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THE WHITE HOUSE COUNSEL TORTURE MEMO: THE FINAL PRODUCT OF A FLAWED SYSTEM

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law. . . . To declare that . . . the end justifies the means . . . would bring terrible retribution.¹

I. INTRODUCTION

In describing abuse of his family by U.S. prison guards, a disabled Iraqi man told U.S. Army investigators that guards pulled him around by his penis and then sodomized him with a water bottle.² His sister reported that another brother was severely beaten; his bloody and bruised body was then thrown into her cell, landing on top of her sister.³ The man died shortly thereafter.⁴ The family's allegations were substantiated by a military contractor from CACI International Inc.⁵

The members of the family were detained and accused of supplying arms to a paramilitary group loyal to Saddam Hussein and subjected to torture by U.S. servicemen.⁶ The abuse occurred at the Ad-hamiya Palace, one of Hussein's Baghdad villas, in 2004.⁷ In January 2005, the Pentagon released reports of abuse similar to this account that occurred beyond those of Abu Ghraib, the U.S.-run detention center in Iraq.⁸

1. Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 695 (2004) (citing *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

2. John Hendren, *Pentagon Files Reveal More Allegations of Abuse in Iraq; Documents Contain Descriptions of Severe Detainee Mistreatment Beyond Abu Ghraib*, L.A. TIMES, Jan. 25, 2005, at A1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

Other reported abuse includes forced sodomy, electrical shock of the testicles and other body parts,⁹ severe beatings, cigarette burns,¹⁰ sexual humiliation,¹¹ desecration of the Koran,¹² and water boarding.¹³ Torture has also resulted in two reported deaths in an Afghan jail.¹⁴

9. See Sen. Kennedy Issues Statement on Anniversary of Abu Ghraib Scandal, U.S. FED. NEWS, Apr. 26, 2005.

10. *Id.*

11. *Id.*; Paul Vitello, *U.S. Policy Fosters Abuse*, NEWSDAY, May 3, 2005, at A6.

12. Richard A. Serrano & John Daniszewski, *Dozens Have Alleged Koran's Mishandling*, L.A. TIMES, May 22, 2005, at A1 (reporting abuse of the Koran at Guantanamo Bay, Iraq, and Afghanistan). Prisoners at Guantanamo Bay staged a massive hunger strike when reports of the desecration spread. *Id.* Detainees complained that soldiers tore the book into pieces, urinated on the book, scrawled obscenities inside it, had a guard dog carry it around, flushed it in the toilet, and threw it on the floor and used it as a carpet. *Id.* Abuse of the Koran was reported by *Newsweek*. James Rainey & Mark Mazzetti, *Newsweek Retracts Its Article on Koran*, L.A. TIMES, May 17, 2005, at A1. The story instigated riots in the Middle East that left 14 people dead. *Id.* After sharp criticism from the Bush Administration the article was retracted. *Id.* Pentagon spokesman Bryan Whitman called the article "'irresponsible' and 'demonstrably false.'" *Id.* The spokesman for the White House indicated that the *Newsweek* article had "serious consequences" and that the "image of the United States abroad has been damaged." *Id.* Defense Secretary Donald H. Rumsfeld "said the news media needed to be more careful." *Id.* However, less than two weeks later the Pentagon confirmed the alleged abuse of the Koran. Richard A. Serrano, *Pentagon: Koran Defiled*, L.A. TIMES, June 4, 2005, at A1. Regarding the incident of urination on the Koran, a guard acknowledged that "[h]e had urinated near [a] vent, and the wind blew it into the vent, from which it splashed into the cell" and onto the Koran. Eric Schmitt, *Military Details Koran Incidents at Base in Cuba*, N.Y. TIMES, June 4, 2005, at A1.

13. Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14 & 21, 2005, at 106, 114. In this "novel interrogation method[]" called "water boarding," a prisoners is "immersed in water until he nearly drowns." *Id.* This form of near-asphyxiation, or simulated drowning, creates the fear of death in the prisoner and has traumatized victims for years. *Id.* One victim was unable to take showers years later and "panicked when it rained." *Id.* at 112. Another account of abuse was reported by FBI agents who witnessed female interrogators "forcibly squeeze male prisoners' genitals" and chain naked detainees "low to the floor for many hours." Neil A. Lewis, *Investigation Reportedly Finds Guantanamo Abuse*, SAN DIEGO UNION-TRIB., May 1, 2005, at A6. Types of sexual humiliation include "forcing groups of . . . detainees to masturbate themselves while being photographed," "forcibly arranging detainees in various sexually explicit positions for photograph[s]," and "video-taping . . . naked male and female detainees" and "keeping them naked for several days." *U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison*, 98 AM. J. INT'L L. 591, 594-95 (Sean D. Murphy ed., 2004). In order to soften up another prisoner for interrogation, military officials made the man "pick plastic bottle caps out of a drum" filled with feces and water. Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1.

14. Douglas Jehl, *Army Details Scale of Abuse in Afghan Jail*, N.Y. TIMES, Mar. 12, 2005, at A1. One of the reported deaths was a twenty-two-year-old taxi driver named Dilawar. Golden, *supra* note 13. Dilawar was tortured for information relating to "a rocket attack on an American base." *Id.* He was "chained by [his] wrists to the top of his cell for much of the previous for four days." *Id.* His legs were beaten by guards for several days, to the point they could no longer bend. *Id.* The most repugnant detail was that "[m]ost of the interroga-

The detainees were chained to the ceiling and kicked and beaten by American soldiers, resulting in death.¹⁵ “At least 26 detainees have died in American custody in Iraq and Afghanistan since 2002 in what Army and Navy investigators have concluded or suspect were acts of criminal homicide”¹⁶

Shortly after the terrorist attacks on September 11, 2001, Alberto R. Gonzales, as head of the White House Counsel (WHC),¹⁷ drafted a memorandum to the President (WHC Memo) interpreting the Geneva Convention III on the Treatment of Prisoners of War (GPW).¹⁸ The GPW outlines the international law on acceptable treatment of prisoners of war and prohibits all forms of torture.¹⁹ The WHC Memo, along with others, provided legal justification for coercive interrogation techniques used on U.S.-held detainees.²⁰ The WHC Memo ar-

tors . . . believed Mr. Dilawar was an innocent man who simply drove his taxi past the American base at the wrong time.” *Id.*

15. Jehl, *supra* note 14.

16. Douglas Jehl & Eric Schmitt, *U.S. Military Says 26 Inmate Deaths May Be Homicide*, N.Y. TIMES, Mar. 16, 2005, at A1; see Douglas Jehl, *Pentagon Will Not Try 17 G.I.'s Implicated in Prisoners' Deaths*, N.Y. TIMES, Mar. 26, 2005, at A1.

17. The scope of this Comment will be limited to the memorandum written by chief WHC lawyer Alberto Gonzales and the role of the WHC in drafting it.

18. Draft Memorandum from Alberto R. Gonzales, White House Counsel, to George W. Bush, President, United States, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002) [hereinafter WHC Memo].

19. See generally Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

20. See Neil A. Lewis, *Documents Build a Case for Working Outside the Laws on Interrogating Prisoners*, N.Y. TIMES, June 9, 2004, at A8 (describing several memos discussing U.S. interrogation techniques and U.S. use of torture). Torture was justified under the guise of preventing attacks against and providing safety for the American people. See *id.* However, former Secretary of State Colin L. Powell argued in favor of applying the GPW to al Qaeda and the Taliban, because not doing so would “reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the laws of war for our troops.” *Id.* Torture by U.S. officials and acceptance of the practice of torture by the current administration may lead to more human rights violations in other countries. Alan Cowell, *Amnesty Blasts U.S. over Human Rights Violations*, SAN DIEGO UNION-TRIB., May 26, 2005, at A3. Human Rights Watch declared that some countries with “poor human rights records are now ‘citing the U.S. record to justify their own.’” *Id.* Furthermore, Amnesty International dubbed the Guantanamo Bay detention center, with over 400 inmates from over forty countries, the “gulag of our times.” *Id.* The example of U.S.-led torture will not make the world a safer place. Terrorism is a product of hatred toward the United States; it cannot fight terrorism with torture. Moreover, a senior Arab intelligence official stated that “‘Guantanamo is a huge problem for Americans’ ‘Even those who were not hard-core extremists have . . . been taught to hate. If they let these people go, these people will make trouble.’” Tim Golden & Don Van Natta Jr., *U.S. Said to Overstate Value of Guantanamo Detainees*, N.Y. TIMES, June 21, 2004, at A1 (quoting a senior Arab intelligence official).

gued the GPW's "strict limitations on questioning of enemy prisoners" were "obsolete."²¹ While the WHC Memo focused on the application of the GPW to al Qaeda and the Taliban,²² there is a strong consensus that the abuse in Iraq resulted from the torture techniques approved for use against al Qaeda and the Taliban.²³ Thus, the WHC Memo was a legal opinion to the President and was part of the legal framework²⁴ for "routine" U.S.-conducted torture against enemies in the war against terrorism and the war in Iraq.²⁵

While the WHC is responsible for interpreting the law for the President, the WHC is unable to provide legally sound advice because the ethical duties of the WHC are in constant tension. The Model Rules of Professional Responsibility require, among other duties, independent and objective legal advice from the WHC.²⁶ However, loyalty to the President and his policies often trumps these ethical duties,

21. WHC Memo, *supra* note 18.

22. *See, e.g., id.*

23. John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26; Editorial, *The Roots of Abu Ghraib*, N.Y. TIMES, June 9, 2004, at A22; Bilder & Vagts, *supra* note 1, at 689, 691. *See generally* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

24. Barry et al., *supra* note 23 ("Bush administration created a bold legal framework to justify this system of interrogation . . .").

25. *See, e.g.,* Mark Danner, *We Are all Torturers Now*, N.Y. TIMES, Jan. 6, 2005, at A27 ("[A] path the Bush Administration set . . . has transformed the United States from a country that condemned torture and forbade its use to one that practices torture routinely. . . . Shortly after the 9/11 attacks, Americans began torturing prisoners, and they have never really stopped."); *see also* Bilder & Vagts, *supra* note 1, at 689-90; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503 (2003). *See generally* THE TORTURE PAPERS, *supra* note 23; Matthew Segal, *Advocate or Counselor? Alberto Gonzales' Promotion Following His Torture Memo Raises Important Questions on Government Lawyering*, RECORDER, Mar. 25, 2005, at 4; Lewis, *supra* note 20; *U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison*, *supra* note 13, at 593; Mark Bowden, *Lessons of Abu Ghraib*, ATLANTIC MONTHLY, July 1, 2004, at 37. Amnesty International, citing the record of U.S. abuse of detainees at the Abu Ghraib prison in Iraq and the Guantanamo Bay detention center in Cuba, has sharply criticized the Bush Administration for "condoning 'atrocious' human rights violations, thereby diminishing its moral authority and setting a global example encouraging abuse by other nations." Cowell, *supra* note 20, at A3. The Bush Administration has often called the detainees in Guantanamo Bay the world's most dangerous terrorists or, in Vice-President Dick Cheney's words, "the worst of a very bad lot." Golden & Van Natta, *supra* note 20. This apparently includes several minors—the exact number is unknown because the military has sought to conceal the precise number of juveniles held—including a boy who was captured when he was 14. Neil A. Lewis, *Some Held at Guantanamo Are Minors, Lawyers Say*, N.Y. TIMES, June 13, 2005. While at Guantanamo the 14 year old boy was regularly beaten, hung by his wrists for hours, and given cigarette burns. *Id.*

26. *See generally* MODEL RULES OF PROF'L CONDUCT (1983); MODEL CODE OF PROF'L RESPONSIBILITY (1980).

leaving only inaccurate legal advice that furthers the interests of the President.²⁷ The WHC Memo is an example of how political pressures hinder good legal advice to the detriment of the public interest, the ultimate client of the WHC. In order for the WHC to render accurate legal advice to the President, it must be freed from political pressures. The United States should follow the example of New Zealand's Crown Law Office, an independent department, which advises its respective executive branch.²⁸ The WHC will not be able to fulfill its mandated ethical duties and provide sound impartial legal advice to the President unless it is an independent office free from inherent conflicts of interest.

Part II of this Comment will focus on the responsibilities and ethical duties of the WHC in a lawyer-client relationship. Part III will describe the ethical duties of the WHC that are in constant tension and examine rules of professional responsibility pertinent to advising clients. The ethical violations committed while preparing the WHC Memo will be examined in Part IV. The final part will propose a solution of creating an independent legal advisory agency to the executive branch, such as exists in New Zealand, which may avoid the inherent problems of the political pressures of the WHC.

II. RESPONSIBILITIES AND DUTIES OF THE WHC IN A LAWYER-CLIENT RELATIONSHIP

To understand the ethical duties and responsibilities of the WHC, it is necessary to first identify the client of the WHC. The characterization of the client is important in defining to whom the WHC owes its loyalty and diligence. This next section will define the client of the WHC and illuminate the WHC's duties.

A. *Duties and Responsibilities of the WHC*

The WHC was created in the 1940s by President Franklin D. Roosevelt.²⁹ The WHC was intended to be the President's general assistant, who would handle various internal legal questions.³⁰ The duties of the WHC remain ambiguous and are simply, as one recent WHC

27. See *infra* Part II.

28. See *infra* Part V.

29. Jennifer Wang, *Raising the Stakes at the White House: Legal and Ethical Duties of the White House Counsel*, 8 GEO. J. LEGAL ETHICS 115, 118 (1994).

30. Ronald Goldfarb, *Counsel of Confusion*, N.Y. TIMES, Mar. 9, 1994, at A15.

lawyer stated, “what the President wants.”³¹ The duties of the WHC have changed depending upon the wishes of the sitting President.³² The WHC’s general duties include “reviewing legislation and Presidential statements, overseeing Presidential appointments, and handling pardons.”³³

When a former WHC lawyer to Lyndon B. Johnson was asked what guidelines he followed when serving the President, the WHC lawyer responded, “[n]ot many.”³⁴ The WHC lawyer for Richard M. Nixon was asked the same question, and he responded, “[n]ext to none. It was an existential nightmare—fuzzy, obscure, intuitive.”³⁵ More recently, WHC lawyers for President George H.W. Bush have taken a greater role in the reshaping of public policy.³⁶

The WHC has few mandated duties, but most importantly, it must keep the President happy.³⁷ The relationship between the President and his “lawyers ha[s] long been a bone of contention. Andrew Jackson told Attorney General Roger Taney to solve a problem the way he wanted ‘or I will find an Attorney General who will.’”³⁸ The loose guidelines of the WHC, combined with a strong incentive to please the client, may lead to dangerous loyalty and conflicts of interest.³⁹

B. *The Client of the WHC*

There are problems in identifying the client of the WHC, which can lead to frustration in fulfilling the duties of the WHC.⁴⁰ A lawyer of the WHC has been commonly “known as the President’s lawyer.”⁴¹ However, legally, “the President’s ‘official’ lawyer is . . . the Attorney General of the United States.”⁴² The Attorney General represents the

31. *Id.*

32. Wang, *supra* note 29, at 118-19.

33. *Id.* at 119.

34. Goldfarb, *supra* note 30.

35. *Id.*

36. Wang, *supra* note 29, at 120.

37. Naftali Bendavid, *White House Counsel: The Job that Pits Ethics Against Reality*, RECORDER, Mar. 14, 1994, at 1.

38. Goldfarb, *supra* note 30. While President Jackson was referring specifically to the then Attorney General, his statement reflects one President’s view toward the President’s lawyers in general.

39. See Bendavid, *supra* note 37. See generally John W. Dean, *Watergate: What Was It?*, 51 HASTINGS L.J. 609, 621 (2000); Goldfarb, *supra* note 30.

40. See generally Wang, *supra* note 29.

41. Anthony S. Alperin, *The Attorney-Client Privilege and the White House Counsel*, 29 W. ST. U. L. REV. 199, 208 (2002).

42. *Id.*

entire executive branch of the federal government, requires Senate approval of his or her appointment, and must testify to congressional committees concerning the administration of his or her department.⁴³ In contrast, a WHC lawyer is differentiated from the Attorney General in that he or she does not need Senate approval for appointment, and executive privilege forbids testifying to the Senate concerning the administration of the WHC.⁴⁴

To properly establish the role and responsibilities of the WHC, it must be determined whether the client of the WHC is the President, the office of the Presidency, or the federal government as a whole. The federal government draws all of its power from the people, and therefore all government employees are accountable to the people.⁴⁵ Each government agency has the obligation to perform its duties in furtherance of the public interest consistent with the Constitution and the laws of the land.⁴⁶

However, it may be impractical for the WHC to represent the public interest as a client.⁴⁷ It is difficult to determine what actually is in the public interest in any situation because there are many different concepts of public interest.⁴⁸ Further, placing a WHC lawyer in the position to serve the public interest may conflict with our democratic system in which the role of the WHC is an advocate for the executive branch.⁴⁹ In our democracy, with its separation of powers, the President has a “substantial interest in maintaining the powers of the executive branch.”⁵⁰ Congress and the judiciary both have means of protecting their own constitutional authority.⁵¹ Similarly, the executive branch must have a legal advocate to “protect the powers of the executive branch from encroachment by Congress or the judiciary.”⁵² The

43. *Id.*

44. *Id.* at 208-09.

45. Wang, *supra* note 29, at 121.

46. *In re Lindsey*, 148 F.3d 1100, 1108 (D.C. Cir. 1998).

47. Wang, *supra* note 29, at 122.

48. *Id.*; Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294-95 (1987).

49. Miller, *supra* note 48, at 1296; *see* Wang, *supra* note 29, at 124.

50. Wang, *supra* note 29, at 124.

51. *Id.* at 125. Congress may check the power of the President by exercising the “powers of the purse, oversight investigation, and impeachment.” *Id.* at 124. Congress can also override a presidential veto. U.S. CONST. art. I, § 7, cl. 2. The judiciary has the power to decide the cases that comes before them, and they have the authority “to order the executive branch to take or refrain from taking specific actions.” Wang, *supra* note 29, at 124. The attorney for the President must protect the interests of the President to properly maintain the power of the President in our system of checks and balances. *Id.* at 124-25.

52. *Id.* at 125; *see also* Miller, *supra* note 48, at 1296.

attorney for the executive branch serves the interests of the decision-making authority, which is the President in his official capacity.⁵³ If the President's policies are not upheld, then the President's policy-making and constitutional powers will be diminished.⁵⁴

Nevertheless, the government lawyer is obligated, by rules governing his professional responsibility, to look beyond the relationship with the client and serve the public interest, which is the goal of all governmental agencies.⁵⁵ Each officer of the executive branch must take an oath to uphold the cause of the Constitution.⁵⁶ "Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency."⁵⁷ The WHC must consider the interest of the public while representing the President.⁵⁸

III. ETHICAL DUTIES OF THE WHC IN CONSTANT TENSION

A WHC lawyer is a political officer who is charged with interpreting the law and is accountable only to the President.⁵⁹ This leaves the WHC lawyer in a precarious situation where he must interpret the law while facing constant pressure to deliver legal advice that furthers the position of his client, the President.⁶⁰ This next part will describe the ethical duties of the WHC that may be difficult to meet and the rules pertinent to advising clients.

53. See Wang, *supra* note 29, at 125; Micheal S. Paulsen, *Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and Its Limits*, 61 LAW & CONTEMP. PROBS. 83, 85 (1998).

54. See Wang, *supra* note 29, at 125.

55. See *In re Lindsey*, 148 F.3d 1100, 1109 (D.C. Cir. 1998); see Segal, *supra* note 25 ("Unlike a private practitioner, the loyalties of a government lawyer . . . cannot and must not lie solely with his or her client agency.").

56. *In re Lindsey*, 148 F.3d at 1108.

57. *Id.*; see also Segal, *supra* note 25.

58. *In re Lindsey*, 148 F.3d at 1109; see Wang, *supra* note 29, at 125.

59. See Segal, *supra* note 25. A WHC lawyer knows "that no police officers will swoop down on the president if, following your advice, he treads upon or crosses a legal boundary." *Id.* "Government lawyers may likewise be shielded from penalties." *Id.* Thus, without oversight by anyone other than the President himself, there are essentially no other checks on the WHC.

60. The WHC is the lawyer for the "Presidency" as a whole and not the President individually. Bendavid, *supra* note 37.

A. Selected Ethical Duties of the WHC

This section will describe the ethical duties that are uniquely important to the WHC. These duties pull in opposite directions and may be compromised without careful attention and diligence by the WHC lawyer.⁶¹ Lawyers of the WHC are subject to disciplinary rules in the states where they are licensed to practice and must perform the duties set forth by their respective state bars.⁶²

1. Duty to the Client

The first and most important duty of any lawyer is to advance the position of the client.⁶³ A lawyer who prejudices or damages the position of his client is subject to discipline.⁶⁴ The lawyer must use his or her best judgment solely for the benefit of the client, “within the bounds of the law,” and free from external influences and loyalties.⁶⁵

The WHC lawyer has an ethical obligation to follow the client’s instructions.⁶⁶ The comment to Rule 1.2 of the Model Rules of Professional Conduct (Model Rules) states that “[t]he client has the ultimate authority to determine the purpose to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations.”⁶⁷ The WHC must adhere to the objectives and interests of the client, pursue these objectives with vigor, and use all available legal resources to accomplish these goals.⁶⁸

61. Bendavid, *supra* note 37.

62. 28 U.S.C. § 530B(a) (2005).

63. MODEL CODE OF PROF’L RESPONSIBILITY pmb1. (1983).

64. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-101(A)(3)(1980). A lawyer may be subjected to various degrees of discipline for violating rules or statutes. RICHARD C. WYDICK ET AL., CALIFORNIA LEGAL ETHICS 45 (4th ed. 2003). The mildest form of discipline is private or public reprimand. *Id.* A lawyer who receives a public reprimand will usually have their name published in a publication aimed only for attorneys, but in some cases the public press. *Id.* The reprimand severs as discipline and education for other attorneys. *Id.* Suspension is a harsher form of punishment, and the lawyer is prohibited from practicing law for several months or even a term of years. *Id.* The most severe form of discipline is disbarment, which typically entails a permanent ban from practicing law. *Id.* Other forms of punishment include having to re-take the legal ethics bar examination. *Id.*

65. Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 962 (1991) (citing MODEL CODE OF PROF’L RESPONSIBILITY EC 5-1 (1980)).

66. Wang, *supra* note 29, at 132.

67. *Id.* (quoting MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. (1983)).

68. Lanctot, *supra* note 65, at 964.

2. *Duty of Zealous Advocacy*

The Model Rules require lawyers to zealously advocate for the position of their client.⁶⁹ Zealous advocacy is traditionally viewed as requiring the “single-minded devotion to a client’s interests.”⁷⁰ The WHC lawyer must represent his client with zeal, and in doing so use any legal theory or argument to advance the position of his client.⁷¹ WHC lawyers do not have free reign under the guise of zealous advocacy and loyalty, but rather, must balance their zealous representation with their other ethical duties.⁷²

However, zealous advocacy is inappropriate for governmental lawyers; they must temper their representation and advocate for the interests of justice.⁷³ In fact, the WHC lawyer is required to seek just results.⁷⁴ Thus, the WHC lawyer, at times, must not follow the instructions of the client, but instead pursue just results.⁷⁵

3. *Duty to Remain Objective and Independent*

A lawyer must zealously advocate for the position of the client, but when a lawyer may formulate wide-reaching policy, the duty to remain objective and independent is equally important.⁷⁶ The WHC advises the President on the legality of his national and foreign policies. The lawyer, in turn, has a substantial influence in formulating

69. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (1983). While outside the scope of this Comment, a group of lawyers have been unable to meet their mandated ethical duties because of the Bush Administration's choice not to apply the GPW to prisoners in the War against Terrorism. Nat'l Ass'n of Criminal Def. Lawyers Ethics Advisory Committee, Op. 03-04 (2003). The National Association of Criminal Defense Lawyers and military lawyers defending suspects in the War against Terrorism at Guantanamo Bay have complained of their inability to fulfill their ethical duty to zealously represent their clients because a military commission restricted the GPW's application to those prisoners. *Id.* The lawyers argue that the government, despite constitutional limitations and other domestic laws, imposed severe and unreasonable limitations on those prisoner's rights, and that they were unable to provide effective or ethical representation. *Id.* See generally *id.* (providing an interesting discussion on the military lawyer's ethical dilemma).

70. Lancot, *supra* note 65, at 954.

71. *Id.* at 955.

72. Raymark Industries, Inc. v. Stemple, No. 88-1014-K, 1990 WL 72588, at *18 (D. Kan. 1990).

73. See Lancot, *supra* note 65, at 955.

74. *Id.* at 957 (citing MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1980)).

75. See *id.* at 955-57 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 (1975) (recognizing that Canon 7 states “the duty of all government lawyers [is] to seek just results rather than the result desired by a client”)).

76. MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983).

policy.⁷⁷ Therefore, WHC lawyers have an additional responsibility to the public when formulating public policy to ensure the policies are legally sound and fair.⁷⁸

Institutions that formulate public policy require the most effective decision-making processes because their decisions affect all citizens.⁷⁹ Effective policy decisions can only be made after the lawyer has fully researched the problem, critically applied objective independent judgment, and provided the client with unbiased legal advice.⁸⁰ The ability of the WHC lawyer to reshape public policy is justified only if the lawyer fulfills his ethical duty to render objective and independent legal advice.⁸¹ Problems may arise with advising on the legality of public policy when the lawyer only applies objectivity “when it affects another party adversely.”⁸²

When determining the legality of public policy, there is an inherent conflict of interest for the WHC lawyer.⁸³ To ensure legal validity, objectivity is a crucial ethical quality necessary to participate in formulating policy.⁸⁴ To render objective counsel, a lawyer must be uninfluenced by biases or prejudices and detached from the views of the client.⁸⁵

The WHC lawyer is required by Model Rule 2.1 to “exercise independent professional judgment and render candid advice.”⁸⁶ The WHC lawyer must be prepared to give straightforward and objective advice to the client, even if the advice does not further the client’s policy goals.⁸⁷ The Model Rules require the lawyer to fully analyze all

77. See Wang, *supra* note 29, at 120.

78. See Steven H. Leleiko, *Professional Responsibility and Public Policy Formation*, 49 ALB. L. REV. 403, 417 (1985).

79. See *id.* at 427.

80. See *id.*

81. “The duty to exercise independent judgment is the cornerstone of the lawyer’s responsibilities. Fulfilling this responsibility justifies the powers and privileges that lawyers possess.” Leleiko, *supra* note 78, at 427. Recent administrations have given the WHC the privilege of influencing public policy. Wang, *supra* note 29, at 120. Therefore, this power and privilege is only justified if the WHC lawyer fulfills the ethical duty to render objective and independent legal advice.

82. *Id.*

83. See *id.* at 411.

84. *Id.* at 409-10.

85. *Id.* at 411.

86. See MODEL RULES OF PROF’L CONDUCT R. 2.1 (1983).

87. MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. (1983).

aspects of the client's situation and provide the client with candid legal advice, even if that advice is contrary to what the client wants.⁸⁸

B. Ethical Rules Pertinent to Advising Clients

The Model Rules define professional misconduct in Rule 8.4.⁸⁹ The Rule provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."⁹⁰ A recent ABA formal opinion discussing Rule 8.4 declared the Rule prohibited a "broad" range of conduct.⁹¹ Furthermore, the Rule shall apply generally to all aspects of the lawyer's professional obligations and activities.⁹² Thus, all client correspondence, legal representations, statements of law, and advice to clients must not be dishonest or misrepresent the law, or the lawyer may be subject to discipline under the Model Rules.

The Model Code of Professional Responsibility (Model Code) states that an attorney must represent the client "within the bounds of the law."⁹³ A lawyer must zealously advocate for the client, but to stay within the bounds of the law, he must not "[k]nowingly advance a claim . . . that is [not supported by] existing law."⁹⁴ A lawyer cannot advance a claim contrary to existing law without a good faith justification seeking modification or reversal.⁹⁵ Further, a lawyer shall not "knowingly make a false statement of law or fact."⁹⁶ "A false opinion is one which ignores or minimizes serious legal risks or misstates the . . . law . . . knowingly or through gross incompetence."⁹⁷ A lawyer may violate the rules by recklessly failing to disclose applicable law pertinent to the legal advice tendered to the client.⁹⁸ Thus, the

88. MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983). "[A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. (1983); *see also* Bilder & Vagts, *supra* note 1, at 692.

89. MODEL RULES OF PROF'L CONDUCT R. 8.4 (1983).

90. *Id.*

91. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433 (2004).

92. *Id.*

93. MODEL CODE OF PROF'L RESPONSIBILITY EC 7 (1980).

94. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1980) ("In his representation of a client, a lawyer shall not: . . . Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.").

95. *Id.*

96. *Id.*

97. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 346 (1985).

98. *Id.*

ethical rules are clear that a lawyer zealously advocating for his client cannot make any claim or representation that advances the position of his client, unless it is grounded in existing law.⁹⁹

Further, the Model Rules forbid a lawyer from counseling a client or assisting a client to violate or evade the law.¹⁰⁰ A lawyer may render an honest opinion on the lawfulness and the legal consequences that may flow from the client's proposed conduct.¹⁰¹ However, regardless of the actions taken by the client, a lawyer must never counsel a client to violate the law.¹⁰² Thus, a lawyer must walk a fine line between delivering advice of the possible legal consequences of the client's conduct and rendering an analysis on how the client may engage in unlawful conduct with impunity.

When advising a client on the legality of proposed conduct, the lawyer is held to a good-faith standard in determining the application of the law.¹⁰³ If "there is no 'substantial authority' in support of the position," a lawyer may advise a client as to the legality of proposed conduct if there is a good faith basis for doing so.¹⁰⁴ Thus, the lawyer must believe in good faith that the position of the client is warranted under existing law or there is a valid reason for the law's extension or modification.¹⁰⁵ A good faith position requires the "realistic possibility of success if the matter is litigated," and the lawyer must advise the client of the "potential penalties and other legal consequences" if the client chooses the proposed conduct.¹⁰⁶

IV. ETHICAL VIOLATIONS OF THE WHC MEMO: A PRODUCT OF INHERENT FLAWS IN THE WHC

The political pressures exerted on the WHC can inhibit the institution from delivering sound and accurate legal advice.¹⁰⁷ This pressure

99. See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1980).

100. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1983) ("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."); see Paulsen, *supra* note 53, at 86.

101. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1983).

102. *Id.*

103. *See id.*

104. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 85-352 (1985).

105. *Id.*

106. *Id.*

107. Bendavid, *supra* note 37 ("Because a sound legal decision can be a political disaster, the presidential counsel constantly sacrifices legal ground for political advantage.").

resulted in WHC advice regarding the treatment of prisoners that was driven by loyalty to the President rather than adherence to the law.¹⁰⁸ This part of the Comment will examine the advice rendered in the WHC Memo, illustrate the ethical violations of the WHC in drafting the memo, and discuss the inherent flaws of the WHC.

A. *The WHC Memo Contains Legally Unsound Provisions*

On January 25, 2002, Alberto R. Gonzales wrote President Bush a memorandum, under the authority of the WHC, concerning the “Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban.”¹⁰⁹ The WHC Memo advised the President of the ramifications of his decision not to apply the GPW to al Qaeda and the Taliban.¹¹⁰ Gonzales provided the legal background and the positive and negative consequences if the GPW was not applied to the conflict with al Qaeda and the Taliban.¹¹¹ Finally, Gonzales provided the President with the “Responses to the Arguments for Applying the GPW to al Qaeda and the Taliban.”¹¹²

1. *The President Does Not Have the Constitutional Authority to Violate the Law*

The WHC Memo stated that the President has the constitutional authority to evade international and domestic laws relating to the human rights of prisoners of war.¹¹³ Gonzales advised the President that he had the “constitutional authority to make the determination” not to apply the GPW to captured terrorists in the war against terrorism.¹¹⁴ This WHC legal opinion directly contradicted the Constitution’s express grants of power to Congress and a landmark Supreme Court de-

108. See Bilder & Vagts, *supra* note 1, at 691-93 (“[T]he Gonzales memo was legally inept.”); Jordan Paust, *The Common Plan to Violate the Geneva Conventions* (May 25, 2004), <http://jurist.law.pitt.edu/forum/paust2.php>.

109. WHC Memo, *supra* note 18. A draft memo was prepared on January 25, 2002. Because there is limited availability to WHC documents, it is unclear when the actual memo was sent to the President.

110. *Id.*

111. *Id.*

112. *Id.*

113. See *id.*

114. *Id.*

cision.¹¹⁵ The legal justification Gonzales provided the President for suspending the GPW for captured terrorists is “legally untenable.”¹¹⁶

First, Article I of the Constitution provides the framework for the legislature and expressly grants Congress powers separate from the executive branch.¹¹⁷ Specifically, section eight gives Congress the power to “make Rules concerning Captures on Land and Water,”¹¹⁸ to “define and punish . . . [o]ffences against the Law of Nations,”¹¹⁹ and “[t]o make Rules for the Government and Regulation of the land and naval forces.”¹²⁰

Second, the Supreme Court rejected presidential authority to ignore domestic laws and the Constitution during war times in the landmark decision *Youngstown Sheet & Tube Co. v. Sawyer*.¹²¹ In this case, President Truman issued an executive order during the Korean War directing the seizure of certain steel companies to prevent a strike.¹²² The executive branch argued the order was valid under the President’s power while acting as Commander-in-Chief.¹²³ The Court held that the Constitution gives Congress the exclusive authority to seize private property for public use and Presidential action pursuant to this exclusive power is unconstitutional.¹²⁴

However, John C. Yoo, Deputy Assistant Attorney General when the WHC Memo was written and currently a law professor at Berkeley,¹²⁵ concurs with the WHC’s opinion that the President has the

115. Bilder & Vagts, *supra* note 1, at 690-91; see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that the President’s military power does not extend past express constitutional grants of exclusive authority to Congress, such as seizures of public property). The Constitution expressly grants Congress the exclusive authority to make rules concerning captures on land and water. U.S. CONST. art. I, § 8, cl. 11. Accordingly, the WHC and the executive branch do not have the authority to reshape public policy concerning captures on land and water.

116. Bilder & Vagts, *supra* note 1, at 690. See Lawyers’ Statement on Bush Administration’s Torture Memos (Aug. 4, 2004) (statement written to the administration about the ethical violations of the torture memos signed by several hundred lawyers, law professors, judges, and other high ranking legal professionals), http://www.allianceforjustice.org/spotlight/collection/spotlight_statement0804.html [hereinafter Lawyers’ Statement]; see also Edward Alden, *Dismay at Attempt to Find Legal Justification for Torture*, FIN. TIMES (London), June 10, 2004, at 7.

117. U.S. CONST. art. I.

118. U.S. CONST. art. I, § 8, cl. 11.

119. U.S. CONST. art. I, § 8, cl. 10.

120. U.S. CONST. art. I, § 8, cl. 12.

121. 343 U.S. 579 (1952).

122. *Id.* at 582.

123. *Id.*

124. *Id.* at 588.

125. Mayer, *supra* note 13, at 112; Alden, *supra* note 116.

power to override the GPW.¹²⁶ Yoo argues the President has the “plenary power” to override a U.N. convention if he is acting as Commander-in-Chief and in defense of the country.¹²⁷ Yoo contends that “Congress doesn’t have the power to ‘tie the President’s hands in regard to torture as an interrogation technique.’ . . . ‘It’s the core of the Commander-in-Chief function. They can’t prevent the President from ordering torture.’”¹²⁸ Yoo argues the constitutional remedy for an abuse of this unfettered presidential power is provided by the impeachment power of Congress.¹²⁹ If the President oversteps his authority, then he may be impeached.¹³⁰

Nonetheless, the WHC advice that the President has the authority to make the determination not to apply the GPW to captured terrorists is not legally sound.¹³¹ Yoo’s arguments do not save the legality of the advice. Many scholars disagree with his contention, because his logic is unpersuasive and suffers from the same flaws as the WHC’s opinion.¹³² As stated above, Congress has the exclusive constitutional authority to establish rules regulating “Captures on Land and Water, . . . define and punish . . . Offences against the Law of nations, and . . . make Rules for the Government and Regulation of the land and naval forces.”¹³³ Congress ratified the GPW in 1955,¹³⁴ and the GPW regulates treatment of prisoners of war,¹³⁵ defines torture, and provides rules for all nations concerning armed forces.¹³⁶ According to the express grants of power in the Constitution, the President does not have the constitutional authority to regulate captures on land and water, and

126. Mayer, *supra* note 13, at 112-14 (quoting John C. Yoo).

127. *Id.* at 114.

128. *Id.* (quoting John C. Yoo).

129. *Id.*

130. U.S. CONST. art. II, § 6.

131. Alden, *supra* note 116, at 7 (quoting Harold Hongju Koh, Dean of Yale Law School and former U.S. Assistant Secretary of State); Paust, *supra* note 108; Lawyers’ Statement, *supra* note 116, at 1.

132. See Mayer, *supra* note 13, at 114 (discussing the many criticisms of the controversial memos and the legal analysis and conclusions supporting it); Alden, *supra* note 116, at 7 (discussing several criticisms of the government lawyers responsible for the controversial memos).

133. U.S. CONST. art. I, § 8.

134. GPW, *supra* note 19.

135. Article 13 of the GPW states that prisoners of war “must at all times be humanely treated,” and article 17 adds that “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.” *Id.* at arts. 13, 17.

136. See generally GPW, *supra* note 19.

may not suspend the GPW to captured terrorist. The precedent of *Youngstown Sheet & Tube Co.* holds that the President does not have the authority to act in a role expressly granted to Congress. Therefore, according to the Constitution and Supreme Court precedent, since Congress ratified the GPW, the President does not have the authority to suspend the GPW.

2. *The GPW Does Apply to al Qaeda and the Taliban*

The legal opinion that the GPW does not apply to al Qaeda and the Taliban is legally unsupportable because every person is protected by the Geneva Conventions.¹³⁷ In the memo, the WHC stated that “the war against terrorism is a new kind of war.”¹³⁸ This new type of war, it continued, places a premium on the ability to obtain information quickly from captured terrorists to avoid further attacks on the American people.¹³⁹ Moreover, according to the WHC, “this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.”¹⁴⁰ The WHC supported this opinion on the following grounds:

Afghanistan was a failed state because the Taliban did not exercise full control over the territory and people, was not recognized by the

137. Lawyers’ Statement, *supra* note 116 (“[T]he treaty . . . protects even unlawful combatants who do not qualify as prisoners of war . . .”), at 1; *see also* Bilder & Vagts, *supra* note 1, at 690; Mayer, *supra* note 13, at 114 (“There is no such thing as a non-covered person under the Geneva Conventions.” (quoting a former State Department lawyer)); Paust, *supra* note 25, at 511-12.

138. WHC Memo, *supra* note 18, at 2.

139. *Id.* The WHC and the Bush Administration claim that coercive interrogation techniques are needed to gain information quickly. *Id.* However, long time F.B.I. and C.I.A. agents have stated that torture does not provide reliable information. Meyer, *supra* note 12, at 112, 116. Torturers are able to get confessions, but the confessions are rarely accurate. *Id.* at 116. The victims will confess to crimes simply to stop the torture. *See id.* at 112. The agents claim that physical torture is not a productive interrogation method and suggest that if detainees are provided a lawyer, detainees are more likely to cooperate because the lawyer can assist them in receiving a shorter sentence. *Id.* Dan Coleman, an ex-F.B.I. agent, said it best: “The lawyers show these guys there’s a way out. . . . It’s human nature. People don’t cooperate with you unless they have some reason to. . . . Brutalization doesn’t work. We know that. Besides, you lose your soul.” *Id.* (quoting Dan Coleman, former F.B.I. agent). For more on the value of information produced from torture, and an excellent article on the U.S. practice of sending detainees to other countries that will torture for the United States, *see generally id.* Donald Rumsfeld has often cited the importance of the interrogations at Guantanamo Bay, but military officials have stated that “the Guantanamo detainees have provided only a trickle of intelligence with current value,” with the best information resulting from a reward system, not torture. Golden & Van Natta, *supra* note 20.

140. WHC Memo, *supra* note 18, at 2.

international community, and was not capable of fulfilling its international obligations . . . [and] the Taliban and its forces were, in fact, not a government, but a militant, terrorist-like group.¹⁴¹

The WHC's argument that Afghanistan was a "failed state" is inconsistent with the official position of the United States.¹⁴² William Taft IV, the State Department's legal advisor, maintains the official position of the United States has been that "before, during, and after the emergence of the Taliban, . . . Afghanistan constituted a state."¹⁴³ Furthermore, the United States has "held Afghanistan to its treaty obligations and identified it as a party to the Geneva Conventions."¹⁴⁴

There is no category of persons on the globe that is not covered and protected by the Geneva Conventions.¹⁴⁵ The GPW shields fighters in every type of conflict, "from world wars to local rebellions."¹⁴⁶ The GPW by its own terms and conditions "governs all conflicts 'at any time and in any place whatsoever.'"¹⁴⁷ The GPW protects unlawful combatants that are not considered prisoners of war¹⁴⁸ and applies to all people whether they are prisoners of war or not.¹⁴⁹ Anyone who is detained, regardless of status, is afforded protection under the Geneva Conventions and other relevant international law.¹⁵⁰ Therefore, any human being who is detained, whether he is a prisoner of war, ordinary citizen, "unprivileged belligerent," or even a terrorist, must be afforded the protections of the GPW.¹⁵¹

141. *Id.* at 1.

142. Mayer, *supra* note 13, at 112.

143. *Id.*; see also Memorandum from Colin L. Powell to Counsel to the President in THE TORTURE PAPERS, *supra* note 23, at 124.

144. Powell, *supra* note 143.

145. Mayer, *supra* note 13, at 114; see also Paust, *supra* note 25, at 511-12; Lawyers' Statement, *supra* note 116, at 1.

146. Mayer, *supra* note 13, at 114.

147. Lawyers' Statement, *supra* note 116, at 1 (quoting GPW, *supra* note 19, art. 3 para. 1). Colin Powell, acting as Secretary of State, submitted a memo to the President and argued against the WHC memo stating that "[t]he United States has never determined that the GPW did not apply to an armed conflict in which its forces have been engaged." Powell, *supra* note 143, at 125. Moreover, addressing the argument that the GPW does not apply to illegal combatants, Powell stated that the "GPW was intended to cover all types of armed conflicts and did not by its terms limit its application." *Id.* at 122-25.

148. Lawyers' Statement, *supra* note 116, at 1; see also Paust, *supra* note 25, at 511-12; Mayer, *supra* note 13, at 112-14.

149. Paust, *supra* note 108.

150. *Id.*

151. Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 817 (2005).

The WHC's legal opinion that captured members of al Qaeda and the Taliban are illegal enemy combatants not covered by the GPW has been defended by Yoo.¹⁵² He compares members of al Qaeda and the Taliban to pirates and slave traders who were not fighting on behalf of any nation.¹⁵³ Yoo argues pirates and the Taliban are people who are so bad they do not deserve the protection of the GPW.¹⁵⁴ For support, Yoo relies upon the Lincoln assassination, where the assassins were tried before a military court and subsequently executed.¹⁵⁵

However, neither the WHC's nor Yoo's basis for the choice not to apply the GPW to al Qaeda and the Taliban is legally supportable.¹⁵⁶ First, the WHC's argument that Afghanistan is a failed state is directly contradictory to the official position of the United States.¹⁵⁷ Second, the United States was unmistakably involved in an international armed conflict with the Taliban in Afghanistan,¹⁵⁸ triggering the application of the GPW.¹⁵⁹ Third, notwithstanding Yoo's arguments, the language of the GPW clearly covers all people; thus, even unlawful combatants are included in the provisions of the GPW.¹⁶⁰ Therefore, the legal opinion of the WHC furnished to the President regarding his decision not to apply the GPW to al Qaeda and the Taliban is not legally sound.

152. Mayer, *supra* note 13, at 112-14.

153. *Id.*

154. *Id.*

155. *Id.*

156. See Paust, *supra* note 108; Mayer, *supra* note 13, at 112; Lawyers' Statement, *supra* note 116, at 1; Bilder & Vagts, *supra* note 1, at 690.

157. Mayer, *supra* note 13, at 112; see also Powell, *supra* note 143, at 124.

158. Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 5 (2001).

159. *Id.*; Lawyers' Statement, *supra* note 116, at 1.

160. Regardless of a detainees' POW status, the detainee is still covered under the GPW.

During an armed conflict, all persons who are not POWs, including so-called unprivileged or "unlawful combatants," have at least various nonderogable rights to due process under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (the "Geneva Civilian Convention") and the first Protocol Additional to the Geneva Conventions ("Geneva Protocol I"). Thus, even if POW status is somehow lost, any detainee has due process protections under the Geneva Conventions and Protocol I, human rights law, and other international laws as noted herein. In case of doubt as to the status of an accused criminal or detainee, the Geneva POW Convention requires that all persons having committed a belligerent act and having fallen into the hands of the enemy shall enjoy POW protections until such time as their status has been determined by a competent tribunal.

Paust, *supra* note 25, at 511-12 (internal quotations omitted).

3. U.S. Officials May Not Escape Liability for War Crimes Against the Taliban

The WHC Memo also contains legal advice on how U.S. officials may violate international law and domestic criminal law with impunity.¹⁶¹ The memo illustrates a common plan to evade and violate international and domestic law.¹⁶² In the memo, Gonzales counsels the President that holding the GPW inapplicable to al Qaeda and the Taliban “[s]ubstantially reduces the threat of domestic criminal prosecution under the War Crimes Act.”¹⁶³ The War Crimes Act (WCA) defines a “war crime” as a “grave breach in any of the international conventions signed at Geneva,” including the GPW, and applies to any “member of the Armed Forces” or U.S. national inside or outside the United States.¹⁶⁴ Punishment for a violation of the WCA may be imprisonment for life, and if death results from the violation, then the offender shall be subject to the death penalty.¹⁶⁵

To avoid prosecution for war crimes, the WHC opined that “[a] determination that the GPW is not applicable to the Taliban would mean that [the WCA] would not apply to actions taken with respect to the Taliban.”¹⁶⁶ Gonzales elaborated and advised the President that holding the GPW inapplicable “would create a reasonable basis in law that [the WCA] does not apply.”¹⁶⁷ Furthermore, this would provide a valid defense to any domestic prosecution for war crimes.¹⁶⁸

Gonzales created the legal framework and advised the President on how U.S. servicemen and nationals could avoid domestic prosecution for war crimes.¹⁶⁹ The advice given to the President was designed to avoid criminal liability.¹⁷⁰ By simply holding the GPW inapplicable, U.S. serviceman and nationals may torture without being exposed

161. “Some critics charged that the memoranda . . . propos[ed] arguments to protect those involved in coercive interrogation from potential prosecution under U.S. law.” Bilder & Vagts, *supra* note 1, at 691. “A series of memorandums from the Justice Department . . . provided arguments to keep United States officials from being charged with war crimes for the way prisoners were detained and interrogated.” Lewis, *supra* note 20.

162. See Paust, *supra* note 108.

163. WHC Memo, *supra* note 18.

164. 18 U.S.C. § 2441 (2005).

165. *Id.*

166. WHC Memo, *supra* note 18.

167. *Id.*

168. *Id.*

169. Neil A. Lewis, *Justice Memos Explained How to Skip Prisoners Rights*, N.Y. TIMES, May 21, 2004, at A10; Lewis, *supra* note 20.

170. Lewis, *supra* note 20.

to the WCA.¹⁷¹ If the GPW does not apply, then it cannot be violated. Gonzales created a defense for any serviceman charged with a war crime.¹⁷² This defense did not exist before the WHC's advice to the President. Gonzales' advice is similar to finding loopholes to avoid criminal liability.¹⁷³ Now U.S. officials and nationals might not be held legally accountable for any war crimes committed against the Taliban.¹⁷⁴ Accordingly, the WHC has advised the President on how to evade and violate domestic and international law.

B. The WHC Memo Contains Ethical Violations

The legal opinions in the WHC Memo were products of excessive loyalty to the President.¹⁷⁵ The WHC delivered to the President the legal advice he wanted to hear.¹⁷⁶ The legal justification for torture resulted from "too much advocacy, and not enough counsel."¹⁷⁷ Presumably, the WHC of the Bush Administration was asked to provide legal justification for torture. The WHC rendered advice that the President wanted; however, it did not fulfill the WHC's ethical duty to deliver candid legal advice, even if that advice was contrary to the client's interest.¹⁷⁸ This resulted in legal misinterpretations and legally unsound policies.¹⁷⁹

The WHC Memo was born from excessive loyalty.¹⁸⁰ Once the opinion was no longer politically tenable, the memo was repudiated and the legal advice was no longer deemed accurate.¹⁸¹ The memo

171. *Id.*

172. Lewis, *supra* note 169.

173. *See id.*

174. Army investigators who discovered that U.S. servicemen had killed detainees in an Afghan jail charged the men with homicide. *See Jehl & Schmitt, supra* note 16. However, if the domestic criminal law of the WCA had applied to the killings, then the torturers would have been subjected to the prosecution for war crimes because they engaged in torture and death resulted from torture. This raises the question of whether the servicemen were able to evade the domestic criminal law of the WCA. *See Jehl & Schmitt, supra* note 16.

175. *See Segal, supra* note 25 ("The critics were probably right to identify loyalty as a driving force behind Gonzales' conduct.").

176. *See id.* (noting Gonzales critics' belief that "Gonzales had simply provided Bush with the legal opinions Bush wanted").

177. Matthew Segal, *More Than Yes Men*, LEGAL TIMES, Mar. 21, 2005, at 66.

178. A lawyer has a duty to render candid advice, MODEL RULES OF PROF'L CONDUCT R. 2.1, even if that advice is "unpalatable to the client." MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt.; *see also Bilder & Vagts, supra* note 1, at 692.

179. *See Lawyers' Statement, supra* note 116, at 1-3; Bilder & Vagts, *supra* note 1, at 690-91, 693; Mayer, *supra* note 13, at 112-14; Powell, *supra* note 143, at 124.

180. Segal, *supra* note 25.

181. *Id.*; Segal, *supra* note 177.

evinced skilled and well-crafted arguments in favor of the client's position, but failed to fully and squarely present to the President his legal options.¹⁸² The WHC satisfied the duty to the client of zealous advocacy, but failed to act as a proficient counselor and dispense candid advice.¹⁸³ In doing so, the WHC breached its ethical duties by advancing positions directly contradictory to existing law, or unsupported by legal authority, and providing the President with instructions on how U.S. officials can evade liability for war crimes.

1. WHC's Position Misstated the Law or Was Unsupported by Existing Law

As discussed above, Model Rule 8.4 prohibits a lawyer from engaging in conduct involving dishonesty or misrepresentation.¹⁸⁴ "Knowingly misstating facts or law . . . is 'conduct involving dishonesty, fraud, deceit, or misrepresentation'"¹⁸⁵ and thus a violation of Model Rule 8.4. A misstatement of law, whether "intentionally or recklessly misleading," violates professional rules of conduct.¹⁸⁶ Additionally, Model Rule 8.4 applies broadly to all aspects of a lawyer's professional obligations and activities.¹⁸⁷ Therefore, this Rule would apply to legal advice given by the WHC to the President.

Discipline Rule 7-102 of the Model Code provides that lawyers must zealously advocate for their client, but in order to stay within the bounds of the law, they must not knowingly advance a claim that is not supported by existing law.¹⁸⁸ The lawyer, in fulfilling his professional obligations to the client, must not knowingly make a false statement of law or fact¹⁸⁹ or advance a position not supported by current law.

The President had a clear policy goal to violate the Geneva Conventions and the WHC attempted to legally justify that policy goal.¹⁹⁰ The WHC fulfilled its obligation to zealously fight for the client, but

182. See Segal, *supra* note 25; Powell, *supra* note 143, at 122, 24.

183. Segal, *supra* note 25.

184. MODEL RULES OF PROF'L CONDUCT R. 8.4 (1983).

185. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 346 (1985).

186. *Id.*

187. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433 n.8 (2004).

188. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1980).

189. *Id.*

190. Paust, *supra* note 108 (discussing a "common plan" to violate the Geneva Conventions).

in the process, the WHC “lawyers . . . failed to meet their professional obligations.”¹⁹¹

The WHC advised the President that he has the constitutional authority not to apply the GPW to al Qaeda and the Taliban,¹⁹² however this advice contradicted the Constitution and Supreme Court precedent.¹⁹³ The Constitution expressly grants to Congress the exclusive power to regulate captures on land or water.¹⁹⁴ The Supreme Court interpreted the Constitution in *Youngstown Sheet and Tube Co.* and rejected broad presidential authority to act in a role granted solely to Congress.¹⁹⁵ Accordingly, the President does not have the constitutional authority to regulate captures on land or water,¹⁹⁶ which includes detainees captured during times of war.

Advancing legal opinions contrary to the Constitution and Supreme Court precedent is dishonest and a misrepresentation of the law. Thus, in advising the President that he could disregard the GPW, the WHC delivered legal advice that was a dishonest misrepresentation of the law, in violation of Model Rule 8.4.

Further, the WHC advanced a position that was not supported by existing law.¹⁹⁷ If a position is not supported by existing law, or one which “misstates” the law, it is considered a “false opinion,”¹⁹⁸ which in turn violates Discipline Rule 7-102 of the Model Code. By misrepresenting Supreme Court precedent, the WHC advanced a legally inaccurate opinion in violation of Discipline Rule 7-102.

The WHC also opined that the GPW does not apply to al Qaeda and the Taliban, because (1) “the war on terrorism is a new kind of war”; (2) the “Taliban . . . [is] not a government, but a militant, terrorist-like group”; and (3) “Afghanistan is a failed state and the Taliban “did not exercise full control over the territory and people.”¹⁹⁹

191. Lawyers’ Statement, *supra* note 116, at 2.

192. WHC Memo, *supra* note 18.

193. Lawyers’ Statement, *supra* note 116, at 2 (“[The memo] directly contradicts several major Supreme Court decisions . . . and specific provisions of the Constitution itself.”); *see also* Bilder & Vagts, *supra* note 1, at 690-91 (“[T]he memoranda’s contention . . . is legally untenable in view of the Constitution[] . . . and . . . the Supreme Court’s landmark decision in [*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)].). *See generally* Paust, *supra* note 25.

194. U.S. CONST. art. I, § 8, cl. 11.

195. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

196. *Id.*

197. *See* Bilder & Vagts, *supra* note 1, at 690-91 (“[T]he memoranda’s contention . . . is legally untenable in view of the Constitution’s express grant to Congress . . .”)

198. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 346 (1985).

199. *See* WHC Memo, *supra* note 18.

However, the provision of the WHC Memo that advised the President the GPW may not apply to terrorists in the war against terror is inconsistent with the international law of the GPW. Even if the Taliban and al Qaeda are militant, terrorist like groups, the GPW applies to all conflicts and all fighters across the globe.²⁰⁰ There are no groups of fighters or persons that are not covered under the GPW.²⁰¹ Further, the contention that Afghanistan was a failed state contradicts the official United States position.²⁰²

The WHC's justifications were erroneous and misstated the law. "Knowingly misstating . . . law . . . is . . . [a] misrepresentation."²⁰³ Since these statements and opinions misrepresented the official U.S. position,²⁰⁴ the WHC acted in violation of Model Rule 8.4.

Additionally, Disciplinary Rule 7-102 states that a lawyer may advance a claim contrary to existing law if he has a good faith justification for the modification.²⁰⁵ Stating that terrorists do not fall into any category protected by the GPW is not currently supported by any legal authority. Yoo argued that terrorists are not fighting on behalf of any nation and therefore are illegal enemy combatants not protected by the GPW.²⁰⁶ However, there are many who believe that there is no person or conflict that is not covered under the Geneva Conventions.²⁰⁷ It is difficult to determine if the WHC's argument will suffice as a good faith justification to avoid a violation of Disciplinary Rule 7-102.

2. WHC May Not Counsel a Client on How to Evade Prosecution Under Domestic or International Law for War Crimes

A lawyer must walk a fine line between giving an opinion on a proposed action's legal consequences and giving an analysis on how

200. See Lawyers' Statement, *supra* note 116, at 1; see also Mayer, *supra* note 13, at 112-14; Paust, *supra* note 23, at 511-12.

201. See Mayer, *supra* note 13, at 112-14; see also Paust, *supra* note 158, at 5; Lawyers' Statement, *supra* note 116, at 1; Powell, *supra* note 143, at 125.

202. Mayer, *supra* note 13, at 112; Powell, *supra* note 143, at 124.

203. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 346 (1985).

204. Rule 8.4 of the Model Rules of Professional Conduct prohibit a lawyer from "engaging in conducting involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROF'L CONDUCT R. 8.4 (1983). "Knowingly misstating facts or law . . . is 'conduct involving dishonesty, fraud, deceit, or misrepresentation . . .'" ABA opinion 346. Therefore, a knowing misstatement of law violates Rule 8.4.

205. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1980).

206. Mayer, *supra* note 13, at 112.

207. See Lawyers' Statement, *supra* note 116, at 1; Mayer, *supra* note 13, at 112-14; Paust, *supra* note 23, at 511-12.

the client may engage in unlawful conduct with impunity.²⁰⁸ Model Rule 1.2(d) prohibits a lawyer from advising a client on how to violate or evade the law.²⁰⁹ However, the legal advice of the WHC illustrates a common plan to develop a legal framework to shield U.S. officials and nationals from domestic criminal prosecution for war crimes.²¹⁰

Here, the WHC advised the President that if he simply did not apply the GPW to the Taliban, then U.S. officials could not be prosecuted for war crimes committed against the Taliban.²¹¹ This legal opinion provided a defense for anyone charged with a war crime.²¹² A war crime under the WCA is defined as a grave violation of the GPW.²¹³ If the GPW does not apply to the Taliban, there can not be a violation of the WCA against the Taliban.

Liability for war crimes under domestic law has been tested and it has been successfully evaded. Over twenty-five prisoners have died in American custody; torture by U.S. servicemen is the suspected cause.²¹⁴ One soldier who chained an Afghan prisoner to the ceiling and kicked and beat him until he died was charged with manslaughter.²¹⁵ Twenty-one soldiers have been listed for prosecution relating to other torture-inflicted deaths but have only been charged with murder, negligent homicide, and assault.²¹⁶ These deaths may have resulted from torture, a grave breach of the GPW, and should be actionable under the WCA.²¹⁷ Therefore, U.S. servicemen can commit, and have committed, war crimes against the Taliban without violating the WCA. The WHC manufactured a legal route for U.S. servicemen to commit war crimes and avoid domestic criminal prosecution,²¹⁸ thus violating Model Rule 1.2(d).

208. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1983).

209. *Id.*

210. *See* Paust, *supra* note 108; *see also* Bilder & Vagts, *supra* note 1, at 694; Lewis, *supra* note 20.

211. WHC Memo, *supra* note 18.

212. *Id.*

213. 18 U.S.C. § 2441 (2005).

214. Jehl & Schmitt, *supra* note 16.

215. *Id.*

216. Jehl, *supra* note 16. In another death caused by torture, a soldier lifted an Iraqi to his feet by a baton held to his throat. *Id.* This man was not charged with any crime. *Id.* Also, sixteen other soldiers were not prosecuted at all for the death of three prisoners. *Id.* In one of the deaths, the soldier was not charged because he had not been "well informed of the rules of engagement." *Id.*

217. 18 U.S.C. § 2441.

218. *See* Paust, *supra* note 108; Bilder & Vagts, *supra* note 1, at 690-95; Lewis, *supra* note 20; Segal, *supra* note 25. *See generally* THE TORTURE PAPERS, *supra* note 23; 18 U.S.C. § 2441.

C. Conflicts of Interest Inherent in the WHC

The WHC's duty to zealously advocate for the client often overpowers the duty to provide independent and objective legal advice.²¹⁹ The WHC must further the interests and policies of the President, but since sound legal advice "can be a political disaster, the presidential counsel constantly sacrifices legal ground for political advantage."²²⁰ For the WHC, the duty to provide objective legal advice is often trumped by the President's need for legal advice that furthers his policy goals.²²¹

The ethical duty to remain objective and independent may be subverted by the strong loyalty to the President.²²² John W. Dean, a former WHC lawyer to Richard M. Nixon, pled guilty to a felony charge of obstructing justice and defrauding the United States for his activities in the Watergate cover-up.²²³ Dean claims that many illegal acts were committed out of loyalty to the President.²²⁴ Those who were loyal to Nixon were loyal to the President they thought he was, or could be, not the dishonest and corrupt President that he was.²²⁵ Nixon was forced to resign only after he lost the loyalty and support of his staff at the White House.²²⁶

A President has the ability to attract dangerous loyalty that can lead to compromising ethical duties, "because of the commanding aura of his high office."²²⁷ Egil "Bud" Krogh, a White House assistant who pled guilty to charges stemming from a burglary, illustrated it well: "Nixon, to me, was much larger than life. He was a huge, al-

219. See Bendavid, *supra* note 37. See generally Wang, *supra* note 29 (discussing the position of the WHC lawyer).

220. Bendavid, *supra* note 37.

221. See *id.*

222. See *id.* A professor of political science at the University of Texas, stated that Alberto Gonzales was selected to be head of the WHC because he has the "potential for loyalty." Charlie Savage, *Nominee Benefits from Friends in High Places*, L.A. DAILY J., Jan. 7, 2005, at 5. Professor Bruce Buchanan suggests that Gonzales was an unknown Texas lawyer who has risen to public office as a result of his connections to the "Bush family [political] machine." *Id.* For an interesting look into the background of Gonzales, including his accepting of campaign contributions for re-election to the Texas Supreme Court from Enron while they were appearing before his court, see *id.*

223. *Dean Disbarred in Virginia for "Unethical Acts,"* N.Y. TIMES, Feb. 1975, at A19.

224. Dean, *supra* note 39, at 621.

225. *Id.* at 620-21 ("Today it is clear that Richard Nixon and his White House were corrupt, dishonest and venal . . .").

226. *Id.* at 622.

227. See *id.*

most mythic being when I first went to work there. I guess the word is awe, both for him and his office.”²²⁸

Certainly all Presidents understand the commanding authority and allegiance that their high office commands and use them effectively.²²⁹ Nixon was able to use the power of his office to command “blind loyalty” from the attorneys in the WHC, who in turn committed illegal acts.²³⁰ Some of the lawyers did not perceive any wrongdoing simply because they were doing their job “in service of the President, or at his direct request.”²³¹

The problem of blind loyalty with the WHC is compounded by the lack of accountability. The lawyers of the WHC have an obligation to abide by the Constitution and other applicable laws when rendering advice to the President, but there is practically no review of their opinions.²³² The WHC lawyers “rarely” face consequences for their conduct and are effectively shielded from any penalties.²³³ Although WHC lawyers’ theories are subject to review, governmental agencies, national courts, and Congress all give great deference to their opinions.²³⁴ Furthermore, the zealous advocacy of the WHC is not counterbalanced by an adversary.²³⁵ In reality, there is no “safety net” to mandate respect for the law or international legal order except for the professional integrity of these lawyers.²³⁶ In essence, the only checks on the actions of the WHC are the President and the lawyers themselves.

Because of the many conflicts of interest, and the minimal safeguards on their behavior, the WHC must be held accountable to the rules governing professional responsibility. Recognizing that the WHC lawyer is “always buffeted by the powerful crosswinds of politics, ethics, loyalty and the law—winds that often push him in opposing directions,”²³⁷ the rules of professional responsibility provide the lawyer with guidelines on how to counter these conflicts. The lawyers

228. *Id.*

229. *See id.*

230. *See id.*

231. *Id.*

232. *See Bilder & Vagts, supra* note 1, at 693.

233. *See Segal, supra* note 25.

234. Bilder & Vagts, *supra* note 1, at 693.

235. Segal, *supra* note 25.

236. Bilder & Vagts, *supra* note 1, at 693.

237. Wang, *supra* note 29, at 117 (quoting Bendavid, *supra* note 37). Bendavid states: “You represent the president, but also the institution of the presidency. Your advice must be legally sound, but also politically astute. Your job is to provide ethical guidance, but also to keep your boss happy.” Bendavid, *supra* note 37.

of the WHC are subject to the disciplinary rules in the state where they are licensed to practice, and they must be held accountable to these rules.²³⁸

V. A PROPOSED SOLUTION FROM NEW ZEALAND

The WHC has a very difficult job. The WHC must advise the President on the legality of certain issues; but there are political pressures to reach conclusions that further the policy goals of the President. The WHC must be loyal to the goals of the President, but this loyalty can cause conflicts between adhering to the ethical duties of a lawyer and providing the client with the legal framework to institute his policies. The WHC could be more effective if the pressure of loyalty was lifted.²³⁹ To provide effective and ethical representation to the President, the WHC must evolve into an institution similar to the top legal advisor of the executive branch in New Zealand. The final part of this Comment will look at the New Zealand model of providing the executive branch with independent legal advice.

A. *The Legal Advisory Department to the Executive Branch in New Zealand*

New Zealand is a constitutional monarchy consisting of a parliamentary government.²⁴⁰ The Queen of New Zealand is the formal head of state and the Governor-General represents the crown, but their duties are mostly ceremonial.²⁴¹ The Prime Minister is the head of the executive branch and his appointed cabinet,²⁴² while the Parliament has the power to make the laws.²⁴³

The Solicitor General is the chief legal advisor to the government of New Zealand and an officer of the executive branch.²⁴⁴ The other law officer of the government is the Attorney General, who is appointed by the Prime Minister and is a member of his cabinet and Par-

238. 28 U.S.C. § 530B(a) (2002).

239. "Those who've emerged from the crucible of the office say the pressures can make decisions agonizingly difficult." Bendavid, *supra* note 37. "In the case of government lawyers providing advice to policy-makers, the counseling model of lawyering is clearly better than the advocacy model." Segal, *supra* note 177.

240. See GEOFFREY PALMER & MATTHEW PALMER, BRIDLED POWER 3 (1997).

241. *See id.* at 40-41.

242. *Id.* at 52.

243. *Id.* at 128.

244. John McGrath, *Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General*, 18 N.Z. U. L. REV. 197, 207-08 (1998).

liament.²⁴⁵ The Attorney General is a legal advisor to the government and is responsible for seeing that the government is managed in compliance with the law.²⁴⁶

The Solicitor General is the head of the Crown Law Office (CLO).²⁴⁷ The two primary goals of the CLO are to ensure that the actions of the executive government are lawful and that the government is not prevented from lawfully implementing its policies.²⁴⁸ The client of the Solicitor General is the government.²⁴⁹ The Solicitor General advises the Prime Minister and the departments of the government on a variety of public functions, including the actions of the government, the constitutionality of its policies, and the relationships between the departments.²⁵⁰

The office of the Solicitor General was created in 1875 in response to concerns that the Attorney General would be unable to offer legal advice independent of political considerations.²⁵¹ The Crown recognized the importance of independent legal thought and realized that the arguments of the Attorney General would be shaped by the government's interests. The concern over the tension between holding a political office and the "duty to act independent[] of political considerations" in dispensing legal advice to the government, led to the creation of the non-political office of the Solicitor General.²⁵² The Solicitor General was created to be a non-political legal advisor to counter the inherent political bias of the Attorney General as a political officer.²⁵³

The Solicitor General and the WHC have much the same functions. Both render legal advice to the executive branch in "the zone where . . . law and policy [converge]" and often conflict.²⁵⁴ Like the

245. *Id.* at 198; see RICHARD MULGAN, *POLITICS IN NEW ZEALAND* 75 (2d ed. 1997).

246. McGrath, *supra* note 244, at 203.

247. *Id.* at 200.

248. *Id.* at 214; CROWN LAW OFFICE STATEMENT OF INTENT 2 (2005), available at http://crownlaw.govt.nz/artman/docs/cat_index_7.asp.

249. McGrath, *supra* note 244, at 207.

250. *Id.* at 208; John McGrath, *The Crown, the Parliament and the Government*, 7 WAIKATO L. REV. 1, 2 (1999).

251. McGrath, *supra* note 244, at 197-98.

252. *Id.*

253. See *id.* at 201 (stating that the appointment of a non-political Solicitor General was certainly related to the political office of Attorney General). See generally Crown Law Office, *Historical Information*, GOVT.NZ, at <http://www.crownlaw.govt.nz/pagepub/docs/about/historical.asp> (last visited Dec. 6, 2005).

254. McGrath, *supra* note 244, at 208 (discussing Solicitor General); CROWN LAW OFFICE STATEMENT OF INTENT, *supra* note 248, at 2 (discussing Solicitor General); Bendavid, *supra* note 37 (discussing the WHC).

WHC, the Solicitor General advances the interests of the executive branch.²⁵⁵ However, the latter does not advance the government's position if "it can clearly be discredited."²⁵⁶ The Solicitor General always keeps the interest of the state in mind, but "the highest value is in maintaining the integrity of the law."²⁵⁷ The Solicitor General recognizes that the best interests of the Crown are not always in "the narrow interests of the government of the day or the bureaucracy which supports it."²⁵⁸ Needless to say, the Solicitor General's popularity on legal advice will inevitably "swing wildly."²⁵⁹

The significant difference between the CLO and the WHC is that the former is an independent government office.²⁶⁰ The latter is more akin to New Zealand's Attorney General, since both are politically accountable. The established constitutional practice in New Zealand is that the Solicitor General and the CLO are non-political officers.²⁶¹ It is well recognized in New Zealand that the duties exercised by the CLO require independence from the current government.²⁶² The CLO operates with less direction from the state so the possibility of influence is dramatically less than it is for the WHC.

The politically independent nature of the office is well established. The Solicitor General is appointed by the Governor-General at

255. CROWN OFFICE STATEMENT OF INTENT, *supra* note 248, at 2 (discussing the role of the Solicitor General); Wang, *supra* note 29, at 125 (discussing the role of the WHC).

256. *Id.* at 207.

257. McGrath, *supra* note 244, at 208.

258. *Id.* at 207.

259. *Id.* at 208.

260. *Id.* at 200; McGrath, *supra* note 250, at 2; The White House, White House Offices, <http://www.whitehouse.gov/government/off-descrp.html> (last visited Dec. 4, 2005) (listing the office of the WHC as a "White House Office," indicating that the office falls within the executive branch and is not an independent office).

261. McGrath, *supra* note 244, at 198.

262. *Id.* New Zealand has a judicial system that is also independent with judges who are appointed and have life tenure. MULGAN, *supra* note 245, at 169-70. They have lower courts of general jurisdiction, the District Courts, an intermediary appellate court called the High Court, and a Court of Appeals, which, as the name suggests, takes appeals from the judgments rendered by the lower courts. *Id.* The final judicial authority rests with the Judicial Committee of the Privy Council in London. *Id.* at 170. The justices of the Court of Appeal and the High Court, unlike the District Courts, are appointed and tenured. *Id.* The CLO, and the Solicitor General, is also an independent institution, but provides legal advice to the executive branch so the legality of a policy or action may be advised upon before it is test during a lengthy court process. McGrath, *supra* note 244, at 208. An independent WHC may look similar to the United States Supreme Court, but an independent WHC would be more efficient in rendering unbiased policy advice than waiting for a ruling from the Supreme Court. Also, the WHC would be able to give advisory opinions whereas the Supreme Court cannot.

the “prerogative” of the Crown, and the position is permanent.²⁶³ The Solicitor General is free from political responsibilities and is able to form legal arguments without having to determine if they are congruent with the policy or preferred arguments of the executive branch.²⁶⁴ The CLO is beyond suspicion of party bias.²⁶⁵ The independence enjoyed by the CLO is the freedom from conforming to the political perspective of the party in power.²⁶⁶ Moreover, the CLO has the freedom to advise the executive government on the application of the law, as viewed by the CLO.²⁶⁷

B. Application of the New Zealand Model

The structure of the WHC must be modified and follow the lead of New Zealand to make the WHC an independent government agency.²⁶⁸ Over a century ago, New Zealand recognized it was impossible to expect sound legal advice from a politically accountable lawyer, and so it chose to make its top legal advisor independent.²⁶⁹ The United States must follow the example of New Zealand because the WHC faces the same political pressures as the former Attorney General of New Zealand. The United States is the world’s biggest superpower and its policy decisions undeniably affect the entire world community; thus, it has a greater responsibility to ensure the legality of those decisions. Just as the U.S. judiciary functions as an independent check on the other two branches, a CLO-type WHC would function as an independent unit immune from the political pressures that influenced one WHC lawyer to turn the United States onto a path

263. McGrath, *supra* note 244, at 201; McGrath, *supra* note 250, at 2.

264. *Id.* at 207.

265. *See id.* at 200 (stating that the CLO is an independent government agency).

266. *Id.* at 216.

267. McGrath, *supra* note 244, at 216; *see* CROWN LAW OFFICE STATEMENT OF INTENT, *supra* note 248, at 3.

268. “In the case of government lawyers providing advice to policy-makers, the counseling model of lawyering is clearly better than the advocacy model.” Segal, *supra* note 25. The New Zealand model of an independent advisor to the executive branch encompasses the *counseling model of lawyering*, whereas the current WHC is closer to an *advocacy model* and resulted in the WHC Memo.

269. McGrath, *supra* note 244, at 197 (“[T]here is increasing concern over the tension between holding political office and discharging a duty to act independently of political considerations.”).

of torture,²⁷⁰ which has caused nearly thirty deaths²⁷¹ and the condemnation of the world community.²⁷²

If the WHC position was permanent and did not simply change with every new President, then the WHC would not suffer from the political pressures currently inherent in the position.²⁷³ Independent and objective advice is required from the WHC, but compliance with these ethical duties may not be possible for the WHC in the current political landscape.²⁷⁴ The duty to the President as a client, coupled with the duty to zealously advocate for the President, make compliance with the duty to remain independent and objective nearly impossible. If the WHC does not furnish the legal advice or the legal justification for the policies the President wants, then the President may simply find another lawyer who will.²⁷⁵

The WHC Memo is a good example of how the President can elicit legally unsound advice from the WHC simply to further his policies. If the WHC was an independent agency, with the same duties to the client and of zealous advocacy, would the lawyer reach the same conclusions as this WHC? Would the lawyer advocate for the legal justification for torture and provide a road map to commit war crimes with impunity? I think not.

CONCLUSION

The now-common practice of torture by U.S. officials and nationals is morally repugnant and illegal under domestic and international law.²⁷⁶ The WHC in charge of interpreting the law in the WHC Memo did not fulfill their obligations of professional responsibility. The professional conflicts inherent in the WHC position make it nearly impossible to render legally sound advice while keeping the President happy. Loyalty to the President can create professional con-

270. See Mark Danner, *supra* note 25 (“[A] path the Bush Administration set . . . has transformed the United States from a country that condemned torture and forbade its use to one that practices torture routinely.”).

271. Jehl, *supra* note 16; Jehl & Schmitt, *supra* note 16.

272. See Bilder & Vagts, *supra* note 1, at 690; Paust, *supra* note 108 (“[T]here is evidence of a Common Plan to violate the 1949 Geneva Conventions.”).

273. See Bendavid, *supra* note 37. See generally Wang, *supra* note 29 (discussing the legal and ethical duties of the WHC).

274. MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983); Bendavid, *supra* note 37.

275. Goldfarb, *supra* note 30.

276. However, apparently the Bush Administration claims, despite recent “reports of secret CIA prisons where terrorism detainees might have been mistreated,” “the United States is the world leader on human rights.” Associated Press, *U.S. Leads the Way on Human Rights, White House Says*, SAN DIEGO UNION-TRIB., Dec. 3, 2005, at A9. “The president has made it very clear that we do not torture, he would never condone torture or authorize the use of torture.” *Id.* (quoting White House press secretary Scott McClellan).

licts of interest. The United States should look to the New Zealand model of providing the government legal advice and establish a legal advisor independent of the executive branch. Without independent thought, the WHC may continue to advance legally unsound arguments to further the policies of the President, possibly to the detriment of the people of the United States and the world community.

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* J.D. candidate April 2006, California Western School of Law; B.A. 2003, University of Washington. Thanks to Professors Ruben J. Garcia for brainstorming and Jo Ann Roake for her generous use of red ink. I thank my parents, Ramona and William, for always encouraging and teaching me to question, respectfully; brother Anton for setting the bar high; Lacey for keeping me sane; Bouyad, Fro, Crazy Dan, and Big Steve for keeping it real. I dedicate this Comment to those whose voices have been have been silenced by torture.

