This Note is dedicated to my sister Molly, my oldest friend. I would also like to thank Professor Diane Mazur for her invaluable insights and her constant willingness to help.

I. INTRODUCTION

Abu Ghraib is one of the world’s most notorious prisons.\(^2\) Under Saddam Hussein, it was the sight of atrocious acts of torture, weekly executions, and inhumane living conditions.\(^3\) When coalition forces moved in after the fall of Saddam Hussein in April 2003, they repaired the old prison and added a medical center so that it could be used as a United States military prison.\(^4\) Shockingly, in April 2004, CBS aired grotesque pictures of abuse of Iraqi prisoners at the hands of United States soldiers at Abu Ghraib.\(^5\) Some pictures showed naked Iraqi prisoners piled on top of one another and forced to simulate sexual acts while American soldiers stood in the background smiling.\(^6\) In June of 2004, with these shocking pictures still fresh in American minds, The Washington Post released an August 1, 2002 memorandum (the Torture Memo)\(^7\) that had been

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3. Id.
4. Id. at 21.
5. Id. at 22-23. This was not the only recent incident of abuse of prisoners by American soldiers. In December 2002, Secretary of Defense Donald Rumsfeld approved a series of harsh questioning methods for use at the Guantanamo Bay prison. Editorial, Torture Policy, WASH. POST, June 16, 2004, at A26. These methods included removing clothing, using stress positions, hooding, using dogs to induce fear, and inflicting mild noninjurious physical conduct. Id. A national guardsman who was undercover as a prisoner at Guantanamo went public in 2004 with allegations of abuse. Associated Press, U.S. Military Details 8 Guantanamo Abuse Cases (Nov. 5, 2004), http://www.msnbc.msn.com/id/6413220. He described an attack in November 2002 where the “extraction team” removed him from his cell and repeatedly slammed his head against the steel floor. Id. As a result of the abuse, the guardsman suffered brain injuries and seizures. Id. Other abuses have been reported from Guantanamo:

A detainee was forced to kneel so many times he was bruised, a barber gave reverse mohawks and a female interrogator ran her fingers through a prisoner’s hair and sat in his lap, the U.S. government says in the most detailed accounting of eight abuse cases at its Guantanamo Bay prison for terror suspects.

Id.

6. Hersh, supra note 2, at 22-23.
7. Dana Priest, Justice Dept. Memo Says Torture “May Be Justified” (June 13, 2004), http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html. See generally Memorandum from Jay S. Bybee, Assistant Attorney General, Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Torture Memo] (discussing the application of 18 U.S.C. §§ 2340-2340A (2000)). The Torture Memo is not the only recent controversial memo from the Department of Justice Office of Legal Counsel. A January 22, 2002 memo, for example, argued that the Geneva Convention does not apply to enemy combatants. Memorandum from Jay S. Bybee, Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense (Jan. 22, 2002) (discussing the application of treaties and laws to al Qaeda and Taliban detainees). However, this Note will not explore any memos other than the
principally drafted by John Yoo, signed by former Assistant Attorney General Jay S. Bybee, and addressed to Alberto Gonzales, the President’s legal counsel. The authors of the Torture Memo argued that torture may be justified if done pursuant to the President’s power as Commander in Chief.

The Torture Memo was a response by the Office of Legal Counsel (OLC) to a CIA request for legal advice regarding standards of conduct for interrogation. In the Torture Memo, the OLC first argued that

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8. R. Jeffrey Smith, Slim Legal Grounds for Torture Memos, WASH. POST, July 4, 2004, at A12. John Choon Yoo is currently a member of the faculty at Boalt Hall School of Law, University of California, Berkeley. Boalt Hall, John Choon Yoo Faculty Profile, available at http://www.law.berkeley.edu/faculty/profiles/facultyProfile.php?facID=235. At the time of drafting the Torture Memo, Yoo was Deputy Assistant Attorney General in the Department of Justice Office of Legal Counsel. Id. 9. Torture Memo, supra note 7, at 46. George W. Bush appointed Jay S. Bybee to be Assistant Attorney for the U.S. Department of Justice in the Office of Legal Counsel in 2001. U.S. Department of Justice Office of Legal Policy, Jay S. Bybee Biography, at http://www.usdoj.gov/olp/bybeebio.htm (last visited May 5, 2005). It was in his role as Assistant Attorney General that Bybee signed the Torture Memo. See Torture Memo, supra note 7, at 46. Bush then appointed Bybee to the U.S. Court of Appeals for the Ninth Circuit on January 7, 2003, and the Senate confirmed Bybee on March 13, 2003. Judges of the United States Courts, Biography of Jay S. Bybee, at http://air.fjc.gov/servlet/tGetInfo?jid=2981 (last visited May 5, 2005). 10. Torture Memo, supra note 7, at 1. At the time this Note was written, Alberto Gonzales was being considered for the position of Attorney General. Senate Judiciary Committee, Confirmation Hearings for Alberto Gonzales, Jan. 6, 2005 [testimony of Senator Specter]. On January 6, 2005, Gonzales appeared before the Senate Judiciary Committee for a confirmation hearing. Id. At the time that the Torture Memo was written, Gonzales was Counsel for President George W. Bush. See id. Before joining Bush in the White House, Gonzales was Bush’s attorney while Bush was Governor of Texas and then served as a judge on the Supreme Court of Texas. Id. 11. Torture Memo, supra note 7, at 2. 12. The OLC website states:

The Assistant Attorney General in charge of the Office of Legal Counsel assists the Attorney General in his function as legal advisor to the President and all the executive branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the executive branch, and offices within the Department. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement. The Office also is responsible for providing legal advice to the executive branch on all constitutional questions and reviewing pending legislation for constitutionality.

although 18 U.S.C. §§ 2340-2340A criminalize torture, those sections do not prohibit cruel and inhumane treatment. The OLC then argued for a very narrow definition of torture, which includes only the most extreme acts that are specifically intended to inflict severe mental or physical pain and suffering. Furthermore, according to the OLC, even if interrogation techniques were found to constitute torture, the rules proscribing torture would be unconstitutional as infringing on the President’s inherent powers. Finally, the OLC argued that if all else failed, the President could claim either self-defense or necessity to justify the use of torture.

When The Washington Post published the Torture Memo on June 13, 2004, the OLC’s narrow definition of torture shocked the consciences of people around the world and incited much criticism. The Torture Memo shocked many lawyers in particular, not only because of the narrow definition of torture but also because of its broad interpretation of

14. Section 2340 defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340(1) (2000). Section 2340A makes it a crime to commit torture and provides punishments that vary from a fine to death depending on the severity of the torture. Id. § 2340A(a).

15. Torture Memo, supra note 7, at 1.

16. Id.

17. Id. at 2.

18. Id. Although this Note does not deal with the OLC’s advice on self-defense, it is an interesting topic for another day. The OLC prospectively advised its client on the possibility of claiming self-defense retrospectively. The OLC’s advice raises the question of whether there is a difference between the ethical standards that apply to prospective advice and those that apply to retrospective advice. In Ethical Abuse the author described the difference between prospective advice and retrospective advice. Ethical Abuse, supra note 1, at 1084-85. The Note proposes a hypothetical situation where a client wants to keep a secret on the stand and the lawyer advises him to answer in a way that is misleading by negative implication. Id. at 1082-83. The author notes that if the client follows this advice he would not be committing perjury, but the author initially inquires whether the lawyer’s advice is ethical. Id. at 1083. The author describes several approaches for analyzing this hypothetical situation, including the Pure Client Model, whereby the lawyer’s only concern is zealously advocating on his client’s behalf, id. at 1086-88, and the Libertarian Model, whereby the client must know the relevant legal parameters prospectively in order to make full use of his liberty. Id. at 1088-89. The author concludes that lawyers should operate under the same ethical rules in giving both prospective and retrospective advice. Id. at 1099. Nevertheless, prospective advice that encourages a client to engage in criminal activity by explaining how to avoid conviction is arguably subject to different ethical norms than is a retrospective defense on the same basis. See id. at 1088.

19. Priest, supra note 7.

presidential powers. There certainly are different views on the extent of presidential powers, but many have argued that the view expressed in the Torture Memo is one held by only a minority of legal scholars.

Considering the public outrage that ensued after The Washington Post published the Torture Memo, it is not surprising that the OLC withdrew the Torture Memo in June 2004. On December 30, 2004, the OLC issued a memorandum (the Replacement Memo) to replace the Torture Memo. In the Replacement Memo, the OLC defined torture much more broadly than it did in the Torture Memo and concluded that it was unnecessary to address issues of presidential powers because the President had unequivocally stated that the United States would not participate in torture.

Although the Torture Memo is no longer in effect, it remains necessary to contemplate its ramifications and the responsibility of its authors. As 130 lawyers wrote in their statement on the Torture Memo, “[t]he belated repudiation of the August 2002 memorandum . . . is welcome, but the repudiation does not undo the abuses that this memorandum may have sanctioned or encouraged during the nearly two years that it was in effect. The subsequent repudiation, coming after public outcry, confirms its original lawless character.” Therefore, this Note will examine the professional responsibility of the authors of the Torture Memo at the time of its writing.

While lawyers holding a minority viewpoint are free to express their opinions and are even free to argue their theories in defense of their clients

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21. Smith, supra note 8; Lawyers’ Statement, supra note 20. In the Lawyers’ Statement, the lawyers argued:

One of the surprising features of these legal memoranda is their failure to acknowledge the numerous sources of law that contradict their own positions, such as the Steel Seizure Case, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). The unprecedented and under-analyzed claim that the Executive Branch is a law unto itself is incompatible with the rule of law and the principle that no one is above the law.

Lawyers’ Statement, supra note 20.

22. Smith, supra note 8 (“If you line up 1,000 law professors, only six or seven would sign up to [the Torture Memo’s minority viewpoint].”) (quoting David B. Rivkin Jr., a White House lawyer during the Reagan administration).


24. Id. at 1.

25. Id. at 1-2.

(so long as it has some basis in law and fact),\textsuperscript{27} the OLC’s arguably one-sided Torture Memo sparked controversy.\textsuperscript{28} The memo appeared to be more a piece of persuasive advocacy than a thoughtful consideration of the arguments.\textsuperscript{29} This type of prospective advocacy raises several ethical issues, many of which may require answers too speculative to resolve in this Note. First, was the OLC’s advice on the breadth of presidential powers in clear contradiction to the governing law? Second, did the OLC intend to “cover” the actions of the President? In other words, by telling the President that he has broad powers and that torture is defined narrowly, was the OLC effectively providing him with the defense of reliance on the advice of counsel?\textsuperscript{30} Third, by the very act of writing the Torture Memo,  

\textsuperscript{27} Model Rules of Prof’l Conduct R. 3.1 (2002); Allen & Priest, \emph{supra} note 20 (“A lawyer is permitted to craft all sorts of wily arguments about why a statute doesn’t apply” to a defendant. . . . ‘But a lawyer cannot advocate committing a criminal act prospectively.’”) (quoting Scott Norton, Chairman of the International Law Committee of the New York City Bar Association). In fact, government lawyers already have begun crafting these “wily arguments.” In \textit{Comollari v. Ashcroft}, 378 F.3d 694 (7th Cir. 2004), the government lawyer argued for a narrow definition of torture, claiming that a sniper who shoots someone so as to cause his victim’s immediate death has not tortured his victim while a sniper who shoots his victim in an artery and thereby causes him to slowly bleed to death has committed torture. \textit{Id. at 697; see} Noah Leavitt, \textit{Government Redefining Torture} (Aug. 25, 2004), at http://www.cnn.com/2004/LAW/08/25/leavitt.torture (last visited May 5, 2005) (citing the Government’s argument in \textit{Comollari}).  

\textsuperscript{28} \textit{See supra} notes 20-21 and accompanying text.  

\textsuperscript{29} For example, the OLC wrote:  

\begin{quote}  
In light of the President’s complete authority over the conduct of war, without a clear statement otherwise, we will not read a criminal statute as infringing on the President’s ultimate authority in these areas. . . .  
\end{quote}  

\textsuperscript{30} Third, by the very act of writing the Torture Memo,  

\begin{quote}  
A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had acted in good faith that his conduct would not amount to the acts prohibited by the statute. . . . A defendant could show that he acted in good faith by taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience.  
\end{quote}  

\textit{Id.} (citing Ratzlaf v. United States, 510 U.S. 135, 142 n.10 (1994)). The Court in \textit{Ratzlaf} noted that
did the OLC intend to provide the President with an opinion akin to binding legal precedent that would guarantee adherence to the torture policy by the entire federal government?\textsuperscript{31} Finally, if the answer to any of these questions is “yes,” did the OLC lawyers assist or counsel their client in conduct that the lawyers knew to be criminal or fraudulent in violation of the Model Rules of Professional Conduct (the Model Rules)?\textsuperscript{32}

All of these issues cannot entirely be resolved in this Note because they involve questions of intent that would be difficult to prove even in a courtroom. Nevertheless, this Note will discuss each of these issues to explore the potential extent of the ethical violations involved in the writing of the Torture Memo. More broadly, this Note attempts to address both the conflicting ethical concerns that exist for all lawyers and, in particular, some of the special ethical concerns facing lawyers in the OLC. While other articles have examined the OLC Torture Memo from a moral perspective,\textsuperscript{33} this Note focuses on the professional responsibility of the lawyers as specifically mandated by the Model Rules.

Part II will briefly describe the role of the OLC and the often-conflicting duties that arise therein. To provide a background for analyzing the advice in the Torture Memo, Part III will discuss the existing law that defines the scope of presidential powers. Part IV will describe in more detail the advice given in the Torture Memo regarding the scope of presidential powers. Part V will describe the relevant provisions of the Model Rules and the corresponding case law. Part VI will analyze the advice given by the OLC regarding presidential powers through the lens of the lawyers’ responsibilities under the Model Rules.\textsuperscript{34} Finally, Part VII will offer possible solutions to the professional responsibility dilemma demonstrated in the Torture Memo.

\textsuperscript{31} See Priest, supra note 7 (“Bybee’s signature gives the document additional authority, making it akin to a binding legal opinion on government policy on interrogations.”).

\textsuperscript{32} See MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2002).


\textsuperscript{34} This Note does not, however, imply that the President actually did commit a crime. It is not necessary to find that a crime actually occurred in order to show that a lawyer counseled or assisted the client in criminal or fraudulent conduct. Werme’s Case, 839 A.2d 1, 2 (N.H. 2003) (reasoning that where the lawyer had counseled her client to break the law in violation of New Hampshire Rules of Professional Responsibility 1.2(d), it was irrelevant whether or not her client actually committed the crime).
II. THE OFFICE OF LEGAL COUNSEL

As an initial matter, it may be helpful to understand the role of the Office of Legal Counsel. While this is a complicated issue that has received much scholarly attention, this Note will address it only briefly to provide a general understanding of the professional responsibility implications arising from that role. Although few people have heard of the OLC, its influence is nonetheless significant.\(^\text{35}\) An OLC opinion serves two purposes: 1) it advises the President on the law; and 2) it acts as binding legal precedent on the entire executive branch.\(^\text{36}\)

Congress has given the Attorney General the authority to give opinions on questions of law when requested by the President and other officials of executive departments.\(^\text{37}\) The Attorney General has delegated much of this authority to the Assistant Attorney General in charge of the OLC.\(^\text{38}\) The Assistant Attorney General in charge of the OLC, therefore, helps the Attorney General in his role as advisor to the President.\(^\text{39}\) The OLC drafts opinions on behalf of the Attorney General in response to requests from the Counsel to the President and other executive agencies.\(^\text{40}\)

It is worth noting that the Attorney General is a part of the executive branch and is thus a direct subordinate of the President.\(^\text{41}\) Because the Attorney General is head of the OLC, the President controls both the Attorney General and the OLC. At the same time, however, the OLC opinions are binding on the executive branch, which includes the Department of Justice. Therefore, the OLC has two roles that occasionally may conflict.

The Attorney General’s role has recently been of interest due to the confirmation hearings for Alberto Gonzales, former counsel for the President. In his confirmation hearings before the Senate Judiciary Committee, Gonzales said:

35. Fall Meeting Dinner Honors Office of Legal Counsel, ADMIN. & REG. L. NEWS (ABA, D.C.), Winter 1998 (“To most of the legal world, the Office of Legal Counsel is an unknown entity. Indeed, Chief Justice Rehnquist, one of the former Assistant Attorneys General honored at the dinner, commented that, when he was called by the Attorney General and offered the job, he asked what the office did; he had never heard of it. Its relative obscurity, however, is at odds with its importance.”), available at http://www.abanet.org/adminlaw/news/vol23no2/olchist.html.


38. Id. § 510.

39. See supra note 12.

40. See supra note 12.

If confirmed as Attorney General, I will no longer represent only the White House, I will represent the United States of America and its people. I understand the differences between the two roles. In the former, I have been privileged to advise the President and his staff. In the latter, I would have a far broader responsibility: to pursue justice for all the people of our great nation; to see that the laws are enforced in a fair and impartial manner for all Americans.\(^42\)

While this role seems clear enough, the Torture Memo demonstrates that it is not always so simple. During Gonzales’s confirmation hearings, Senator Patrick Leahy of Vermont expressed his concern regarding the role of the Attorney General. He said:

> When he was designated for this position by the President, Judge Gonzales said that he was looking forward to, in his words, “continuing to work with friends and colleagues in the White House in a different capacity on behalf of our President.”

But there may be times when the Attorney General of the United States has to enforce the law and cannot be worried about friends, colleagues and benefactors at the White House.

\[\ldots\]

\[\ldots\] The job of attorney general is not about crafting rationalizations for ill-conceived ideas. It is a much more vital role than that. It is about being a forceful, independent voice in our continuing quest for justice and in defense of the constitutional rights of each and every American.\(^43\)

Although most seem to agree that the role of Attorney General, and thus the OLC, should be characterized by independence, the text of the Torture Memo demonstrates that this is not always the case.\(^44\)

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\(^{43}\) Id. (testimony of Senator Patrick Leahy).

\(^{44}\) Senator Leahy said:

> We have now seen what happens when the rule of law plays second fiddle to a President's policy agenda. With John Ashcroft as Attorney General and with a White House Counsel’s office that has impulsively facilitated rather than cautiously vetted serious constitutional issues, the Administration has taken one
III. PRESIDENTIAL POWERS DEFINED

Article II of the United States Constitution defines the scope of Presidential powers.\textsuperscript{45} It begins by vesting executive power in the President and then continues by enumerating the specific powers of the President.\textsuperscript{46} The language of Article II, however, is far from clear and leaves open the question of whether the President’s powers are solely limited to those enumerated in Article II. Some have argued that because Article I\textsuperscript{47} limits congressional power to those powers “herein granted,” the lack of such language in Article II is evidence of broader presidential powers.\textsuperscript{48} Others, however, have argued that the enumerated powers in Article II would be mere surplusage if they do not exclusively define the extent of the President’s powers.\textsuperscript{49}

In \textit{Youngstown Sheet & Tube Co. v. Sawyer},\textsuperscript{50} the Supreme Court addressed the issue of inherent presidential powers and held that the President’s powers were not limitless.\textsuperscript{51} In \textit{Youngstown}, steel company employees were preparing a strike that would shut down the country’s untenable legal position after another regarding the rule of law in the war against terror.

\ldots

\ldots Those policies include this nominee’s role in developing interpretation of the law to justify harsh treatment of prisoners tantamount to torture.

\textit{Id.} (testimony of Senator Patrick Leahy).

\textsuperscript{45} See U.S. CONST. art. II.

\textsuperscript{46} \textit{Id.} at art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”). The specific powers of the President are to act as commander in chief, to grant reprieves and pardons, to make treaties, to nominate public ministers and judges of the Supreme Court with the advice and consent of the Senate, and to grant commissions during the recess of the Senate. \textit{Id.} at art. II, § 2.

\textsuperscript{47} \textit{Id.} at art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).


\textsuperscript{50} 343 U.S. 579 (1952).

\textsuperscript{51} \textit{Id.} at 588-89 (“The Constitution did not subject this law-making power of Congress to presidential or military supervision or control. \ldots The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times.”).
steel mills. President Truman, concerned that a strike would jeopardize national security because steel was essential to manufacturing weapons and other materials for war, issued an executive order that the Secretary of Commerce take possession of the nation’s steel mills to ensure their continued operation. The steel companies obeyed the Secretary’s orders but brought proceedings against him.

The Supreme Court addressed whether the President was acting within his presidential powers when he issued the order. The Court stated that presidential powers arise only from an act of Congress or from the Constitution. The Court found that there was no statute or act of Congress that supported the seizure of the steel mills. The Court also found that there was no express constitutional language that would allow the order; specifically, the grant of executive power in Article II did not authorize the order because the order was akin to lawmaking, and Article I specifically reserves the lawmaking power for Congress.

Justice Jackson concurred with the majority and described a three-part analysis of executive powers. Under his analysis, the President’s power would vary depending on the circumstances. First, Justice Jackson reasoned that the President’s authority is at its greatest when the President acts pursuant to an express or implied act of Congress. Second, Justice Jackson suggested that when there is no congressional act to support the President’s actions, the President may act only pursuant to his own independent powers. Finally, he argued that the President’s powers are at their lowest when the President acts in contradiction to the express or implied will of Congress.

While the Court in Youngstown definitively concluded that President Truman could not issue an order to take possession of the steel mills, the case did not state a clear rule to be applied in future cases. Many scholars

52. Id. at 582.
53. Chemerinsky, supra note 48, at 871.
54. Youngstown Sheet & Tube Co., 343 U.S. at 583.
55. Id.
56. Id.
57. Id. at 582.
58. Id. at 585.
59. Id.
60. Id. at 587-88 (“The Constitution did not subject this law-making power of Congress to presidential or military supervision or control.”).
61. Id. at 635-37 (Jackson, J., concurring).
62. Id. (Jackson, J., concurring).
63. Id. at 635 (Jackson, J., concurring); see also Am. Fed’n of Labor & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 787, 796 (D.C. Cir. 1979) (distinguishing Youngstown because in this case the President was acting pursuant to a direct grant of authority from Congress).
64. Youngstown Sheet & Tube Co., 343 U.S. at 637 (Jackson, J., concurring).
65. Id. (Jackson, J., concurring).
have recognized that there are four possible approaches to interpreting Youngstown:

(1) There is no inherent presidential power, and the President may act only if there is express constitutional or statutory authority.
(2) The President has inherent authority unless the President interferes with the functioning of another branch of government or usurps the powers of another branch.
(3) The President may exercise powers not mentioned in the Constitution so long as the President does not violate a statute or the Constitution.
(4) The President has inherent powers that may not be restricted by Congress and may act unless the Constitution is violated.

While each approach finds support in Youngstown, the approach taken can have a dramatic impact on the outcome of a case. To further complicate the issue of inherent presidential powers, in United States v. Curtiss-Wright Export Corp., the Court held that the President’s inherent powers are much greater in foreign affairs than they are in domestic affairs. In Curtiss-Wright, the House of Representatives and the Senate issued a joint resolution giving the President authority to issue a proclamation making it a crime to sell “arms or munitions of war” within the United States to the countries engaged in the Chaco conflict. The President in turn issued the proclamation, and the Supreme Court reversed demurrers and remanded to the lower courts in light of the President’s proclamation.

While the Supreme Court often has noted that the President’s powers are greater in the realm of foreign affairs or hostile relations than in the

67. Chemerinsky, supra note 48, at 879-80. Chemerinsky demonstrates the importance of the approach with an example. In the 1970’s, President Nixon claimed the power to impound and thus refused to spend funds appropriated by Congress. Id. at 879. Under the first approach, this would be unconstitutional because there is no constitutional or statutory authority for this. Id. at 880. Under the second approach, it also would be unconstitutional because it usurps Congress’s spending power. Id. Under the third approach, it would be constitutional so long as Congress had not adopted legislation to the contrary. Id. Finally, under the fourth approach, it would be constitutional as an inherent power, and any congressional act to the contrary would be an unconstitutional restraint on the President. Id.
68. 299 U.S. 304 (1936).
69. Id. at 319.
70. Id. at 312.
71. Id. at 312-13.
realm of domestic affairs, it is significant that Justice Jackson’s three-part analysis in Youngstown seemingly applies even in these cases. As in Curtiss-Wright, the President typically acts with acceptance from Congress, or at least does not act against Congress. In Hamilton v. Dillin, for example, the Supreme Court stated in dicta that the President likely has authority over hostile operations. Nevertheless, the Court did not decide this issue and held only that it was clear that the President could act with the concurrent authority of Congress.

Similarly, in Haig v. Agee, the Supreme Court held that the President could revoke a passport on the grounds that the passport holder was involved in foreign activities that were a threat to the national security and foreign relations of the United States. In this case, the President was again acting with congressional approval. Also, in Department of the Navy v. Egan, the Court upheld the Navy’s decision to revoke security clearance for the plaintiff. Again, the Court noted that, in the absence of a congressional statement to the contrary, courts should avoid restraining the President’s power in military and national security affairs. In this case, however, the Court again found congressional approval of the executive’s actions.

Although the preceding cases all relate to foreign affairs, national security, or hostile relations, the principle articulated in Justice Jackson’s concurrence in Youngstown remains true. When the President acts with the authority of Congress, his power is at its highest; when the President

72. Id. at 319 (quoting Justice Marshall’s argument before the House of Representatives in 1800 stating, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”).
73. 88 U.S. 73 (1875).
74. Id. at 87.
75. Id. at 88 (“But without pursuing this inquiry, and whatever view may be taken as to the precise boundary between the legislative and executive powers in reference to the question under consideration, there is no doubt that a concurrence of both affords ample foundation for any regulations on the subject.”).
77. Id. at 306-07.
78. Id. (“We hold that the policy announced in the challenged regulations is ‘sufficiently substantial and consistent’ to compel the conclusion that Congress has approved it.” (quoting Zemel v. Rusk, 381 U.S. 1, 12 (1965))).
80. Id. at 520, 533-34.
81. Id. at 530.
82. Id. (“Finally, we are fortified in our conclusion when we consider generally the statute’s ‘express language’ along with ‘the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.’” (quoting Block v. Cnty. Nutrition Inst., 467 U.S. 340, 345 (1984))).
83. See supra notes 61-65 and accompanying text.
acts with silence from Congress, he acts only pursuant to his own powers.\textsuperscript{84} Importantly, none of these cases stands for the proposition that the President may act against Congress.\textsuperscript{85} Other similar cases are consistent with this trend.\textsuperscript{86}

IV. THE TORTURE MEMO ON PRESIDENTIAL POWERS

The Torture Memo analyzes 18 U.S.C. §§ 2340-2340A and their application to defining permissible interrogation tactics outside the United States.\textsuperscript{87} According to these statutes, it is a crime to commit or attempt to commit torture outside of the United States.\textsuperscript{88} In the Torture Memo, the OLC begins by defining torture so narrowly that very few acts would qualify as criminal under 18 U.S.C. § 2340A.\textsuperscript{89} However, the OLC argues in the alternative that if a particular act were to violate § 2340A, the statute would be unconstitutional for interfering with the President’s war powers.\textsuperscript{90}

In arguing for the President’s broad powers as Commander in Chief, the OLC began the section by discussing the war with al Qaeda and the threat posed by potential future terror attacks.\textsuperscript{91} The OLC reasoned that because al Qaeda continues to plan future attacks, it is necessary for national security and defense that the United States capture and interrogate the individuals involved in potential attacks.\textsuperscript{92}

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\textsuperscript{84} See \textit{supra} notes 61-65 and accompanying text.
\textsuperscript{85} See \textit{supra} notes 68-82 and accompanying text.

\begin{quote}
First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.
\end{quote}

\textit{Id.} at 842-44; see also \textit{Franklin} v. Massachusetts, 505 U.S. 788, 800-01 (1992) (holding that the Court would not consider the President as an “agency” under a statute for damages in the absence of an explicit statement by Congress); \textit{Japan Whaling Ass’n} v. Am. Cetacean Soc’y, 478 U.S. 221, 241 (1986) (holding that Congress intended to give the Secretary of Commerce discretion with respect to international whaling quotas).

\textsuperscript{87} Torture Memo, \textit{supra} note 7, at 1.
\textsuperscript{89} See Torture Memo, \textit{supra} note 7, at 1.
\textsuperscript{90} \textit{Id.} at 31.
\textsuperscript{91} \textit{Id.} at 31-33.
\textsuperscript{92} \textit{Id.} at 33.
Next, the OLC reasoned that 18 U.S.C. § 2340A must be interpreted so as to avoid constitutional problems.\textsuperscript{93} The OLC first claimed that the President has complete discretion in exercising his power as Commander in Chief.\textsuperscript{94} For this proposition, the OLC relied on \textit{Hamilton v. Dillin}, which the OLC quoted as saying, “it is \textit{‘the President alone [] who is constitutionally invested with the entire charge of hostile operations.’}”\textsuperscript{95}

Therefore, the OLC suggested that § 2340A should not be interpreted as applying to interrogations conducted pursuant to the President’s authority as Commander in Chief.\textsuperscript{96} In its reasoning, the OLC also relied on \textit{Department of the Navy v. Egan}, where the Court held that it would not assume that Congress intended to interfere with the President’s authority in military affairs and national security unless Congress specifically stated its intention to do so.\textsuperscript{97}

Beyond \textit{Egan}, the OLC relied extensively on prior memoranda of the OLC that stated that Congress lacks the authority to define how the President may exercise his powers as Commander in Chief during wartime.\textsuperscript{98} Specifically, the OLC relied on a published OLC opinion (“Prosecution for Contempt” Memo) that asserted that a congressional contempt statute could not be construed so as to apply to executive branch officials who claim executive privilege in response to congressional subpoenas.\textsuperscript{99} The OLC reasoned that, like a contempt statute, § 2340A would significantly burden and inmeasurably impair the President’s ability to fulfill his national security responsibilities.

\textsuperscript{93} Id. at 34.
\textsuperscript{94} Id. at 33.
\textsuperscript{95} Id. at 34 (alteration in original) (emphasis added) (quoting \textit{Hamilton v. Dillin}, 88 U.S. 73, 87 (1875)).
\textsuperscript{96} Id.
\textsuperscript{97} Id. (citing Dep’t of the Navy v. \textit{Egan}, 484 U.S. 518, 530 (1988)). The Court in \textit{Egan} wrote, “unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.” \textit{Egan}, 484 U.S. at 530.
\textsuperscript{98} Torture Memo, supra note 7, at 34-35 (citing Memorandum from Patrick F. Philbin, Deputy Assistant Attorney General, Department of Justice Office of Legal Counsel, to Daniel J. Bryant, Assistant Attorney General, Department of Justice Office of Legislative Affairs (Apr. 8, 2002) (regarding the Swift Justice Authorization Act); Memorandum from John C. Yoo, Deputy Assistant Attorney General, Department of Justice Office of Legal Counsel, to Timothy E. Flanigan, Deputy Counsel to the President (remainder of citation redacted in memo); Memorandum from Richard L. Shiffrin, Deputy Assistant Attorney General, Department of Justice Office of Legal Counsel, to Andrew Fois, Assistant Attorney General, Office of Legislative Affairs (Sept. 15, 1995) (regarding the Defense Authorization Act)).
\textsuperscript{99} Id. at 35 (quoting Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. Off. Legal Counsel 101, 134 (1984)). The OLC opinion stated:

[I]f executive officials were subject to prosecution for criminal contempt whenever they carried out the President’s claim of executive privilege, it would significantly burden and immeasurably impair the President’s ability to fulfill his
would burden and impair the President in carrying out his powers if the statute could criminalize actions taken by executive officials pursuant to the President’s Commander in Chief powers.\textsuperscript{100}

Next, the OLC argued that even if § 2340A were construed as applying to executive officers acting pursuant to the President’s Commander in Chief powers, the Justice Department could not enforce only briefly § 2340A against those executive officers.\textsuperscript{101} The OLC supported this proposition almost exclusively by citing to previous OLC opinions and memoranda.\textsuperscript{102} First, the OLC again relied on the “Prosecution For Contempt” Memo, claiming that it had concluded therein that courts and prosecutors should reject prosecutions against people acting pursuant to the President’s authority.\textsuperscript{103}

Second, the OLC relied on post-9/11 OLC memoranda that broadly defined the scope of the President’s powers and reasoned that it was even more crucial that courts and prosecutors reject prosecutions against people acting pursuant to the President’s Commander in Chief power.\textsuperscript{104} In keeping with these memoranda, the OLC reasoned that as the Commander in Chief, the President has a duty to protect the country; therefore, the President must have all powers necessary to achieve that end.\textsuperscript{105} Citing only to a book on the status of prisoners of war, the OLC continued by arguing that one of the main duties of a Commander in Chief is “capturing, detaining, and interrogating members of the enemy.”\textsuperscript{106}

\begin{flushright}
constitutional duties. Therefore, the separation of powers principles that underlie the doctrine of executive privilege also would preclude an application of the contempt of Congress statute to punish officials for aiding the President in asserting his constitutional privilege.
\end{flushright}


100. Torture Memo, \textit{supra} note 7, at 35.

101. \textit{Id.} at 36.

102. \textit{Id.} at 36-39. The OLC also cited \textit{Lichter v. United States}, 334 U.S. 742, 782 (1948), and \textit{The Prize Cases}, 67 U.S. (2 Black) 635, 670 (1862), but these cases only indirectly support the OLC’s proposition. The OLC interprets \textit{Lichter} to stand for the proposition that the distribution and scope of powers must be construed so as to promote the most “efficacious defense of the nation.” Torture Memo, \textit{supra} note 7, at 37. The OLC uses the \textit{Prize Cases} to support the idea that the President alone can decide whether his actions as Commander in Chief were appropriate and that it is not for a court to decide such a political question. \textit{Id.} at 38.

103. Torture Memo, \textit{supra} note 7, at 36.

104. \textit{Id.} (citing September 11 War Powers Memorandum: Memorandum from Patrick F. Philbin, Deputy Assistant Attorney General, Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Nov. 6, 2001) (regarding the legality of using commissions to try terrorists)).

105. \textit{Id.} at 38.

106. \textit{Id.} (citing \textit{Allan Rosas, The Legal Status of Prisoners of War} 59-80 (1976) (describing the necessity of detaining enemy combatants and hostile civilians in modern conflicts)).
On the issue of presidential powers, the OLC concluded that any effort by Congress to limit the President in using his Commander in Chief powers to interrogate battlefield combatants would be unconstitutional. The OLC supported this conclusion by comparing interrogations to the President’s strategic and tactical decisions on the battlefield. The OLC wrote,

Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

Therefore, the OLC concluded that if § 2340A could be construed to criminalize action taken by the President as Commander in Chief, that statute must be found unconstitutional and prosecutors and judges should reject such prosecutions.

V. THE MODEL RULES OF PROFESSIONAL CONDUCT

Ethical conduct is often impossible to define because each individual has his own sense of what is right and wrong and his own set of values that will determine his actions when he is faced with competing ethical concerns. The Model Rules exist to ensure some level of uniformity in

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107. Id. at 39.
108. Id.
109. Id.
110. See id. at 31-39. The OLC wrote:

As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy. The demands of the commander in chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such a case, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply Section 2340A in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.

Id. at 31.

111. Some scholars argue, under a theory of ethical relativism, that what is right or wrong varies for each person. The Markkula Center for Applied Ethics has defined ethical relativism as:
the ethics that guide lawyers and to provide a model for states to set up similar rules and corresponding avenues for disciplinary action in the event that a lawyer strays from the Model Rules.\textsuperscript{112}

Although the Model Rules attempt to provide a uniform moral compass for lawyers to follow, its rules are often far from clear.\textsuperscript{113} When a lawyer

the theory that holds that morality is relative to the norms of one’s culture. That is, whether an action is right or wrong depends on the moral norms of the society in which it is practiced. The same action may be morally right in one society but be morally wrong in another. For the ethical relativist, there are no universal moral standards—standards that can be universally applied to all peoples at all times.

Manuel Velasquez et al., Ethical Relativism (2004), available at http://www.scu.edu/ethics/practicing/decision/ethicalrelativism.html. However, many scholars discount this theory, arguing that there is a constant morality across all cultures and societies and that it is simply the means of achieving the moral ends that may differ. \textit{Id}. Regardless of the worth of the theory, the legal profession requires a uniform ethical code that will bind lawyers in their relationships with clients who are often in a vulnerable position. Such rules are essential to building the trust between a lawyer and a client that is necessary for an effective fiduciary relationship. The Preamble to the ABA Canons of Professional Ethics, a predecessor of the model rules, reads as follows:

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.


113. \textit{See} Paul D. Knothe & Amy Horowitz, \textit{Walking the Tightrope Between Advising and Assisting Clients with Criminal or Fraudulent Conduct: Can the ABA Provide Better Guidance?}, 15 Geo. J. Legal Ethics 809, 824-25 (2002) (describing the confusion that existed in interpreting Rule 1.2(d) before the Ethics 2000 revisions to the Model Rules and theorizing that this confusion would be lessened if the proposed revisions were implemented). The ABA since has incorporated the Ethics 2000 proposals into the Model Rules. Douglas K. Schnell, Note, \textit{Don’t Just Hit Send: Unsolicited E-Mail and the Attorney-Client Relationship}, 17 Harv. J.L. & Tech. 533, 540 (2004). Nevertheless, uncertainty remains:

A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.
is faced with an ethical dilemma, the lawyer must read each rule in the context of the entire Model Rules. Even then, the lawyer’s decision will often have to strike a balance between two competing rules. It is in regard to striking this balance between conflicting rules that the Model Rules is less than clear. Therefore, where rules conflict, the desired ethical uniformity of the Model Rules is often replaced with personal ethics or the lack thereof.

Most lawyers will acknowledge that zealous advocacy is the very essence of legal representation. The comment to Rule 1.3 states:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer

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114. See Model Rules of Prof’l Conduct prml. ¶ 8 (2002). The Model Rules recognize that, in certain cases, a lawyer’s ethical obligations will conflict and that, in those cases, a lawyer will act according to his own judgment and in a spirit compatible with the “principles underlying the Rules.” Id. at prml. ¶ 9.

115. See id.

116. See id.

117. See, e.g., Colorado v. Chappell, 927 P.2d 829, 829 (Colo. 1996) (describing a situation where an attorney told her client that “as her attorney” she advised her to obey the court’s restraining order not to remove her child from Colorado but that “as a mother” she advised her to run).

must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.119

Zealous advocacy, however, is not the lawyer’s only ethical duty.120 Nevertheless, many scholars have discussed the recent trend of lawyers to focus almost exclusively on their duty to represent their client zealously and within the bounds of the law as narrowly defined.121 However, the comment to Rule 1.3 also makes clear that the lawyer’s actions must be lawful and ethical.122 Therefore, a lawyer who follows Model Rule 1.3 without regard to other ethical rules likely will violate another provision of the Model Rules.

120. Id. at prmb. Also, as Sean Griffith has written:

   In this Afterword and Comment, I argue that the model of the lawyer as a zealous advocate has become so pervasive within legal ethics that ethical norms no longer provide a significant constraint on a lawyer’s conduct in the interests of her client. Without a normative principle to act as a counterweight to the dictates of zealous advocacy, legal ethics cannot provide any basis for a lawyer to resist a client’s goals. Legal ethics has thus failed to produce a normative principle capable of constraining the conduct of business lawyers in the current corporate scandals.

Griffith, supra note 118, at 1227.

121. E.g., Gordon, supra note 118, at 710 (describing the survey responses of big-firm lawyers that reflected a belief that zealous advocacy was their primary ethical responsibility and that zealous advocacy means doing everything they can for their clients within the limits of the rules); Griffith, supra note 118, at 1228-29; see also ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 145 (1996) (“What a defense attorney ‘may’ do, he must do, if it is necessary to defend his client. A zealous defense attorney has a professional obligation to take every legal and ethically permissible step that will serve the client’s best interest—even if the attorney finds the step personally distasteful.”). Of the Pure Client Model, Lord Brougham states:

   “[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expeditious, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.”

Ethical Abuse, supra note 1, at 1086 (quoting 2 Trial of Queen Caroline 8 (1821), quoted in MELINKOFF, supra note 1, at 189).

One of the countervailing considerations to zealous advocacy within the Model Rules is the proscription against assisting or counseling a client in criminal or fraudulent conduct. Model Rule 1.2(d) states:

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

The proscriptive aspect of this rule has two facets. First, a lawyer cannot counsel a client to break the law. This aspect seems obvious on its face, but this type of counseling can be subtler than explicitly telling a client to break the law. A lawyer may not, for example, ask his client a leading question that suggests what the correct answer should be and thereby encourage his client to commit perjury.

Second, a lawyer cannot assist a client in breaking the law. Assisting a client in breaking the law can take various forms. A somewhat obvious example of assisting a client in criminal or fraudulent activity may be a lawyer who effects a fraudulent transfer on the client’s behalf or who makes a false certification to a third party on the client’s behalf. However, assisting a client in criminal or fraudulent activity may occur more subtly. For example, a lawyer who inappropriately counsels his client under the first part of the rule also may be inappropriately assisting his client to the extent that the lawyer’s advice provides the client with the legal defense of reliance on counsel’s advice. It is important to note that a lawyer may

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123. Id. at R. 1.2(d).
124. Id.
125. Id.
126. Cf. In re Sieg, 515 N.W.2d 694, 699 (Wis. 1994) (holding that a lawyer did not violate the rules of professional conduct when the lawyer advised his client to obtain a signed statement from the client’s brother certifying that the client had permission to use the brother’s name even though the client then fraudulently created and signed a statement to that effect).
127. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2002).
128. Reliance on the advice of counsel is a defense to specific intent crimes.State v. Jacobson, 681 N.W.2d 398, 404 (Minn. Ct. App. 2004). Although reliance on advice of counsel is not an absolute defense, it is relevant to the defendant’s intent when that intent is an element of the crime charged. Id.; see also 52 AM. JUR. 2D MALICIOUS PROSECUTION § 100 (2004). The section states:

Acting on the advice of counsel is sometimes treated as an affirmative defense to a claim for malicious prosecution, and sometimes as simply negating either the lack of probable cause or malice. In any case, the defendant is saved from liability for malicious prosecution if he or she consulted with an attorney in good faith,
have assisted or counseled his client in criminal activity under the rule even if his client does not actually commit the crime or fraud.\footnote{129}

Model Rule 1.2(d) not only defines what a lawyer cannot do, but it also attempts to clarify this prohibition by defining what a lawyer can do. The latter part of Model Rule 1.2(d) makes clear that a lawyer does not violate the rule simply by discussing the consequences of a client’s proposed conduct.\footnote{130} Unfortunately, these latter aspects of Model Rule 1.2(d) may further confuse the lawyer’s competing interests.\footnote{131}

Model Rule 3.1 also limits a lawyer to bringing or defending proceedings or arguing issues therein only in cases where the lawyer has “a basis in law and fact” for making an argument.\footnote{132} The rule makes clear that a lawyer is not prohibited from arguing for an extension, modification, or reversal of existing law so long as the lawyer has a good faith basis for doing so.\footnote{133} This provision is consistent with Model Rule 1.3, which requires zealous advocacy.\footnote{134} So long as a lawyer can make a good faith argument on behalf of the client, she should do so. The comments to

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\textit{Id.} (footnotes omitted).

\footnote{129. See supra note 34.}
\footnote{130. Model Rules of Prof’l Conduct R. 1.2(d) (2002).}
\footnote{131. See Ethical Abuse, supra note 1. There, the author proposed a hypothetical situation based on Bronston v. United States where the client gave an evasive answer on cross-examination. \textit{Id.} at 1082-83. The client’s answer was not an outright lie (and the Supreme Court found that it was not perjury), but the client’s answer was misleading through negative implication. \textit{Id.} at 1083. The author agreed that the client’s response was not perjury but questioned whether the lawyer would have been ethical if he had advised the client to answer evasively. \textit{Id.} The author notes the difference between what a lawyer can do in prospectively advising his client to act in a morally questionable way and what a lawyer can do in retrospectively defending his client for engaging in morally questionable conduct. \textit{Id.} at 1084. The author noted:}

\begin{quote}
[A] lawyer may enable future client conduct by describing the relevant legal boundaries without actually encouraging misbehavior. Bronston’s lawyer could explain that a misleading but truthful answer is not perjury without actually telling Bronston how he should testify. . . .
\end{quote}

\begin{quote}
. . . If the lawyer’s description of options is sufficient such that the client really understands each alternative, the client will pick the option with the best consequences, even without the lawyer saying “I think you should do X.”
\end{quote}

\textit{Id.} at 1088-89. Thus, by discussing the consequences of a client’s proposed conduct, the lawyer actually may enable the client to avoid those consequences illegally. Therefore, the line between assisting and describing consequences may not always be clear.

\footnote{132. Model Rules of Prof’l Conduct R. 3.1 (2002).}
\footnote{133. \textit{Id.}}
\footnote{134. See \textit{id.} at R. 1.3.}
Model Rule 3.1 state that “[s]uch action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail.” 135 Therefore, where the law is unclear, the lawyer is not restricted to arguing the most probable interpretation; rather, he may argue any good faith interpretation that would support his client’s case.

It is noteworthy, however, that Model Rule 3.1 appears in the section of the Model Rules on advocacy (Article 3). There is no corresponding provision in the section of the Model Rules on counseling (Article 2). In Article 2, Model Rule 2.1 requires that a lawyer use “independent professional judgment and render candid advice.” 136 There is no statement that a lawyer can advise his client on any nonfrivolous interpretation of the law even if that interpretation is not the most probable interpretation. It is likely that the absence of such a provision in Article 2 means that the lawyer may not advise his client prospectively on an improbable interpretation of the law in the same way that the same lawyer may argue retrospectively an improbable interpretation to the court.

VI. A WRONG DEFINITION OF PRESIDENTIAL POWERS: ASSISTING OR COUNSELING IN CRIMINAL CONDUCT

A. Introduction

While the Model Rules attempt to create bright-line rules for lawyers to follow in their daily lives, this Note recognizes that the rules are often far from bright. Surely the lawyers who wrote the Torture Memo can and have argued that the memo was only an analytical document and was not intended to provide advice on the use of any particular type of torture. 137 They can argue that their memo stated a plausible interpretation of the law on presidential powers (though perhaps not the most popular interpretation). 138 They also can argue that potential defenses are part of the relevant law and therefore within their duty to advise. Nevertheless, the Torture Memo does not seem to comply with the spirit of the rules. The problem may be that the memo is a result of an overly-literal reading of the Model Rules that ignores the Model Rules’ underlying principles, or it may be a result of ethical rules that need to be clarified. 139 In either case,
the Torture Memo and the torture that it justifies are the best examples of the magnitude of the problem.

B. The Advice on Presidential Powers: Criminal Counseling

The Torture Memo presents a plausible interpretation of presidential powers. It may even be an interpretation that would be properly presented in court as a defense if the President were prosecuted under § 2340A. The law is not nearly as clear, however, as the OLC makes it out to be. The OLC presents highly debatable concepts in a highly argumentative and persuasive manner that is unusual in a memorandum from a lawyer to his client. The OLC also relies heavily on prior OLC opinions rather than on actual case law. Finally, the OLC distorts the case law it presents in order to support its ultimate conclusion that the President has broad power in his role as Commander in Chief that cannot be limited by Congress.

The OLC cites several cases for the proposition that the President has broad powers in foreign affairs and national security. The OLC then argues that Congress cannot interfere with these powers. What the OLC neglects to mention, however, is that each of the cases it refers to involves a President who is acting pursuant to the authority of Congress or, at a minimum, who is not acting against Congress. The OLC never once acknowledges Youngstown, where Justice Jackson in his concurrence made clear that the President’s authority is at its lowest when he acts against Congress.

While the OLC argued that § 2340A did not specifically purport to control the President, it did not specify that this conclusion was also essential to a finding that the President had the power to conduct interrogations that involve “torture.” As an initial matter, the OLC argued

140. See supra notes 1-6 and accompanying text.
141. Although, arguably, even if the OLC lawyers presented this argument in court, they would risk violating their ethical obligation under Model Rule 3.3(a)(2) to provide competent advice. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2002). Where as here, however, the lawyer is merely counseling the client (and not advocating for the client), the duty to disclose contrary authority is even greater.
142. See supra notes 87-110 and accompanying text. Although the OLC and the President do not share a typical lawyer-client relationship, see supra Part II, the Note will refer to the President as the OLC’s client because part of the OLC’s role is to advise the President. See supra notes 39-40.
143. See supra notes 99, 102 and accompanying text.
144. See supra note 102 and accompanying text.
145. Torture Memo, supra note 7, at 33-35.
146. Id. at 38.
147. See supra notes 94, 97 and accompanying text; cf. supra notes 73-75, 79-82 and accompanying text.
148. See supra notes 61-65 and accompanying text.
that § 2340A did not control the President. The OLC then argued in the alternative that if § 2340A did control the President, it was unconstitutional as interfering with the President’s powers as Commander in Chief. This ignores the case law that the OLC relies on, none of which supports the idea that the President can act against Congress’s stated intent.

Arguably, the OLC’s advice is a violation of Model Rule 1.2(d) in that it involves counseling a client in criminal activity. First, many lawyers have argued that the OLC’s interpretation of presidential powers is wrong. Under that approach, although the OLC did not actually advise the President on what types of interrogation techniques to use, it advised the President that he could disregard a criminal statute.

Alternatively, even if § 2340A arguably would not control the President, it is not clear that it is ethical to advise the President to participate in activity that would be criminal but for his “power” as President. Rule 1.2(d) states that a lawyer cannot counsel his client to participate in criminal activity, but it does not define criminal activity. It is clear under §§ 2340, 2340A that torture is criminal. Whether or not Congress has power over the President in this regard, torture is still criminal. Therefore, regardless of the President’s powers, his lawyers should not advise him to allow torture in interrogations.

This argument is a bit of a stretch under the Model Rules given that “criminal” is not defined and that it could easily be argued that if the President has the power to conduct torture, then torture is not illegal. Nevertheless, former OLC attorneys have recognized a duty to do more than merely advise the President on how to avoid criminal sanctions. In their Guide, the lawyers wrote:

OLC always should be mindful that the President’s legal obligations are not limited to those that are judicially enforceable. . . . An OLC approach that instead would equate “lawful” with “likely to escape judicial condemnation” would ill serve the President’s constitutional duty by failing to describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it.

149. Torture Memo, supra note 7, at 36.
150. Id. at 31, 39.
151. See id. at 37-38; supra notes 94, 97 and accompanying text.
152. See Model Rules of Prof’l Conduct R. 1.2(d) (2002).
153. See supra notes 19-21 and accompanying text.
156. Principles to Guide the Office of Legal Counsel (Dec. 21, 2004), at 2, available at
This statement by the former OLC attorneys reveals a recognition that even where a President could “get away with” a particular course of action, it may be unethical for an OLC attorney to advise the President to pursue that course of action if the action would otherwise be unlawful.

C. Covering the Client: Subtle Assistance

The unbalanced and one-sided advice of the OLC is more than an analysis of the law—it is advocacy. One must wonder why the OLC was motivated to advise its client so adamantly on an area of the law that is far from clear. While it is not simple to determine what the OLC’s intent was in writing the memo, a possible motivation would be to “cover” the President. The OLC could cover the President in two ways. First, by writing the memo, the OLC provided the President with the defense of reliance on advice of counsel. Second, by writing the memo, the OLC ensured that the entire federal government, including the Department of Justice, would act according to the OLC’s analysis, thereby ensuring that the DOJ would not prosecute the President. If cover were in fact the OLC’s motivation, this would be a form of “assistance” under Rule 1.2(d).


157. See, e.g., Hilden, supra note 20 (discussing another recent OLC memorandum). Hilden wrote:

What [Yoo’s] memo added—as he was doubtless aware—was cover. It provides cover for the administration, in the event there are future attempts to prosecute administration members for war crimes. In such proceedings, he doubtless anticipated that advice of counsel could either be used as a formal defense, or at the very least, a persuasive point in favor of the defense: “My lawyer told me it was legal.”

Id. The Guide also seems to recognize the possibility of providing cover when it suggests that the OLC should follow only the advocacy model of lawyering when the OLC specifically states that its opinion is not to be binding on the executive branch. The Guide, supra note 156, at 6.

158. See supra note 157 and accompanying text.

159. Allen & Priest, supra note 20 (“Unlike documents signed by deputies in the Office of Legal Counsel, which are generally considered by federal agencies as advice, a memorandum written by the head of the office is considered akin to a legally binding document, said another former Office of Legal Counsel Lawyer.”); Priest, supra note 13 (“Bybee’s signature gives the document additional authority, making it akin to a binding legal opinion on government policy on interrogations.”).

160. See MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2002).
Reliance on advice of counsel can serve to negate a showing of specific intent where that is an element of the charged crime.\textsuperscript{161} The OLC itself mentioned this possibility in its memo. The OLC wrote,

A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had acted in good faith that his conduct would not amount to the acts prohibited by the statute. Thus, if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture. A defendant could show that he acted in good faith by taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience.\textsuperscript{162}

If the OLC knew that it was providing cover for the President to conduct torture in interrogations, this would convert the OLC’s advice into more than “counseling” under Rule 1.2(d); it would constitute “assistance.”\textsuperscript{163}

Lawyers at the OLC are unique in the ways by which they can “assist” their client because they have more power and influence than most lawyers. OLC memoranda signed by the Assistant Attorney General have the force of binding legal precedent in that the entire executive branch is bound to act by them. This means that, while the Torture Memo was in effect between August 2002 and June 2004, the Department of Justice would have rejected the opportunity to prosecute the President under § 2340A. The OLC says as much in its discussion of presidential powers. It wrote,

\begin{quotation}
[W]e conclude that the Department of Justice could not could not [sic] enforce Section 2340A against federal officials acting pursuant to the President’s constitutional authority to wage a military campaign.
\end{quotation}

Indeed, in a different context, we have concluded that both courts and prosecutors should reject prosecutions that apply federal criminal laws to activity that is authorized pursuant to one of the President’s constitutional powers. . . . Further, we concluded that the Department of Justice could not bring a criminal prosecution against a defendant who had acted

\begin{footnotes}
\item[162.] Torture Memo, \textit{supra} note 7, at 8.
\item[163.] \textit{See} Model Rules of Prof’l Conduct R. 1.2(d) (2002).
\end{footnotes}
pursuant to an exercise of the President’s constitutional power.164

Although the memoranda of most lawyers to their clients do not carry this sort of authority, OLC memoranda clearly do. Therefore, OLC lawyers must have additional ethical concerns. Because of the OLC’s dual role in advising the President and setting policy for the Department of Justice, prospectively advocating for their client may involve assisting that client to evade prosecution.

VII. SUGGESTIONS

A. Introduction

If the Torture Memo is an example of assisting or counseling a client in criminal activity, as this Note has suggested, it is hard to imagine another example with greater potential consequences. The OLC’s influence on the federal government means that its advice not only encouraged torture but also ensured that the President would not be prosecuted for it. Given the magnitude of this problem, it is important to explore possible solutions.165

B. More Definite Ethical Rules

As described above, the Model Rules are often far from clear.166 For example, while a lawyer can make any nonfrivolous argument in court in defense of his client, it is not clear that the same standard applies to advice given prospectively to a client.167 For a client to make an informed decision, he must know more than the merely “nonfrivolous” argument in his defense.168 The client must know the “majority” legal opinion on his issue and be made aware of any significant split of authority. For a lawyer to argue a minority viewpoint to his client in the same way as he would to a court is to deprive the client of a full understanding of the law.

164. Torture Memo, supra note 7, at 36.
165. On the broader issue of torture, Congress has taken some action to rectify the problem. See Smith, supra note 8. Smith described a measure approved by the Senate that would limit U.S. interrogation techniques to those that the United States would consider legal for other countries to use. Id.
166. See supra notes 113-14 and accompanying text.
167. See supra note 131.
168. The Guide, supra note 156, at 2 (“OLC should not simply provide an advocate’s best defense to contemplated action that OLC actually believes is best viewed as unlawful.”).
Currently, Model Rule 3.1 on Meritorious Claims and Contentions is in Article 3, which covers rules of advocacy. 169 Although Model Rule 2.1, which is in Article 2 on counseling, defines the role of the lawyer as an advisor, it does not instruct the lawyer in a way that corresponds to Model Rule 3.1. 170 The ambiguity could be resolved by inserting a provision on prospective counseling in Article 2 that corresponds to the provision on retrospective advocacy in Model Rule 3.1.

It also is noteworthy that nowhere do the Model Rules provide “cover” for the client. While it may be obvious under Model Rule 1.2(d) that a lawyer cannot intentionally provide bad advice for the purpose of providing his client with the defense of reliance on counsel’s advice, an explicit statement to that effect would be helpful. As the rules stand, without the previous clarification suggested in this Note, a lawyer could provide nonfrivolous but one-sided advice advocating a minority viewpoint on the law that not only would provide his client with cover but also would allow the lawyer to avoid charges of misconduct. While the question of providing cover may largely be one of intent that is difficult to prove, it may be helpful to add an express provision in the comments to Model Rule 1.2(d) that makes clear that a lawyer who gives advice as cover is “assisting” under the rule.

C. Professional Independence

While clearer ethical rules would be helpful, the specific problem outlined in this Note may better be solved by implementing a structure of professional independence in the OLC. As discussed above, the OLC and the Attorney General, in theory, act independently from the Executive. 171 In reality, however, this is often far from true. Randolf D. Moss discusses two models to interpreting the role of OLC: 1) the executive branch lawyer as advocate; and 2) the executive branch lawyer as judge. 172 Moss concludes, however, that the approach is not so simple as to be able to choose one model over the other. 173 Rather, the OLC’s role is a combination of the two models. Moss describes it as follows:

Unlike a court, the executive branch lawyer is part of an administration that is accountable to the People and should thus strive, within the bounds of the best view of the law, to achieve its policy goals. He or she should do so with due respect not only for relevant judicial precedent, but also for

170. See id. at R. 2.1, R. 3.1.
171. See supra note 43 and accompanying text.
172. Moss, supra note 36, at 1305-06.
173. Id. at 1330.
the tradition of the executive branch legal interpretation and the substantial body of non-judicial precedent that informs that process. In the end, because the law is by its very nature supreme, the best view of the law must trump other interests.\textsuperscript{174}

Therefore, the OLC’s role involves competing interests of supporting the President’s policy concerns and neutrally analyzing the law.

The dual role of the OLC is comparable to the dual roles of the lawyers involved in the Enron collapse. There, the lawyers acted both as “transaction engineers” and as “gatekeepers.”\textsuperscript{175} As Griffith described it, the lawyers were responsible for both setting up transactions for their clients and then certifying the validity of those transactions to third parties.\textsuperscript{176} Griffith compared this to the dual role of accountants as consultant and auditors.\textsuperscript{177} “When, as gatekeepers, lawyers certify the legal compliance of transactions they have engineered, they are passing judgment on beasts of their own creation.”\textsuperscript{178}

In both cases, the dual-role lawyer risks assisting in criminal or fraudulent activity if he is overly zealous in protecting the interests of his client. As Griffith explained,

\begin{quote}
\textquote{[T]he advocacy principle . . . was the precise problem in . . . Enron . . . [G]atekeepers became advocates, and the test of whether a transaction was acceptable was not whether it made sense in some larger scheme of corporate conduct but whether it was narrowly legal. As long as the transaction met certain minimum requirements, it seemed, the gatekeepers were willing to let it pass.}\textsuperscript{179}
\end{quote}

A dual-role lawyer, therefore, must remain mindful of his duty of neutrality. This, however, may be too much to ask of lawyers, particularly lawyers working under the powerful eye of the President, trained as advocates.\textsuperscript{180} Not only is the President the supervisor of the entire executive branch, including the OLC, but the President also has the power

\begin{itemize}
\item \textsuperscript{174} \textit{Id.}
\item \textsuperscript{175} Griffith, \textit{supra} note 118, at 1225.
\item \textsuperscript{176} \textit{Id.} at 1224-25.
\item \textsuperscript{177} \textit{Id.} at 1225.
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} \textit{Id.} at 1229-30.
\item \textsuperscript{180} \textit{See supra} notes 43-44 and accompanying text (discussing Senator Patrick Leahy’s concerns about whether Alberto Gonzales would be able to remain neutral if he were confirmed as Attorney General despite his long-time friendship with President Bush and others in the White House).
\end{itemize}
to appoint federal judges “with the advice and consent of the Senate.” These may seem to be two independent issues, but they are not when you consider that Justice Scalia and Justice Rehnquist were both former Assistant Attorneys General in charge of the Office of Legal Counsel and that Jay S. Bybee, the signatory of the Torture Memo, is now a judge on the United States Court of Appeals for the Ninth Circuit.

An independent OLC would alleviate the professional responsibility problems demonstrated by the Torture Memo in two ways. First, if the President had independent advice, his lawyer would be able to advise him truthfully and fully on the law without fear that an interpretation of the law could be binding against his client. Second, if the Attorney General did not have a lawyer-client relationship with the President, he could issue opinions with only one concern—the law. The outcome of this separation of roles would benefit everyone. The executive branch as a whole would receive legal policy that is consistent with the law, and the President would receive legal advice that protects his interests as a client. Perhaps most importantly, if the President did not follow the law, the Department of Justice would be free to investigate because any legal advice given to the President would not be binding on the entire executive branch. This approach would most effectively advance the principles behind the Model Rules—the obligation to “zealously . . . protect and pursue a client’s legitimate interests, within the bounds of the law.”

As it stands today, the Torture Memo and its possible connection to recent abuses, such as the atrocities at Abu Ghraib, have made clear that something must change. On December 21, 2004, several former OLC attorneys issued a document entitled, “Principles to Guide the Office of Legal Counsel.” While this document does not call for a drastic change in the structure of the OLC within the executive branch, the document, if followed, will be the first step in rectifying the problem demonstrated by the Torture Memo. The Guide recognizes that the OLC “serves both the institution of the presidency and a particular incumbent,” but it suggests that the OLC should avoid an “advocacy model” because such a model

183. See supra note 9 and accompanying text.
185. See generally The Guide, supra note 156 (offering suggestions on how the OLC should operate by avoiding a purely advocacy-based model of lawyering).
“inadequately promotes the President’s constitutional obligation to ensure the legality of executive action.”

VIII. CONCLUSION

This Note has shown that the OLC, in its Torture Memo, strayed from accepted legal principles in advising the President on his power to use torture. In giving this one-sided advice, lawyers in the OLC may be in violation of ethical standards as stated in the Model Rules. The arguments made in the Torture Memo make clear that something is astray. It would be easy to blame the Torture Memo on its author or its signatory and say that they have violated their duty to the American people by focusing solely on their allegiance to the President. But perhaps the problem is not just a few bad apples. The problem may run deeper and may require a rethinking of the role of the OLC such that its lawyers would not find themselves with conflicting interests every time the President seeks advice on questionable policy. When considering the proper role of the OLC in the future, the OLC should be guided by the principles of the Model Rules and should remember that its primary duty is to help the President uphold the Constitution. In that regard it should never feel conflicted.

186. Id. at 1, 3. The Guide recognizes that there are instances where the OLC may “employ advocacy-based modes of analysis,” such as when it defends an act of Congress. Id. at 6. The Guide insists, however, that in these cases the OLC should make clear that it is not acting in its “typical role as the source of legal determinations that are binding within the executive branch.” Id.

187. Id. at 1.