[A] judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.” This is true even today. Nonetheless, there must be a limit to how far legal advisors are “willing to push the bounds of interpretation to circumvent the law” in order to satisfy the decision maker.
Some tension with rules of ethics and the law are inevitable and desirable, such as good faith efforts to change existing law, as authorized by the rules of professional responsibility. This includes pushing controversial legal opinions in litigation. In the context of legal advisors, if the superior’s legal instruction is questionably ethical, the subordinate is required to determine whether the superior resolved the legal question reasonably.

It follows that the clarity of the supposed obligation will determine to what extent the practitioner will adhere to it. But the ability to claim that an obligation did not exist is limited by outside appraisal mechanisms, such as the courts, a supervisor, an ethics review committee, or outside influences such as news media, non-governmental organizations (NGOs), and scholars. However, in legal advisor positions, there are far fewer checks on the ethical practice of law.

4. Moral Clarity

If the political position and its moral reasoning have not been articulated and debated, the attorney will not have a sound negotiating, or policy advising, position. This was evident when military lawyers sought to compromise on a landmine treaty in order to stay within the bounds of an “angelic” moral high ground with the NGOs and others seeking to ban landmines. Under these circumstances, lawyers more readily concede values when they ask, “[h]ow can we prove we’re good guys too?” Professor Kenneth Anderson discusses the role of military lawyers and advises that they should not try to hold a moral torch and seek entry into a church from which they will always be excommunicated. In other words, government lawyers should not seek the approval of outside organizations, including foreign governments and NGOs. Doing so risks supplementing candid, independent legal advice for an attorney’s own subjective views, as informed by the advocacy position of an outside organization.

5. Time Sensitivity

The urgency of national security legal advice can trigger another tension with ethical compliance. Judge Baker suggests that “[r]apid decision can be obtained
through secrecy and by truncating process; it can also be found through the expectation and practice that process provides.  

He highlights the military chain of command that provides a predictable framework for decision-making, which often occurs in time-sensitive circumstances. Critics of over lawyering in times of crisis suggest that issues of national security have traditionally involved quick action, whereas lawyers get bogged down in the legal process. They argue that the increased involvement of lawyers, particularly uniformed Judge Advocates, is part of the “legalization of warfare” and that lawyer involvement in wartime has increased over the decades, negatively affecting the ability to win wars. But this theory is widely rejected.

It is true that time is at issue in pressing national security cases, but that merely highlights the need for greater norm articulation and anticipatory training. Judge Baker describes the pressure of time as follows:

Not every attorney is suited to a process of decision-making that can be rapid and is conducted under stress and often involves the application of law to uncertain or emerging facts. In this context, lawyers must know when to . . . hold an issue and request time for further review, or to buck the issue up the legal line. There is rarely time to double back for a second look . . . . In short, national security practice requires a capacity to close on issues and make decisions, identifying nuance and caveats, if necessary.

215 Baker, supra note 8, at 309.
216 Glenn Sulmasy & John Yoo, Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror, 54 UCLA L. Rev. 1815, 1835 (2007).
217 Id. at 1835–36.
218 See, e.g., Geoffrey Corn & Eric Talbot Jensen, The Political Balance of Power over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress, 44 Hous. L. Rev. 553, 556–58 (2007) (arguing that civilian control over the military is not limited to the executive branch, and that the constitution requires military loyalty to both political branches); Dickinson, supra note 136, at 3 (discussing the role of organizational structure on JAG lawyers’ effectiveness and arguing that fostering greater compliance with international legal rules is a matter of subtly influencing cultural norms); Victor Hansen, Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations, 50 S. Tex. L. Rev. 617, 619–21 (2009) (critically analyzing Sulmasy and Yoo’s article, disagreeing from a legal and practical perspective); Michael L. Kramer & Michael N. Schmitt, Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations, 55 UCLA L. Rev. 1407, 1409–10 (2008) (responding to Sulmasy and Yoo and arguing that there is not a crisis in civil-military relations and that judge advocates are most qualified and even necessary to provide legal advice during combat operations); Michael A. Newton, Modern Military Necessity: The Role & Relevance of Military Lawyers, 12 Roger Williams U. L. Rev. 877, 877–86 (2007) (providing excellent detail of origins of law of war and the need for military lawyers in the context of complex, legalized nature of modern conflict).
219 Baker, supra note 8, at 313.
Also of note is the moment in which the advisor attorney gets involved in the process. When an attorney is notified of a situation early on, he can give accurate, candid legal advice and provide recommendations for policy options that are consistent with legal limits. If, however, the lawyer does not learn of the situation until the last minute, his role shifts to that of advocate for the position already taken. This not only defines the lawyer’s role, but also affects the quality of legal input.220

6. Nature of the Crisis

Former acting State Department Legal Adviser Michael Matheson stated that the underlying national security issue at hand determines the extent to which policy makers base their decisions on a formal legal analysis. For instance, he agrees that “use-of-force cases are rather unusual situations where typically Presidents make decisions on the basis of what they consider to be overwhelming national security needs.”221 This demonstrates that an attorney’s professional obligations to give accurate legal advice will be most strained in situations requiring advice on the use of armed force.

Professor Goldsmith recalls his time at OLC and the “enormous pressure to stretch the law to its limits in order to give the President the powers he thought necessary to prevent a second 9/11.”222 Historically, situations of national emergency have pressured presidents, including Thomas Jefferson, Abraham Lincoln, and Franklin D. Roosevelt, to stretch the law to meet exigent circumstances.223 In these times, the existence of threats “induce fear bordering on obsession,” which undoubtedly affects the judgment of advisors and decision makers alike.224 Ethics demand that attorneys faced with these situations present the legal implications of all courses of action—even a decision that eschews the law or seeks to expand its normative interpretation.

7. Lack of Reporting Mechanisms

In some circumstances attorneys have few good options in the face of unethical, and, at times, unlawful conduct within an organization. Currently, if a government employee, including lawyers, sees unethical or unlawful policies adopted, there is little choice but to (a) disclose the government misconduct (e.g., fraud, corruption, waste, and internal mismanagement) and risk retaliation, or (b) announce misconduct in public, embarrassing public officials, hoping for First

221 SCHARF & WILLIAMS, supra note 35, at 155.
222 GOLDSMITH, supra note 1, at 11.
223 Id. at 11–12.
224 Id. at 72.
Amendment coverage, or (c) keep quiet and allow the misconduct to continue.\textsuperscript{225} In the latter case, not only has the government employee (particularly lawyers) possibly committed an ethical violation by not reporting misconduct, but for the government attorney who owes at least some allegiance to the public, he has also violated the public trust.

\textbf{D. Beyond Compliance: Toward Internalized Legal Ethics}

Thus far, this Article has analyzed traditional methods of identifying ethical obligations of the government legal advisor, recognized that these fall short of answering “why” lawyers obey the rules, discussed the theoretical underpinnings of compliance theory, and highlighted external factors that pressure attorneys to deviate from ethical practice. This Section offers a comprehensive approach to achieving compliance with professional responsibility obligations in national security practice—a framework this Article refers to as the process of \textit{Internalized Legal Ethics} (ILE). The theoretical basis of this study never being applied in such a comprehensive manner to legal ethics, may offer new insights to habitual, internalized compliance with professional responsibility norms.

There are significant theoretical ethics debates involved at each stage of this approach. For instance, two conventional models of ethical practice include the libertarian, advocate model and the regulatory, officer of the court model.\textsuperscript{226} The former argues for loyalty to the client above all else, taking advantage of procedural rules over substantive norms, and utilizing form over the purpose of underlying legal standards.\textsuperscript{227} The regulatory model prefers substantive norms over procedure and seeks to distill the purpose of the law when giving legal advice to clients, interpreting normative legal restrictions in broad, rather than narrow terms.\textsuperscript{228} These two models—libertarian and regulatory—and the recurring tensions in legal ethics they represent—substance versus procedure; purpose versus form; broad versus narrow framing—are the starting points for any discussion of professional responsibility.\textsuperscript{229}

ILE involves three stages—interaction, interpretation, and internalization—and adopts the competing theoretical models in varying degrees.\textsuperscript{230} The client-based/libertarian model applies in the earliest stages of the process, and the value-

\begin{itemize}
  \item \textsuperscript{225} Lobel, \textit{supra} note 43, at 1256–57.
  \item \textsuperscript{226} Simon, \textit{supra} note 36, at 1085–86.
  \item \textsuperscript{227} \textit{Id.}
  \item \textsuperscript{228} The discussion of substantive rules of legal obligation, as opposed to procedural rules of recognition, change, and adjudication can be traced to H.L.A. Hart’s work. \textit{See}, \textit{e.g.}, Hart, \textit{supra} note 153, at 79; \textit{see also} Hill, \textit{supra} note 134 at 47–49 (offering a detailed discussion of, and critiquing, H.L.A. Hart’s work).
  \item \textsuperscript{229} Simon, \textit{supra} note 36, at 1087.
  \item \textsuperscript{230} These stages are based in large part on a framework suggested by Harold Koh to analyze nation-state compliance with existing legal obligations, known as “transnational legal process.” \textit{See} Koh, \textit{supra} note 14, at 2602–03.
\end{itemize}
The first phase of the process is the interaction itself; most often a situation of national import requiring quick, decisive action by an agency head, combatant commander, or perhaps even the president. At this stage the attorney is first brought into the process, either because a wise policy maker looks for his lawyer to be involved from the start, or because a wise attorney knows to insert himself in the process early on. The level of participation a legal advisor has in national security crises is directly related to the confidence the decision maker has in the attorney. Such confidence is influenced by either the decision maker’s own biases or competencies, or is a reflection of the attorney’s effectiveness. Model Rule 1.1 specifically implicates to this point, requiring attorneys to have a minimum level of competence in a particular matter. Besides constituting an ethical requirement, this rule has practical applications as well. Without demonstrated competence, policymakers will be less likely to engage legal advisors during the interaction phase.

Involvement is the first step to fulfilling the legal advisor’s obligation to provide competent legal advice. Professor Deborah L. Rhode states that the “extent of attorneys’ responsibilities for client conduct would depend on their knowledge, involvement, and influence, as well as on the significance of values at stake.” This requires agency permissiveness as well as individual proactiveness. For example, some policy makers will want to leave the lawyers out of a process altogether assuming they will say “no,” or prefer that advisors stay “in their lane.” Others will not want to wait for the perceived cumbersome deliberation of the lawyers. And still others do not want lawyers controlling the process once they do get involved. In this environment, the attorney may feel compelled to remain quiet or conform her advice to the desires of policy makers—the approval-seeking syndrome.

The detrimental effects of excluding legal advisors are obvious. Specific examples of incidents when legal advisers and inter-agency peers were cut out of the process include: the mining of the Nicaragua harbors in 1984, support for the “contras,” the 1990 kidnapping of Dr. Alvarez-Machain from Mexico, and the policies relating to post 9/11 detention and interrogation operations. Each of these cases was highly controversial, and was criticized for violating basic

232 Id. (stating, “[a] lawyer shall provide competent representation to a client”).
233 ETHICS IN PRACTICE, supra note 68, at 18.
234 SCHARF & WILLIAMS, supra note 35, at 211.
235 BAKER, supra note 8, at 311–12.
236 SCHARF & WILLIAMS, supra note 35, at ch. 17.
domestic and international laws. Increased participation from national security lawyers and an inter-agency vetting process may have had a positive effect. As discussed above, the timeliness of the lawyer’s insertion into the process will affect his or her role. For example, if consulted at an early stage, legal advisors are more able to provide impartial legal advice and weigh the situation dispassionately as might a judge, and recommend a position that is within legal limits. If not brought into the process initially, legal advisors may be able to do little more than give the best legal argument in defense of a decision that has already been made—a pure advocacy role.

The second phase of the process of ILE is norm *interpretation*. When an interaction arises (a situation requiring legal advice) the underlying legal norm may be unsettled, particularly in the nebulous realm of national security law. “In those situations, lawyers from across the executive branch will need to be engaged in finding the correct legal answers. In the ideal setting, all interested agencies will be involved in that assessment.” This underscores the need for the interpretive, discursive phase of norm articulation. The legal advisor is taking a good faith step toward ethical compliance merely by testing legal analysis among inter-agency peers, ensuring that the lawyer can recommend a reasonable interpretation of the

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238 *Id.*

239 Participation in the decision-making process enables the attorney-advisor to know whether policy will conflict with legal obligations. ABA Model Rule of Professional Conduct 1.13(b) is relevant here, providing that “[i]f a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action . . . that is . . . a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary . . . .”


241 Kaye, *supra* note 32, at 591. Kaye describes the likely roles of each primary agency in law of war decisions as follows:

JAG lawyers . . . are necessarily concerned with providing clear, cogent legal advice to commanders, whether at headquarters or in the field. . . . The State Department lawyer provides advice that is consistent with U.S. treaty practice and with the customary norms to which the United States is bound, sensitive to the legal views of U.S. allies abroad, and is particularly concerned with taking positions that are consistent with past legal positions taken by the U.S. government. The Department of Defense General Counsel lawyer is likely to be closer to the civilian policymakers in the Pentagon, and will have perhaps the best sense of what goals the senior leadership wants to achieve, helping them craft legal advice that is attuned to defense policy interests. Lawyers in the Justice Department will obviously be sensitive to the litigation risks in U.S. courts that might be associated with particular courses of action, and they will generally want to ensure that the government takes action consistent with its statutory and constitutional authorities.

*Id.* at 592–93.
This allows the tension between ethical standards and the law to play out among inter-agency peers, who, under Model Rule 2.1, may take into account certain non-legal factors when advising clients. Model Rules 1.2 and 8.4, which allow good faith efforts to determine the scope of applicable law and even challenge existing law, similarly provide necessary flexibility.

The discursive process alone is a check on extra-legal advocacy contrary to ethical norms. Professor Dickinson captured the importance of norm interpretation when she wrote, “[c]onsequently, articulating (and defining) [legal] norms, for example, may have a real impact on institutions even absent mechanisms of enforcement.” The organizational culture within which an attorney works facilitates compliance in this instance by allowing room for norm articulation through debate and a discursive process. Properly implemented, the interpretive phase gives the legal advisor room to give candid, independent legal advice per Model Rule 2.1. When the government agency does not resolve the issue or its resolution is contested, outside organizations such as courts, bar associations, ethics committees, legislatures, administrative agencies, specialized bar organizations, and legal employers may become involved and resolve the legal dispute, requiring policy makers to internalize their interpretation of the underlying norm.

The final step of the process, internalization, is the most difficult to conceptualize, and will be the last element to be realized, if at all. Professor Frederick Schauer supports this analysis, stating, “[i]nternalization—determining whether, the extent to which, and the way in which a rule provides a reason for action—is located initially and primarily within individual decision makers.” Because internalization is more than merely complying with a standard, it involves an individual’s own value set as it adjusts and adapts to underlying norms. Recall that the public interest model of ethical government practice takes a value-oriented approach, and that all government service includes an element of the public interest. This does not call for arbitrary values selection, or reliance on the subjective interests of an ill-defined public. Compliance with the rules of

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242 Deborah L. Rhode & Geoffrey C. Hazard, Jr., Professional Responsibility and Regulation 134 (2d ed. 2007).
244 Id. at 1.2, 8.4; see also Margulies, supra note 187, at 662–63.
245 Model Rules of Prof’l Conduct R. 1.2(d) (providing that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .”).
246 Dickinson, supra note 136, at 7.
247 See Model Rules of Prof’l Conduct R. 2.1.
248 See Rhode & Hazard, Jr., supra note 242, at 10.
249 Schauer, supra note 134, at 128.
professional responsibility must be the goal here, leaving little room for agenda-driven normative interpretation.\textsuperscript{250} Additionally, this element of ILE requires forward thinking about the consequences of the type of legal advice given. As such, it is significant that the practitioner be aware of “the relationship to the other,” what some perceive to be the crucial underpinning of ethics in justice.\textsuperscript{251} Without an empathetic understanding of how legal advice and resulting policy affect others, it becomes easier to succumb to the pressures to depart from compliance with professional responsibility obligations.\textsuperscript{252} Psychological experiments support this idea, where individuals were found to be less likely to carry out unlawful orders when they are in close proximity to the victim.\textsuperscript{253} Therefore, in these circumstances, subordinates will be less likely to carry out unlawful or unethical instructions if there is a greater perception of harm to the victim. Conversely, where the harm is done to an abstract “victim,” such as constitutional standards or the public-at-large, there is greater risk of deviation from ethical norms.

This is where the public interest approach has some effect. While this Article rejects the notion that an attorney can foresee each and every public effect that legal advice might have in a given context (nor is that the attorney’s job), attorneys still need to “consider the cumulative impact of their individual decisions on the effectiveness of legal processes.”\textsuperscript{254} In short, due consideration must be given not only to the impact that advice will have on others, but the impact that similar practice will have on broader compliance with ethical responsibilities. In order to fulfill professional obligations, lawyers must be sure that the advice they provide also raises relevant moral issues embedded in the legal questions raised.\textsuperscript{255} The following case study of the “torture memos” illustrates the effect of narrow considerations when giving legal advice in times of crisis.

\section*{IV. A Modern Case Study of Ethics in National Security Practice}

This Part focuses primarily on a specific group of legal advisors in national security practice: the attorneys at the OLC. Their work following the terrorist

\textsuperscript{250} Dehn, \textit{supra} note 50, at 85 (“[A]dherence to one’s oath of office appears to require that the opinions of predecessors receive due consideration, but ultimately that [a government attorney] give advice based upon the best view of the law.”).

\textsuperscript{251} Emma Hutchison & Roland Bleiker, \textit{Emotions in the War on Terror, in Security and the War on Terror} 66 (Alex J. Bellamy et al. eds., 2008).

\textsuperscript{252} See \textit{Stanley Milgram, Obedience to Authority: An Experimental View} 1–12 (1974); McNeal, \textit{supra} note 170, at 147; see also Perlman, \textit{supra} note 7 (discussing moral deference and its role in the legal system).

\textsuperscript{253} McNeal, \textit{supra} note 170, at 147; see also Michael Hatfield, \textit{Professionalizing Moral Deference}, 104 NW. U. L. REV. COLLOQUIY 1, 8–9 (2009).

\textsuperscript{254} \textit{Ethics in Practice}, \textit{supra} note 111, at 19.

attacks of September 11, 2001 demonstrates not only the extent of influence executive branch legal advisors have in times of crisis, but also the strength of pressures to deviate from compliance with professional responsibility obligations when seeking to meet the president’s national security objectives.  

A. The Government Legal Advisor

Executive branch legal advisors will always face the tension between achieving the political aims of policymakers and an ethics based application of the rule of law.  

Issues of national security are particularly difficult when the legitimate political aims may be to save thousands of lives.  

Professor Goldsmith succinctly summarized this conflict when he stated that national security lawyers are “criticized for being too cautious, for putting on the brakes, for playing it safe in a dangerous world that cannot afford such risk aversion. But [they are] in the same breath cautioned to give ‘sound, accurate’ legal advice within the ‘ confines’ of the law.”  

In fact, the 9/11 Commission report cited the CIA as being “institutionally averse to risk,” but the agency in subsequent years has, again, come under heightened scrutiny due to more aggressive counterterrorism operations.

1. Significance of Legal Advice on Policy

National security lawyers provide “an array of positive or substantive instruments the president may wield to provide for security.” Beyond the physical safety of the nation, government attorneys have a responsibility to protect our values. Robert H. Jackson stated, “[f]undamental things in our American way of life depend on the intellectual integrity, courage and straight thinking of our government lawyers. Rights, privileges and immunities of our citizens have only

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256 See generally OPR REPORT, supra note 51, at 11 (discrediting the legal analysis underlying the torture memos and finding that John Yoo and Jay Bybee committed professional misconduct). But see Memorandum from David Margolis, Assoc. Deputy Attorney Gen., U.S. Dep’t. of Justice, to the Attorney Gen. 2 (Jan. 5, 2010) [hereinafter Margolis OPR Memo], available at http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf (criticizing the findings and flawed analysis of the OPR Report and finding that John Yoo and Jay Bybee did not commit professional misconduct—in spite of significantly flawed ethics underlying the advice given in the torture memos).

257 GOLDSMITH, supra note 1, at 38.
258 Id. at 38.
259 Id. at 92.
261 BAKER, supra note 8, at 308.
that life which is given them by those who sit in positions of authority.\textsuperscript{262} This holds true today, when one considers that legal advisors in the post-9/11 age of national security have had historically unparalleled influence over war policy.\textsuperscript{263}

While government attorneys need guidance from policy makers so they can better tailor advice to meet policy objectives, legal advice cannot be aimed at helping policymakers achieve things that are legally dubious; policymakers need to be informed when the legal advice—even if the advisor believes the advice to be correct as a matter of law—pushes the law beyond past application or will raise substantial controversy domestically or internationally.\textsuperscript{264}

Nonetheless, legal offices within government agencies “are more or less an integral part of the client itself. The relationship between the general counsel’s office and the client can be, and often is, more intertwined in operations than that between the client and any other staff office.”\textsuperscript{265} For example, some have described the OLC as “an elite bureau in the Justice Department staffed by highly-credentialed lawyers. Its primary function is to give opinions on matters of constitutionality regarding interdepartmental and interbranch relations, and to opine on the constitutionality of pending legislation.”\textsuperscript{266} Similarly, during armed conflict, JAGs of the military services are an integral part of combat units on the ground. Their role is to “give continuing on-the-ground advice to troops and commanders on a range of legal matters, including the appropriate limits on the use of force.”\textsuperscript{267}

These attorneys enjoy a significant amount of autonomy and exert influence on the actions of policy makers.\textsuperscript{268} OLC legal opinions carry significant weight, since they are binding on executive branch officials and have precedential value much like the \textit{stare decisis} of court decisions.\textsuperscript{269} There is also very little oversight in this area, because “most legal issues of executive branch conduct related to war and intelligence never reach a court, or do so only years after the executive has acted. In these situations, the executive branch [through legal advisors] determines

\textsuperscript{262} Jackson, \textit{supra} note 18, at 412.
\textsuperscript{263} GOLDSMITH, \textit{supra} note 1, at 129–30.
\textsuperscript{264} Kaye, \textit{supra} note 32, at 594.
\textsuperscript{265} HAZARD, JR., \textit{supra} note 54, at 141; see also GOLDSMITH, \textit{supra} note 1, at 22–23 (discussing the level of influence of five high-ranking executive branch lawyers in the George W. Bush administration, self-labeled the “War Council”).
\textsuperscript{266} Radack, \textit{supra} note 23, at 2 n.5.
\textsuperscript{267} Dickinson, \textit{supra} note 136, at 11.
\textsuperscript{268} See GOLDSMITH, \textit{supra} note 1, at 22–23.
\textsuperscript{269} See, e.g., Morrison, \textit{supra} note 37, at 1448.
for itself what the law requires, and whether its actions are legal.”270 The danger of internal legal advisors is that they have so few checks from the outside—barring Congress, the press, and the electorate.271 Emphasizing the lasting impact of the legal advisor, Michael Matheson drew upon his experience advising the Secretary of State on legal justifications for U.S. armed intervention in Kosovo. While national security lawyers do not make the final decisions, Matheson stated they do “have a significant impact on how the decision is articulated, and that can be important in terms of what precedents are or are not created for the future.”272

B. Case Study: The Torture Memos

Legal advisors engaged in national security practice following the attacks of 9/11 have come under unprecedented scrutiny. In an effort to prevent a subsequent, mass-casualty attack, policy makers and lawyers sought ways to authorize aggressive counter-terrorism and intelligence practices.273 It was in this context that attorneys for the White House, DOJ, and DOD wrote legal memos and opinions determining “the legal contours of our nation’s efforts to combat the terrorist threat,”274 analyzing certain legal constraints involved in armed conflict, the detention and interrogation of captured enemy combatants, and other issues.275 A particular subset of these legal opinions would later be known as the “torture memos.”276

Perhaps the most infamous of the torture memos was that of August 1, 2002, advising the CIA and White House that terrorist suspects held abroad could be

270 See GOLDSMITH, supra note 1, at 32. He adds that “never in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11.” Id. at 129–30.
271 Id. at 33.
272 Scharf, supra note 16, at 67 n.82.
274 Margolis OPR Memo, supra note 256, at 2.
lawfully interrogated using techniques that did not amount to “serious physical injury, such as organ failure, impairment of bodily function, or even death,” which, it is widely agreed, includes practices tantamount to unlawful torture. This memo “argued that the President could disregard legal prohibitions on torture.” It has been the subject of intense scrutiny largely because it was the first in a series of memos authorizing interrogation techniques that some suggest led to the torture and abuse of “war-on-terror” detainees in Afghanistan, Iraq, Guantánamo Bay, and other undisclosed locations. The key architects of the memos were then head of OLC and now federal judge, Jay Bybee, and his then deputy, Professor John Yoo of the University of California Berkeley School of Law. They were the subjects of a five-year professional misconduct investigation within the Department of Justice. The findings of the investigation concluded that “Yoo put his desire to accommodate the client above his obligation to provide thorough, objective, and candid legal advice . . . he therefore committed intentional professional misconduct.”

Several of the legal opinions were later revoked under the watch of Professor Goldsmith, then serving as the OLC head, due to his concern for “the unusual lack of care and sobriety in their legal analysis.” Subsequent actions of both the Bush and Obama Administrations, as well as Congressional hearings, have

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277 Unclassified Bybee Memo, supra note 276, at 1.
278 See Hatfield, supra note 253, at 1 (stating that the Unclassified Bybee Memo “concluded that torture was not illegal—at least not if the President ordered the torture”); Radack, supra note 23, at 2 n.5. see also GOLDSMITH, supra note 1, at 143; see also Alvarez, supra note 11, at 177 n.9.
279 GOLDSMITH, supra note 1, at 135.
280 See generally Scharf, supra note 16, at 81–90; see also GOLDSMITH, supra note 1, at 141–145. Many commentators agree that “the legal analysis produced by the OLC in the Bush administration was intended not as a good-faith attempt to determine what the law requires, but to lay the groundwork for American personnel to later claim reliance on the advice of counsel if subject to prosecution for human-rights violations.” Wendel, supra note 164, at 59; see also Hatfield, supra note 253, at 1 (analyzing what it means to be a contemporary lawyer in light of issues raised because of the torture memos).
281 See Margolis OPR Memo, supra note 256.
282 OPR Report, supra note 51, at 254.
283 GOLDSMITH, supra note 1, at 148. Additional concerns include the narrow definition of “torture” in the memos, the sensitive nature of pushing the legal limits of the prohibition of torture, their “tendentious tone,” and the overly broad legal arguments. Id. at 145–50.
284 On December 30, 2004, OLC Acting Assistant Attorney General Daniel Levin issued a legal memorandum that corrected or eliminated the flawed analysis underlying the August 1, 2002 torture memo. See OPR REPORT, supra note 51, at 5–6, 159.
285 President Obama issued an executive order two days after his inauguration, which provided that no officer, employee, or agent of the United States government may rely on legal analysis relating to interrogation issued by the DOJ between September 11, 2001 and January 20, 2009. See Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).
resulted in revocation of the most controversial aspects of the “war on terror” interrogation and detention policies. Nonetheless, questions remain whether the attorneys who provided this legal advice were acting in a professionally responsible manner, or whether they had let the President’s policy objectives override sound legal analysis.\footnote{The Origins of Aggressive Interrogation Techniques: Part I of the Committee’s Inquiry into the Treatment of Detainees in U.S. Custody: Hearings Before the S. Comm. On Armed Services, 110th Cong. 2–12 (2008).}

The issues arising from the torture memos are significant. Some argue the drafters should be subject to criminal liability for authorizing unlawful practices.\footnote{Whether the authors of the torture memos can or should be subject to prosecution is beyond the scope of this article. That these memos are considered by some to be criminal misconduct is relevant to the underlying ethical issues discussed here. For further discussion of possible prosecution, see, for example, Finkelstein & Lewis, supra note 11. Professor Finkelstein takes the position that the OLC lawyers could be prosecuted under the U.S. Anti-Torture statute under a theory of accomplice liability, i.e. “[t]he lawyers are accomplices because they aided in the commission of the prohibited act (torture) by encouraging, soliciting, or otherwise contributing to the act by giving it legal validation.” Id. at 201. Professor Lewis argues that criminal liability is not appropriate in this case, since (a) “there was very little legal authority” defining torture at the time, (b) the memoranda permit a very narrow set of techniques with oversight, and (c) the analogies used by Professor Finkelstein (i.e., the U.S. prosecution of Japanese water-torturers after WWII) do not prove that the memos violate relevant prohibitions of “severe pain or suffering.” See id. at 207–208; see also Margulies, supra note 198, at 54–57. For an international perspective on the torture memos, see Jordan J. Paust, The Absolute Prohibition on Torture, 43 VAL. U. L. REV. 1535 (2009).} Criminal provisions implicated by the actions sanctioned in the memos include the Anti-Torture Statute\footnote{18 U.S.C. § 2340A(a) (2006) (“Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20} and the 1996 War Crimes Act.\footnote{Separation of powers\footnote{The torture memos have been criticized on numerous grounds, but primarily because they (a) define acts of torture too narrowly, (b) are an open attempt to provide legal cover for those who engage in torture, and (c) fail to adequately account for contrary sources of law. See, e.g., Finkelstein & Lewis, supra note 11, at 195–200. Still others point to “five obvious failures,” including the “omission of universal obligations, absurd narrowing of the definition of torture, over-reading the power of the President, an erroneous reliance on a defense of superior orders, and failure to recognize the illegality of inhuman or degrading treatment.” Wayne McCormack, The War on the Rule of Law, 36 J. NAT’L SECURITY F. 101, 109 (2010); see also Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the U.S.: Hearing Before the S. Comm. of the Judiciary, 109th Cong. 4 (2005) (prepared statement of Harold Hongju Koh), available at http://www.law.yale.edu/documents/pdf/KohTestimony.pdf; Alvarez, supra note 11, at 215 (arguing that the OLC memoranda “tortured” the rules of professional responsibility); Hatfield, supra note 253, at 4–7 (arguing that teaching law students to defer issues of morality to clients allows otherwise competent and moral lawyers to draft works as ethically flawed as the torture memos).}
concerns are also legitimately raised when legal advisors interpret constitutional and treaty obligations as non-binding on the President, as did former White House Counsel Alberto Gonzalez when he advised that the Geneva Conventions were outmoded in the context of the modern conflict with non-state actors. Additionally, significant law of war, human rights, and international legal standards would at a minimum caution against the type of treatment of detainees authorized by the torture memos. At least one foreign government is pursuing a criminal case against those U.S. officials allegedly responsible for torturing war on terror detainees.

Serious ethical concerns are at play here as well. In fact, the Department of Justice’s Office of Professional Responsibility (OPR) conducted an extensive inquiry into whether Professor Yoo and Judge Bybee engaged in professional misconduct. The final OPR report of July 29, 2009, concluded that John Yoo violated his “duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.” (These findings were ultimately rejected.)

years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.”

290 Id. § 2441. A recent New York case, however, indicates that good faith legal advice cannot be criminal. See Vinluan v. Doyle, 873 N.Y.S.2d 72, 83 (App. Div. 2009); see also Finkelstein & Lewis, supra note 11, at 223–24 (arguing that an attorney should be able to raise a good faith defense in a criminal proceeding).


294 Kathleen Clark, Ethical Issues Raised by the OLC Torture Memorandum, 1 J. NAT’L SECURITY L. & POL’Y 455, 463–69 (2005).

295 OPR REPORT, supra note 51, at 11.

296 Margolis OPR Memo, supra note 256, at 2, providing the following:

For the reasons stated below, I do not adopt OPR’s findings of misconduct [by Yoo and Bybee]. This decision should not be viewed as an endorsement of the legal work that underlies those memoranda. However, OPR’s own analytical framework defines “professional misconduct” such that a finding of misconduct depends on application of a known, unambiguous obligation or standard to the attorney’s conduct. I am unpersuaded that OPR has identified such a standard.
The report also found that Judge Bybee recklessly disregarded that same duty by agreeing to sign and issue the memos. In addition to the formal investigation, practitioners and commentators have openly condemned the memos. For example, over one hundred prominent lawyers, including judges, professors, deans, former elected officials, former bar association presidents and private-practitioners, signed the “Lawyers’ Statement on Bush Administration’s Torture Memos.” The statement summarizes professional responsibility failures by the authors of the memos, including failing to uphold the law as officers of the court and as citizens.

The specific professional responsibility obligations at issue include: Model Rules 1.1, 1.2(d), 1.13(b), and 2.1. Many have questioned whether the advice given by the OLC attorneys was indeed “competent representation” required under Model Rule 1.1, particularly in light of the analysis in the torture memos that is dismissive of relevant and applicable human rights and international legal obligations. Beyond the knowledge and skills necessary to interpret domestic and international prohibitions against torture, many contend that the very purpose of the OLC memos was to provide a shield for unlawful interrogation practices. Model Rule 1.2(d) provides,

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

To this day, Professor Yoo and Judge Bybee argue that their legal advice was given in good faith and not in violation of the law or ethics codes. However,

297 OPR REPORT, supra note 51, at 11.
299 Id.
300 MODEL RULES OF PROF’L CONDUCT R. 1.1, 1.2(d), 1.13(b), 2.1 (2009).
302 See GOLDSMITH, supra note 1, at 43.
303 MODEL RULES OF PROF’L CONDUCT R. 1.2(d); see also Angell, supra note 298, at 560–61.
304 John Yoo, My Gift to the Obama Presidency, WALL ST. J., Feb. 24, 2010, available at http://online.wsj.com/article/SB10001424052748704188104575083473537079844.html; see also GOLDSMITH, supra note 1, at 167 (stating that Yoo has defended every
others argue that the prohibition on torture is a non-derogable norm that cannot
be—in good faith—deviated from even at the margins. Rule 1.13(b) applies
insofar as a government attorney representing an agency-client must act in the best
interests of the organization—in this case OLC, the President, and possibly even
the government as a whole. This is particularly true if an official sanctions an
unlawful action (i.e. torture) that might be imputed to the organization. Finally,
Model Rule 2.1 is relevant in light of OPR’s attempt to credit Professor Yoo and
Judge Bybee with failing to exercise independent judgment and thorough,
objective, and candid legal advice.

Earlier drafts of the OPR report relied on several sources of professional
responsibility obligations to determine that misconduct occurred. These include
D.C. Rule of Professional Conduct (“DC Rule”) 2.1, an OLC Best Practices
Memo issued on May 16, 2005, and a document prepared by former OLC
attorneys entitled “Principles to Guide the Office of Legal Counsel” (“OLC
Principles”). In his memorandum rejecting the OPR report’s findings, David
Margolis addresses a more relevant provision that “requires good faith and
prohibits a lawyer from counseling the client to engage in conduct that the lawyer
knows to be illegal.” Additionally, he cites the commentary to DC Rule 1.4,
which cautions the lawyer to make sure that the client has been informed of all
relevant considerations prior to reaching a decision. Among the primary
criticisms of the OLC memos was the failure to include countervailing arguments
against the proposed treatment of detainees.

Margolis’ memorandum of January 5, 2010, ultimately rejected the findings
of the OPR report, since OPR “failed to identify a known and unambiguous

element of the opinion, to this day, in good faith); Margolis OPR Memo, supra note 256, at 7–10 (discussing Yoo and Bybee’s defense of their interpretation of the language contained in U.S. torture statutes, and their criticisms of OPR’s investigation).

See, e.g., Siderman de Blake v. Republic of Arg., 965 F.2d 699, 717 (9th Cir.
1992) (“[T]he right to be free from official torture is fundamental and universal, a right
deserving of the highest status under international law, a norm of jus cogens.”); see also
Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).


Model Rules of Prof’l Conduct R. 2.1 (2011); Margolis OPR Memo, supra
note 256, at 10.

Margolis OPR Memo, supra note 256, at 12.

See D.C. Rules of Prof’l Conduct R. 2.1 (2007), which is identical to Model
Rules of Prof’l Conduct R. 2.1.

Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen.

OLC Principles, supra note 179; Margolis OPR Memo, supra note 256, at 12.

Margolis OPR Memo, supra note 256, at 22 (discussing D.C. Rules of Prof’l
Conduct R. 1.2(e)).

Id.; see also D.C. Rules of Prof’l Conduct R. 1.4(b) cmt.

Margolis OPR Memo, supra note 256, at 23.
applicable standard” of professional conduct that Professor Yoo and Judge Bybee violated. Nonetheless, he concludes that

the DC Rules created an unambiguous obligation on Yoo and Bybee not to provide advice to their client that was knowingly or recklessly false or issued in bad faith. While the OLC best practices may require more, failure to meet those standards should result in poor evaluations or administrative disciplinary action, but not bar referrals.316

The purpose of this discussion is not to re-open a now-finalized ethics inquiry and ask anew whether professional misconduct occurred. Rather, the widely condemned legal memos provide a striking example of the ethical struggle legal advisors face when engaged in national security practice. What these memos reveal, more than anything else, is a failure in the process of ILE. As the next section demonstrates, external pressures to deviate from compliance had a significant impact on the lawyers’ judgment during times of great fear and uncertainty that followed the attacks on September 11, 2001.

C. External Pressures, OLC Memos, and Compliance Trends

A complete picture of the circumstances underlying the controversial OLC memos demonstrates many of the external influences on behavioral compliance discussed above in Part III.C. The externalities at issue in this case include: approval seeking, political and ideological allegiances, and the nature of the crisis and time sensitivity. These factors are key to understanding failures in the traditional models regulating ethics of government legal advisors, and reinforce the need for a behavioral studies approach.

1. Approval Seeking: When Loyalty Overrides Ethics

Initially, taking into account the policy objectives of the President or decision maker is appropriate when rendering legal advice. In fact, the “political factors” contemplated in Model Rule 2.1 are also reflected in the OLC Principles, stating, “[a]lthough OLC’s legal determination should not seek simply to legitimate the policy preferences of the administration of which it is a part, OLC must take account of the administration’s goals and assist in their accomplishment within the law.”317 The OLC Principles also instruct that “OLC’s legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but should also reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds

315 Id. at 26.
316 Id.
317 OLC Principles, supra note 179, at 5.
Therefore, when the legal advisor seeks to stretch the limits of the law, she must balance political considerations with ethical obligations.

Describing the circumstances surrounding the OLC memos, Professor Goldsmith states, “[f]ear explains why OLC pushed the envelope. And in pushing the envelope, OLC took shortcuts in its opinion-writing procedures. On the theory that expert criticism improves the quality of opinions, OLC normally circulates its draft opinions to government agencies with relevant expertise.”

But in this case, OLC refused, at the direction of the White House, to vet the “torture memos” through the State Department in order to control the outcome and “minimize resistance.”

This was routine practice for a group of highly influential legal advisors, termed the “War Council,” during the first term of George W. Bush’s presidency. The “War Council” included White House Counsel, Alberto Gonzales; the Vice President’s Counsel, David Addington; DOD General Counsel, Jim Haynes; Gonzales’s deputy, Tim Flannigan; and John Yoo, deputy at OLC. This group had a significant amount of influence shaping the legal policy, and even making policy, regarding counter-terrorism operations following 9/11. In fact, John Yoo had the authority at OLC to issue legal opinions that were binding on the executive branch, making him a key player in legal interpretation and policy-shaping during this period. He “wrote opinion after opinion approving every aspect of the administration’s aggressive antiterrorism efforts.”

Among the strongest criticisms of the torture memos is that they are nothing more than a shield against prosecution for those who sought to implement “enhanced interrogation” practices. The August 2002 torture memo explained defenses to possible violations of anti-torture provisions. This indicates the lengths to which the authors of the memos were willing to carry out the policy of the third-party, in this case agents of the CIA. Critics of this type of “results-oriented” lawyering cite the flawed logic of starting with the policy objective in

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318 Id. at 3.
319 GOLDSMITH, supra note 1, at 166.
320 Id. at 167.
321 Id. at 22.
322 Id. at 22–23.
323 Id. at 23.
325 See Unclassified Bybee Memo, supra note 276, at 39–41 (discussing the “necessity defense”); see also Rosenthal, supra note 301, at 1579.
326 See William H. Simon, The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example, 60 STAN. L. REV. 1555, 1556–58 (2008) (discussing “quasi-third-party advice” where lawyers “purport to speak disinterestedly in order to influence public conduct or attitudes for the benefit” of clients, and concluding that such opinion practice is “inconsistent with core professional and academic values”).
mind followed by the ethical gymnastics required to work backward to achieve it—irrespective of the law. 327

Approval seeking is an external pressure on all national security practitioners and is of greater concern for those who rely too heavily on a client-centered approach to legal ethics. 328 A prominent example of ethical failure stemming from a misplaced sense of loyalty is the case of Captain Randy W. Stone, a Judge Advocate who was deployed with the Marines in Haditha, Iraq. In late 2005, after a roadside bomb killed a compatriot, Marines in Captain Stone’s unit killed twenty-four Iraqi men, women, and children out of revenge. 329 Captain Stone failed to report these crimes and was later prosecuted by court-martial because he did not report the misconduct or encourage the commanding officer to investigate. 330 In this case, “his loyalty to the command trumped his ethical duty.” 331 Similarly, loyalty to the policy objectives of the White House during a time of war may have clouded the judgment and advice of the most influential legal advisors in the government.

2. Political and Ideological Allegiance: International Law and the Unitary Executive

It is not unusual for executive authority to expand during national security crises. 332 The Bush administration was not unique in this effort. 333 President Lincoln’s Attorney General, Edward Bates, issued a legal opinion justifying the suspension of the writ of habeas corpus, an opinion that has been widely rejected as analytically and legally flawed. 334 Similarly, while serving as President Franklin D. Roosevelt’s Attorney General, Robert Jackson provided legal cover for a destroyers-for-bases deal with the United Kingdom that subverted several

327 Alvarez, supra note 11, at 215.
328 See infra Part III.D.
330 Id.
331 Id. (quoting from Interview with JAG Officer No. 5). In order to overcome misidentification of the Judge Advocate’s client, or the tendency to identify too closely with superiors, the Army formally identifies the “Army” as the client. See U.S. DEP’T OF ARMY, REG. 27–26, RULES OF PROF’L CONDUCT FOR LAWYERS R. 1.13 (1992) (“[A]n Army lawyer represents the Department of the Army acting through its authorized officials . . . [including] the heads of organizational elements within the Army, such as the commanders of armies, corps, and divisions, and the heads of other Army agencies or activities.”); see also Dehn, supra note 50, at 77.
334 Goldsmith, supra note 1, at 168.
congressional statutes in 1940.\textsuperscript{335} More recently, the Clinton administration was heavily criticized for issuing legal opinions “arguing that the President could disregard congressional statutes that impinged on the Commander in Chief or related presidential powers.”\textsuperscript{336} Some commonly hold, however, that the legal advisors during President Bush’s first term were more dedicated than their predecessors to an aggressive go-it-alone approach with regard to Congress and the international community. The OLC and related memos were drafted in this context.\textsuperscript{337}

The U.S. national security legal framework relies in part on international obligations such as the treaty-based laws of war, non-proliferation treaties, and mutual legal assistance treaties.\textsuperscript{338} A school of thought popular among a discrete segment of the academy and bar, including the authors of the OLC memos, seeks to minimize U.S. obligations to international law thereby limiting restraints on executive authority during times of crisis.\textsuperscript{339} Since the U.S. constitutional system incorporates international law into the U.S. legal framework, it would appear to be unethical to advise policy makers that compliance with the Geneva Conventions, for example, is optional.\textsuperscript{340} But in a memorandum to President Bush dated January 25, 2002, White House Counsel Alberto Gonzalez advised that the unique nature of the conflict with al Qaeda and Taliban forces “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemies be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments.”\textsuperscript{341}

Besides an aggressive approach to international legal constraints, legal advisors engaged in post-9/11 national security practice sought to further the

\textsuperscript{335} Id.


\textsuperscript{337} Several scholars have tackled the issue of ideology within the Executive, and specifically, OLC. See generally Neal Kumar Katyal, Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within, 115 YALE L.J. 2314, 2335–42 (2006) (recommending that an adjudicative entity be established that serves as an independent agency); Eric A. Posner & Adrian Vermeule, The Credible Executive, 74 U. CHI. L. REV. 865, 897–902 (2007) (criticizing Katyal’s suggested structural revisions to DOJ and instead supporting bipartisan appointments).

\textsuperscript{338} See generally JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW (2d ed. 2005) (discussing sources of national security law in the United States).

\textsuperscript{339} Scharf, supra note 16, at 58–59.


“unitary executive” model of presidential powers. In this context, “John Yoo’s loyalty to his own ideology and convictions . . . led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client.” Proponents of the unitary executive ideology, typically used to prevent congressional restraints on commander-in-chief authority during wartime, have gone to exaggerated lengths to explain why military attorneys should “get in line” with civilian policies—no matter what.

The JAG attorneys of the military branches came out forcefully against some of the legal opinions that eschewed historical and binding law of war obligations. For example, a top Marine General wrote in a memorandum dated February 27, 2003 that the “harsh interrogation regime could have adverse consequences for American service members.” Each of the leaders of the respective JAG Corps drafted similar memos.

Administration officials criticized efforts by Judge Advocates to issue legal advice or advocate openly against policies relating to the war on terror. Some have argued that in a principal-agent model of civilian-military relations, the military must take a subordinate, agent role on all executive policies. Efforts to go to Congress, the courts, or outside actors (including foreign governments or NGOs) can be categorized as acts that split the unity of the principal, allowing for the agent to act with more freedom, and in some cases, contrary to the policies of the executive. Some have warned, “[c]ivilian leaders should remain aware that the growth in JAG influence can have a detrimental impact on the nation’s ability to win wars.”

This analysis is naturally problematic for JAG attorneys. While JAGs are uniformed officers subject to the chain of command, they are also attorneys bound by the rules of professional responsibility of their respective service and their state licensing authority. This means that, like all lawyers, judge advocates must...

342 GOLDSMITH, supra note 1, at 85. The “unitary executive” model was first used by the Regan administration during the 1980s to “fight off congressional attempts to check presidential power.” Id. In 2004, journalists began to use the phrase to describe the “view that Congress cannot unduly limit the Commander in Chief’s perogatives during wartime,” Id.

343 Margolis OPR Memo, supra note 256, at 67.

344 GOLDSMITH, supra note 1, at 96–98.


346 McNeal, supra note 170, at 144 nn.106–08.

347 E.g., Sulmasy & Yoo, supra note 216, at 1832–33.

348 Id. at 1832.

349 Id.

350 E.g., id. at 1844.
“exercise independent professional judgment and render candid advice.”

Supporting this analysis, Professors Geoffrey Corn and Eric Talbot Jensen stated,

Loyalty to the nation, as well as fidelity to the Constitution—the professional obligation of all members of the armed forces—requires a genuine appreciation not only of the principle of civilian control of the military, but also requires an understanding that this concept connotes more than myopic loyalty to the executive branch.

In fact, many argue that the process for unlawful policies of torture could be adopted only because JAG attorneys were excluded from the decision-making process. Professor Michael Newton rejects compromising our values to combat the terrorist threat, arguing that “lawyers should never accept a moral or legal equivalence between an enemy that deliberately and repeatedly violates the basic norms of international law because a professional military is required to comply with the principles of the law of war at all times.”


The unprecedented nature of the terrorist attacks, coupled with intelligence reports of additional threats, generated fear among policy makers that another devastating attack was inevitable. This echoes the sentiment of legal advisors in the wake of Pearl Harbor. As noted by then Attorney General Francis Biddle, the military “had not forgotten that . . . they had been caught with their pants down at Pearl Harbor,” and they “did not propose to be put in that awkward position again, or to take any chances.”

Uncertain that the national security apparatus could prevent another strike on U.S. soil, and realizing that the usual bureaucratic processes would hinder decisive action, the legal advisors at OLC undoubtedly thought the memos they issued were keeping America safe. The well-documented climate of fear and exigency contributed to an apparent disregard for the ethical norms of the profession.

In his memoir, *The Terror Presidency*, Professor Goldsmith highlights the internment of over a hundred thousand Japanese following the attacks of Pearl Harbor, later called “the worst single wholesale violation of civil rights of Americans.”

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352 Corn & Jensen, supra note 218, at 602.
353 See Dickinson, supra note 136, at 27; Scharf, supra note 16, at 85–86. See generally Kramer & Schmitt, supra note 218 (arguing that judge advocates play an important role in American civil-military relationships).
354 Newton, supra note 218, at 901.
355 Francis Biddle, In Brief Authority 225 (1962); see also Goldsmith, supra note 1, at 48.
357 Wendel, supra note 164, at 63.
American citizens in our history." Attorney General Biddle initially opposed this plan but later provided legal authority for the program when the president rejected his concerns. This demonstrates that pressures in times of crisis prompt lawyers, such as those counseling President Roosevelt and President Bush, to give advice which they believe is in the best interest of the country even if possibly contrary to moral and professional obligations.

In a memorandum submitted to David Margolis in relation to the OPR investigation, Professor Goldsmith expresses agreement:

OPR is not looking at the OLC opinions with the same time constraints as the lawyers who wrote the opinions; instead, OPR has taken nearly five years and still has not rendered judgment. The OLC lawyers did not have this luxury. Perhaps more important, OPR is looking at the OLC opinions not in the context of threat and danger in which they were written, but rather in what former Deputy Attorney General James Comey once described as “the perfect, and brutally unfair, vision of hindsight.”

Unlike Attorney General Biddle, however, there is no known record that the legal advisor subjects of the OPR report objected to the techniques approved in the torture memos, either on legal or moral grounds. Rather they provided legal analysis that endorsed the coercive interrogation practices sought by their clients. This demonstrates, without justifying, the effect that grave, time-sensitive national emergencies have on compliance with professional responsibility obligations.

Behavioral influences such as this are part of the job for government legal advisors. That the traditional ethics models do not account for these external pressures demonstrates the need for an approach that is well suited to restore accountability to OLC and other national security attorneys. The following Part explains how the process of ILE would have prevented the flawed ethical reasoning behind the torture memos and how this approach will assist future government legal advisors comply with legal ethics even in the face of pressure.

V. THE PROFESSIONAL’S DILEMMA AND THE SAFE PASSAGE OF INTERNALIZED LEGAL ETHICS

The complex issues encountered by the drafters of the “torture memos” demonstrate that national security legal advisors face significant external pressures to depart from compliance with ethical norms. Anticipating that these external influences are constant in times of crisis, the process of ILE involves three steps that, if followed, will minimize transgressions from professional obligations. The

358 BIDDLE, supra note 355, at 213.
359 Margolis OPR Memo, supra note 256, at 20 (footnotes omitted) (quoting Memorandum from Goldsmith to Margolis 4 (Jun. 5, 2009)).
three steps of the process outlined above—interaction, interpretation, and internalization—are applied in this Part to guide government attorneys in practice and provide an analytical framework for future academic debate on compliance with legal ethics.

A. Interaction: Engagement in the Decision-Making Process

Practitioners engage in the process of ILE long before a national security crisis emerges. Although the crisis situation technically defines the initial interaction, legal advisors need policy makers to understand and accept the significance of their role, thus ensuring insertion into the decision-making process at the earliest stage. As an example, Professor Newton suggests that the professionalism of military lawyer is extremely important in gaining the credibility and respect of both commanders and soldiers necessary for properly implementing the constraints of the law. This speaks to a certain level of professional competence required of all attorneys by Model Rule 1.1, and the confidence this professionalism inspires.

The trust of the policy makers enables the legal advisor to engage at the onset of the process. Requests for legal advice after a decision has been made leaves the government attorney with the unenviable task of crafting legal arguments to support what may be bad policy, which in turn creates morally ambiguous legal advocacy positions. The lawyer must insert himself into the process so he can give legal advice rather than support flawed policy as a latecomer.

Foreign affairs legal advisors underscore the importance of this dynamic, including those at the U.S. State Department and the UK Foreign Office. For example the mining of the Nicaraguan harbors (among other cases) leaving U.S. legal advisors to defend bad policy decisions and where UK leaders did not heed the advice of legal advisors in two arguably unlawful security operations—the 1956 Suez Canal invasion and the 2003 invasion of Iraq.

The interaction phase was less of a concern for the attorneys involved in drafting the “torture memos.” They were in control of the legal advice and policy-making from the beginning. Nonetheless, decisions made in secret, without wider consultation may have frustrated interagency peers and subordinates. This highlights the significance of the next phase in the process of ILE; interpretation.

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360 See supra Part III.D.
361 Newton, supra note 218, at 889.
363 BAKER, supra note 8, at 315.
364 Id. at 314–15.
366 Id. at 71–73.
B. Interpretation: Articulating the Norm

Following the interaction is the interpretive/discursive phase of norm articulation. This too is complex since offering advice to policy makers is rarely based on simple yes or no questions. The ethical application of the law depends on the interpreted legal norm at issue and the professional responsibility that accompanies the manner of its implementation. Some guidance is found in ethical obligations, which prohibit advising a client to engage in criminal conduct, require attorneys to represent the best interests of their organization, and require independent, candid legal advice. It is the clarity of these obligations that confounds a purely rules-based approach to government lawyering. Model Rule 1.2, for example, prohibits advice that facilitates unlawful activity, but also permits good faith efforts to change existing law. Additionally, loyalty to the organizational client in Model Rule 1.13 does not remedy the client identification issue discussed in detail above. Similarly, Model Rule 2.1 is exceptionally vague in requiring candid, independent advice, while the comment encourages political and other considerations. These provisions may provide the national security attorney needed flexibility, but they also place limits on accountability for the unethical interpretation of legal norms.

Nonetheless, the spirit of these rules and their moral objectives remain essential to the process of ILE. As demonstrated by the fallout surrounding the issuance of the OLC memos, excluding other relevant advisors and issuing opinions that seek to unilaterally reshape constitutional and international legal obligations diminishes the independent, candid nature of the advice given. The effectiveness of the interpretive phase, therefore, depends upon clarifying ambiguous obligations, inter-agency communication, and openly vetting policy-decisions that are contrary to the law.

It is common in times of crisis for situations to arise for which there are no easy solutions. In the aftermath of 9/11, government attorneys struggled with legal issues resulting from an ill-defined conflict. There is no “book on the shelf” for resolving novel issues that threaten the national security. For example, John Bellinger, former State Department Legal Adviser during the second term of the Bush administration, sought to “clarify and adopt a more robust legal framework

367 BAKER, supra note 8, at 317.
368 MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2011).
369 Id. at 1.13(b).
370 Id. at 2.1.
371 See id. at 1.2, 8.4.
372 See supra Part II.
374 See Wendel, supra note 164, at 62–63.
375 RHODE & HAZARD, JR., supra note 242, at 144–45.
for the detention, treatment, and prosecution of captured terrorists.”376 In essence, he was cleaning up after his predecessors. This highlights the need to interpret the underlying norm at issue, particularly when it is ambiguous or subject to multiple interpretations. Without an articulated legal norm, compliance with ethical obligations suffers, since accurate and effective advice is not possible.

Judge Baker states that the law “provides procedural mechanisms offering opportunities to consider, validate, appraise, and improve policy, as well as ensure its lawful execution.”377 He cites the vertical and horizontal separation of powers as a check on the executive’s national security authority.378 Similarly, at an institutional level, the rules of professional responsibility serve as an appraisal and improvement mechanism, contributing to the discursive process of norms governing legal advice.

Inter-agency peers serve as a valuable check on the ethical interpretation of legal norms. Professor Goldsmith recalls that as the head of OLC he would vet significant legal opinions with top lawyers from other executive agencies (i.e. DOD and DOS) to make sure his analysis was sound.379 Prior to issuing a particularly controversial legal opinion, Goldsmith had his analysis checked “by experienced law-of-war attorneys in the State and Defense Departments and in OLC.”380 Similarly, during the Cuban Missile Crisis, President Kennedy’s administration engaged in an extensive internal debate and consulted with foreign governments and international organizations before deciding against the use of armed force.381 Skeptics of the process of ILE might argue that a three-step approach to legal advice may help compliance with professional obligations, but it is not feasible in the high-pressure, time-sensitive environment of national emergencies. These experiences demonstrate that time-sensitive, controversial issues can be properly vetted to ensure accuracy and ethicality through a discursive process.

Rather than thwarting effective decision making, inter-agency dialogue often produces options for carrying out policy objectives.382 Professor Kaye argues,

It is the job of the interagency process to integrate the diversity of agency views, if there is diversity, and to provide the legal options to policymakers. Policymakers then make the decision, hopefully based on a full and frank exposition of the legal options, risks, and their

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377 BAKER, supra note 8, at 308.
378 Id.
379 GOLDSMITH, supra note 1, at 156.
380 Id.
381 Margulies, supra note 198, at 69–70.
382 Inter-agency dialogue is, in fact, the method traditionally used by OLC. See GOLDSMITH, supra note 1, at 166.
assessment of the public interest, as policymakers ultimately are the ones to answer to Congress and the public more generally.\footnote{Kaye, \textit{supra} note 32, at 595.}

Experienced practitioners, therefore, verify the importance of the inter-agency discursive process, which the authors of the torture memos side-stepped at the expense of ethical compliance.

Previous OLC attorneys suggest that “an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired policies,” is required in rendering legal advice.\footnote{OLC Principles, \textit{supra} note 179, at 1.} Nonetheless, the rules of professional responsibility permit good faith efforts to challenge the “validity, scope, meaning or application of the law.”\footnote{\textit{See} MODEL RULES OF PROF’L CONDUCT R. 1.2d (2011); \textit{see also id.} at 1.2 cmt. 9 (“There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.”).} At issue is whether an attorney should continue with questionable policy in the absence of constitutional authority. It is argued that

\begin{quote}
[i]t would not . . . be unethical for [the attorney] to assist in a project that probably would be held unconstitutional under existing Supreme Court precedent so long as the project is not contrary to any binding judgment and the executive branch makes a bona fide claim that the Supreme Court’s prior decision is incorrect.\footnote{Miller, \textit{supra} note 48, at 1297.}
\end{quote}

This argument, in combination with the applicable ethical rules, demonstrates that it is essential to openly articulate when legal interpretation runs contrary to precedent, and, more importantly, to articulate the good faith reasons for rendering this advice.\footnote{\textit{See Margulies, supra} note 198, at 67–68 (calling for a transparent dialog among the branches and public to enhance the quality of norm interpretation, and tailoring of the decision that takes in account both the rationale of the policy proposal and the applicable constitutional limits on these proposals); \textit{see also id.} at 42–43 (“This proposed language would ensure that government lawyers advising on morally perilous questions would give advice that is legal, ethical, moral, complete, balanced and unlikely to lead to violation of current law.”). \textit{See generally} Margulies, \textit{supra} note 187.}

Public discourse may also be required when advisors interpret legal restraints in a manner inconsistent with recognized norms. National security practice inevitably requires “pushing the envelope” of legal norms.\footnote{See generally Margulies, \textit{supra} note 187 (arguing that tensions between legal advice on national security matters and rules of professional conduct are not always negative, if done in a good faith, discursive manner, taking into account long term consequences).} While it is the
“leader’s first duty . . . to protect the country, not follow the law,” if the President is to act extra-legally, then he has a responsibility to do so publicly and throw “himself on the mercy of Congress and the people so that they [may] decide whether the emergency [is] severe enough to warrant extralegal action.” Many consider this the only appropriate manner to subvert laws that may constrain executive action in times of crisis. Efforts to expand executive authority and increase effective intelligence gathering, frequently cited objectives of the torture memo authors, may have stayed within agreeable ethical limits if the legal interpretations at issue had been openly debated.

Historical precedent demonstrates the utility of this approach. When President Jefferson needed to act swiftly to take advantage of the favorable terms of the Louisiana Purchase, without clear constitutional authority to do so, he requested Congress’s permission and made his deliberations public at the outset. Prior to U.S. involvement in the Second World War, Attorney General Robert Jackson gave legal cover to President Roosevelt’s decision to provide destroyers to aid Britain as part of the lend-lease program. Although this deal was prohibited by federal statute and possibly international law, Roosevelt and Jackson engaged in the discursive process by soliciting input from numerous key players inside and outside the government. Today most agree that their actions were aggressive but prudent given the circumstances. These examples demonstrate that application of the process of ILE, particularly the interpretive/discursive stage, will generate broader support for policy decisions that stretch the limits of the law. This is particularly true when the discourse is public, as opposed to the secretive OLC memos that were unfettered by the input of internal and external advice.

C. Internalization: Organizational Facilitation and Individual Responsibility

Consistent ethical compliance can only be fully realized after the individual has adopted the norm at issue as part of his internal value set. Some refer to this as internalization. While an individual’s internal value set is not compelled from the outside, internalization of ethical norms is facilitated by the organizational

389 GOLDSMITH, supra note 1, at 80–81.
390 Id. at 81.
391 Id.
392 Margulies, supra note 198, at 19.
393 Id. at 20.
394 Id.
395 Id. at 20–21. Margulies distinguishes this type of action from those, such as the authors of the torture memos, who act contrary to international and domestic law out of a desire to facilitate expedient presidential action. Roosevelt and Jackson, he argues, were acting “to promote goals that have become pillars of the post-war global legal order: increased international cooperation, regard for human rights, and protection against aggression.” Id. at 31.
396 See supra Part III.D.
structure within which a legal advisor works. “[O]ne must consider whether a change in organizational culture can have an impact on ethical behavior.” If the organization is not willing to adopt compliance procedures, the agency can be required to internalize ethical norms by rules or judgments issued by professional organizations or the courts.

Professor Goldsmith summarizes both the external pressures to deviate from compliance that legal advisers within OLC face, as well as organizational factors that enhance ethical compliance. He states as follows:

The unusual pressures on OLC, the office’s pro-President disposition, and the lack of real oversight may seem to belie the notion that OLC can bind the President to the rule of law. This is where the cultural norms in the office become crucial. Most important are the norms of detachment and professional integrity that permeate OLC and that transcend particular administrations. The oath of office and a powerful professional concern to “do the right thing” help OLC lawyers to resist pressures for certain outcomes when they believe the law requires otherwise.

In light of OLC’s historical integrity and ethically minded practice, it appears that the torture memos were the result of individual judgments encouraged within a specific, isolated organizational culture. Nonetheless, the external pressures to depart from ethical compliance will trouble every administration and challenge future national security practitioners.

When rendering candid, independent advice becomes incompatible with policy objectives it is insufficient to stand idly by. Model Rule 1.13 allows lawyers to report possible misconduct up the organizational chain of command, but may prove insufficient or generate retributive actions against whistleblowers. High profile resignations are sometimes the end result. Prior to the invasion of Iraq in 2003, the legal adviser to the UK Foreign Office, Elizabeth Wilmhurst, resigned due to an inability to reconcile the law governing the use of force and the intended invasion policy. Similarly, Cyrus Vance resigned as Legal Adviser at the U.S. State Department following the botched mission to rescue American hostages in Iran—a mission conducted over his legal objection. These actions reflect a belief, articulated by Conrad Harper, that in order “[t]o be an effective [legal advisor], one must recognize that the exit door must always be open. When there is a very important matter and the government refuses to follow advice that you

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397 McNeal, supra note 170, at 139.
398 See RHODE & HAZARD, JR., supra note 242, at 10; supra Part III.D.
399 GOLDSMITH, supra note 1, at 37–38.
401 Scharf, supra note 16, at 73.
402 Id.
consider to be essential, you are suppose[d] to resign.”\footnote{Id. (quoting Conrad Harper, former Legal Advisor to the Clinton administration).} But resignations are at the far end of the internalization spectrum and other, less extreme, measures must be considered first.

1. \textit{Methods to Facilitate Internalization of Ethical Norms}

An organizational culture that fosters compliance with ethical norms can have a incredible influence on members of the organization. Some mechanisms that can influence ethical behavior include secretly or publicly reporting unethical actions to a higher level within the organization; secretly or publicly reporting unethical actions to someone outside the organization; secretly or publicly threatening an offender or a responsible manager with reporting unethical actions; or quietly or publicly refusing to implement an unethical order or policy.\footnote{McNeal, \textit{supra} note 170, at 139.} Less confrontational methods are also available to improve compliance within an organization, such as (a) whistleblower protections, (b) establishing an attorney “gatekeeper” role, and (c) norm articulation through internal regulations or guiding principles.

Protections for whistle-blowers may provide a “release valve” for attorneys who have legal and ethical objections to a proposed course of action. Whistleblowing is defined as “the disclosure by current or former employees of illegal, immoral, or illegitimate organizational practices to people or organizations that may be able to change the practice.”\footnote{Id. at 144–45; see also Michael P. Scharf & Colin T. McLaughlin, \textit{On Terrorism and Whistle-Blowing}, 38 CASE W. RES. J. INT’L L. 567, 575–78 (2007).} Organizations should endorse internal reporting mechanisms so that a legal advisor does not have to “choose between resignation, reprisal, or violations of the law.”\footnote{McNeal, \textit{supra} note 170, at 134.} The absence of an internal reporting mechanism encourages government employees to leak information to the press or NGOs in order to thwart a program they oppose.\footnote{See generally Jesselyn Radack, \textit{The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last}, 17 GEO. J. LEGAL ETHICS 125 (2003) (discussing the revised 2000 ABA Model Rule of Professional Conduct 1.6 and its broadened exceptions to attorney-client confidentiality, allowing more ethical room for government attorney-whistleblowers). \textit{But see} Julie A. Wenell, \textit{Garcetti v. Ceballos: Stifling the First Amendment in the Public Workplace}, 16 WM. & MARY BILL RTS. J. 623 (2007) (discussing the free speech implications of \textit{Garcetti v. Ceballos} and whistleblower protections).} This is the context that the “public interest” model of legal ethics is open to criticism, since fidelity to a personal value-assessment of a perceived interest might dictate sabotaging a particular program. Providing internal methods of reporting ethical transgressions or perceived conflicts limits the damaging effect of anonymous leaks and may lead to clarification or resolution of the non-compliant practice.
Organizations may also facilitate compliance by granting legal advisors an oversight function, sometimes referred to as a “gatekeeper.” In this role, attorneys are required to perform numerous supervisory tasks, which focus on the fundamental question: “Do the lawyers apply the ethics rules with reason, care, and rigor?” Within this organizational structure, the supervising attorney leads and appraises the ethical practice of the government agency. Compliance begins with the effectiveness of leaders to foster an ethical environment.

In terms of monitoring compliance with professional responsibility obligations, this approach is an attractive model, particularly since its revival in the wake of the restructuring of corporate counsel’s professional responsibilities. Following the Enron scandal of 2001, ethics rules for corporate counsel underwent dramatic changes, including the passage of certain provisions of the Sarbanes-Oxley Act of 2002. Analogous to the gatekeeper role required of corporate counsel, government legal advisors could be required to report professional misconduct internally up the chain; and if supervisors fail to take appropriate action, attorneys would be required to report to an outside oversight body when the violation is ongoing and likely to result in injury. Legal advisors in the JAG Corps already serve the role of “internal gatekeeper” and could provide a useful model to other executive agencies. This model also maintains democratic accountability because the attorney’s client remains the President or Congress through the respective agency, and the attorney does not substitute his own value judgment of the “public interest.”

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408 See Rutheford B. Campbell, Jr. & Eugene R. Gaetke, The Ethical Obligations of Transactional Lawyers to Act as Gatekeepers, 56 Rutgers L. Rev. 9, 14–28 (2003) (focusing on corporate lawyers’ obligations under ABA Model Rules of Professional Conduct 1.13(b) and 1.2(d), arguing that the rules need to strengthen the gatekeeper role of transactional lawyers); Sung Hui Kim, The Banality of Fraud: Re-Situating the Inside Counsel As Gatekeeper, 74 Fordham L. Rev. 983, 1001–26 (2005) (suggesting structural reform to rules of ethics so that corporate counsel can properly carry out their role as gatekeeper).

409 BAKER, supra note 8, at 313.


411 See Government Counsel, supra note 103, at 1425. See generally Lobel, supra note 43 (studying competing loyalties of the corporate and government lawyer and encouraging internal reporting and regulatory mechanisms over more overt reporting of organizational misconduct).

412 See generally Dickinson, supra note 136, at 6–7 (discussing the role of compliance units within organizations and the structure that allows these personnel to succeed at their compliance mission); McNeal, supra note 170, at 145–49 (discussing various virtues of military organizational culture that contribute to heightened compliance with ethical standards).

413 See Kaye, supra note 32, at 597 (“While the duty of executive branch lawyers runs at some level to the whole executive branch, the public-interest view of government
Professor Rhode suggests that organizational compliance mechanisms can include educational programs, practice guidelines, oversight committees, mentoring strategies, and reporting channels. To this end, following the issuance of the torture memos, OLC published a guide to *Best Practices*, which “reaffirm[s] traditional practices in order to address some of the shortcomings of the past.” These rules alone reveal organizational efforts to assist practitioners to internalize well-recognized professional responsibility obligations. Had these practices been in place in 2002 and 2003, and had the leadership fostered an environment of ethical compliance, the problematic reasoning of the torture memos would not have been remembered within OLC as “shortcomings of the past.”

Ultimately, the organization (and law schools) must educate incoming legal advisors that short term gains, at the expense of ethical practice, will neither serve the best interests of the attorney’s career or the interests of the government. Professor Goldsmith expressed this view clearly when he stated, “I also thought I was serving the president even when the White House didn’t like my legal advice, both because the president has a constitutional duty to faithfully execute the law and because skirting the law often leads to political trouble.” The OLC chief during the Clinton administration, Walter Dellinger, concurs. He stated, “[y]ou won’t be doing your job well, and you won’t be serving your client’s interests, if you rubber-stamp everything the client wants to do.” It is at this point that advisors must provide the full spectrum of legal and ethical advice, so that policymakers are aware of adverse moral implications of proposed courses of action.

While providing long-view advice, legal advisors must be cautious of decision makers seeking to keep lawyers out of the process for not approving administration policies. Providing lawful policy options can help circumvent this problem. Goldsmith recalls, when a “proposed action was legally problematic, I would try to suggest ways to achieve its goals through alternative and legally available means.” In this vein, extreme, politically inspired legal arguments must be eschewed, relying instead on an approach that finds an “alternative means to accomplish the same necessary security end.”

The process of ILE will increase compliance with professional responsibility obligations if the stages—interaction, interpretation, and internalization—are advanced from this theoretical discussion to the suggested methods for practical

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414 ETHICS IN PRACTICE, supra note 68, at 18.
415 OPR Report, supra note 51, at 15 n.16 (statement of Steven Bradbury).
417 GOLDSMITH, supra note 1, at 38.
418 Id. (quoting Walter Dellinger, head of OLC during the Clinton administration).
419 Vischer, supra note 255, at 37–38.
420 GOLDSMITH, supra note 1, at 35.
421 BAKER, supra note 8, at 309.
implementation. Rather than discourage the national security practitioner from taking risks,\textsuperscript{422} this process will encourage a balanced, practical, and timely approach to providing legal advice in crisis situations.

VI. CONCLUSION

Ten years after the deadly attacks of September 11, 2001, the threat of terrorism, including the use of weapons of mass destruction, continues to dominate national security scholarship. It will do so for years because this threat has “the greatest potential to transform U.S. national security, in both a physical and a values sense.”\textsuperscript{423} In this context, the discourse that shapes the application of national legal authority can result in “zero sum compromise,” either from policy differences or political motives.\textsuperscript{424} Legal advice charged in these terms will neither advance security objectives nor the rule of law. It is at this point that the rules of professional responsibility are crucial to providing an honest appraisal of the use of the awesome power of executive authority in national security decisions, hopefully deterring misuse in the process.

The issues presented by the memos produced by OLC are just one example of government legal advisors pushing the boundaries of law and ethics during times of crisis. These issues, and the controversies they generate, are not new to the post-9/11 world and they will not end anytime soon. President Obama’s legal advisors will likely be defending for years to come decisions relating to the detention of unprivileged belligerents at Guantánamo Bay and the use of predator drone strikes on suspected Taliban and al Qaeda elements.

The national security practitioner will have his or her moral courage tested regardless of the role of the attorney or the identity of the client, which are the traditional approaches for measuring compliance with professional responsibility obligations. Judge Baker uses the analogy of Field Marshall Slim, who served on the Western Front in the First World War, and was among the strongest commanders of the Second World War. He makes the following tribute:

I have known many men who had marked physical courage, but lacked moral courage. . . . On the other hand I have seen men who undoubtedly possessed moral courage very cautious about taking physical risks. But I have never met a man with moral courage who would not, when it was really necessary, face bodily danger. Moral courage is a higher and a rarer virtue than physical courage.\textsuperscript{425}

\textsuperscript{422} See criticism of the over-cautious approach taken by the CIA in counter-terrorism operations, in \textit{The 9/11 Commission Report}, \textit{supra} note 260, at 93; see also Goldsmith, \textit{supra} note 1, at 94–95.
\textsuperscript{423} Baker, \textit{supra} note 8, at 308.
\textsuperscript{424} Id. at 307.
Following this example, modern national security practitioners, civilian and uniformed legal advisors, exemplify strength, integrity, and a deep commitment to the values that drive the profession of law. In few cases, the weight of a national emergency clouds judgment that, made in calmer circumstances, would caution against legal interpretations that stretch the limits of the law.

Application of the process of ILE alleviates some of the burden placed on government legal advisors and allows surer footing in uncertain times. In addition to enhancing compliance with professional obligations, this process will contribute to national security. As Judge Baker stated, “[s]ustained commitment to the rule of law in practice and perception will serve as a positive national security tool in curtailing recruitment of the next wave and generation of jihadists.” 426 Even in turbulent times, the “sea of ethics” provides safe passage to the national security practitioner.

426 BAKER, supra note 8, at 309.