
GOVERNMENT COUNSEL AND THEIR OBLIGATIONS

I. INTRODUCTION

Shortly after being sworn in as the seventy-ninth Attorney General of the United States, John Ashcroft was asked whether he saw his role as being an “attorney for the president or the country.”¹ “Yes,” was his cryptic reply.² Although he gave his answer in jest, the new Attorney General could be forgiven for any confusion he might have had. The question of the identity of the government lawyer’s client has long been controversial. One scholar, writing in the early 1990s, described the issue as one that had “vexed decision-makers and commentators for many years.”³ Despite attempts to answer the question, it remains far from settled.⁴ The related question of what obligations a government attorney owes to his or her client also remains unanswered. These questions are significant because of the influence that government attorneys enjoy⁵ and the marked increase in the importance of their function in recent years.

Recent developments have magnified the need to clarify the role of government attorneys, particularly those in the executive branch.⁶ First and most importantly, high-level government lawyers have played a central role in the government’s response to the terrorist attacks of September 11, 2001. As Professor Jack Goldsmith, former

¹ NANCY V. BAKER, *GENERAL ASHCROFT: ATTORNEY AT WAR* 21 (2006) (quoting *Larry King Live* (CNN television broadcast Feb. 7, 2001) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0102/07/lkl.00.html>)) (internal quotation marks omitted).

² *Id.* (quoting *Larry King Live*, *supra* note 1) (internal quotation marks omitted).

³ Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 *GEO. J. LEGAL ETHICS* 291, 296 (1991). Professor Cramton offers several possible answers: “the public,” “the government as a whole,” “the branch of government in which the lawyer is employed,” “the particular agency or department in which the lawyer works,” and “the responsible officers who make decisions for the agency.” *Id.*

⁴ See Neil M. Peretz, *The Limits of Outsourcing: Ethical Responsibilities of Federal Government Attorneys Advising Executive Branch Officials*, 6 *CONN. PUB. INT. L.J.* 23, 27–29 (2006) (discussing the ongoing debate); Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 *S. TEX. L. REV.* 269, 271 (1999) (same); Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 *HARV. L. REV.* 1170, 1173–78, 1182–85 (2002) (focusing on attorneys for government agencies and noting the disagreement between commentators over the nature of the government lawyer’s client).

⁵ See Robert H. Jackson, *Government Counsel and Their Opportunity*, 26 *A.B.A. J.* 411, 412 (1940) (“Fundamental things in our American way of life depend on the intellectual integrity, courage and straight thinking of our government lawyers. Rights, privileges and immunities of our citizens have only that life which is given them by those who sit in positions of authority.”).

⁶ This Note focuses on high-level counselors in the executive branch such as the Attorney General, Assistant Attorneys General, the White House Counsel, and the Vice President’s Counsel. However, the model it proposes can apply to other government attorneys (such as counselors in state government or congressional staff attorneys).

head of the Office of Legal Counsel (OLC), put it, “never in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11.”⁷ Government lawyers have also been at the forefront of the Bush Administration’s effort to expand (or in its view, restore) the powers of the executive branch.⁸ Finally, Administration lawyers have been embroiled in controversy after the revelation of their role in the allegedly politicized firing of several U.S. Attorneys in 2005⁹ and in the authorization of likely illegal behavior such as alleged torture of terrorism suspects and warrantless surveillance of Americans.¹⁰

In addition to government attorneys’ growing influence, a number of factors unique to their counseling function weigh in favor of clarifying their role.¹¹ Government lawyers interpret a vast amount of law, “[f]rom questions as profound as the circumstances under which the United States may commit its troops overseas” to “issues as mundane as when a regulation is deemed ‘promulgated.’”¹² These interpretations are rarely subject to judicial review because potential plaintiffs lack standing or because courts apply the political question doctrine.¹³

⁷ JACK GOLDSMITH, *THE TERROR PRESIDENCY* 129–30 (2007).

⁸ See *id.* at 132; FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 158–61 (2007). The two issues are related. The Administration argued that “the power of the president in time of war [is] virtually untrammelled” in order to provide legal cover for actions taken in the global war on terror. Daniel Klaidman et al., *Palace Revolt*, *NEWSWEEK*, Feb. 6, 2006, at 34, 37. Often, the Administration’s efforts to promote its vision of executive power have hampered its efforts at responding to the threat of terror. See GOLDSMITH, *supra* note 7, at 205–09 (arguing that President Bush should have emulated past Presidents and worked with Congress, in a bipartisan fashion, to craft his security policy).

⁹ See, e.g., Eric Lipton & David Johnston, *Justice Dept. Announces Inquiry into Its Hiring Practices*, *N.Y. TIMES*, May 3, 2007, at A18; Karen Tumulty et al., *Inside the Scandal at Justice*, *TIME*, May 21, 2007, at 44.

¹⁰ See, e.g., Neil A. Lewis, *Broad Use of Harsh Tactics Is Described at Cuba Base*, *N.Y. TIMES*, Oct. 17, 2004, at A1; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, *N.Y. TIMES*, Dec. 16, 2005, at A1; see also Memorandum from Alberto Gonzales, White House Counsel, to President George W. Bush (Jan. 25, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 118 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

¹¹ This Note focuses on government attorneys’ counseling function rather than their role in criminal prosecution or civil litigation. Counselors generally interpret the law before decision-makers take action. See generally Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *FORDHAM L. REV.* 275 (1992).

¹² Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 *ADMIN. L. REV.* 1303, 1304 (2000).

¹³ See *id.*; see also GOLDSMITH, *supra* note 7, at 32 (“[M]ost legal issues of executive branch conduct related to war and intelligence never reach a court, or do so only years after the executive has acted.”); cf. *Mitchell v. Forsyth*, 472 U.S. 511, 522–23 (1985) (noting that, while legislators and judges are subject to checks, the Attorney General may not be).

Further, personnel throughout the government rely on these legal opinions, increasing the need that they be correct.¹⁴

Though the role of government attorneys remains difficult to clarify, lessons from the corporate accounting scandals of 2001–2002 can provide guidance. In that period, auditors and attorneys failed to prevent fraudulent conduct, spurring a series of reforms. The American Bar Association (ABA) adopted a new version of Rule 1.13 of the Model Rules of Professional Conduct,¹⁵ which affirmed that a lawyer for an organization must view the organization, rather than its officers, as the client and imposed a duty to report potential violations of the law to the organization's leaders.¹⁶ These reforms embraced a view of attorneys as gatekeepers, amplifying their power to halt malfeasance by decisionmakers and prevent harm to the client or to innocent third parties. Though this duty extends to government attorneys in theory, the ABA left the matter open by failing to define the relevant client.¹⁷

This Note argues for a definition of the client on three levels: the President, the presidency, and ultimately, the public through their representatives in Congress. Under this hierarchy, the attorney primarily has a duty to advance the aims of the current President, but in cases of conflict, the duty to serve the public interest predominates. Part II discusses past attempts to define the client and duties of the government attorney and argues that they have failed to advance a satisfactory model. Part III summarizes the corporate scandals of 2001–2002, focusing on the case of Enron, and explores the reformed ethical duties of corporate attorneys, which now include a stronger gatekeeping function. Part IV argues for a new model for government attorneys that parallels reforms from the corporate world. Part V briefly concludes.

¹⁴ See, e.g., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 78–79 (2004) [hereinafter 9/11 COMMISSION REPORT], available at <http://www.9-11commission.gov/report/911Report.pdf> (describing the role of lawyers' opinions in creating a "wall" that prevented information sharing among government intelligence agencies).

¹⁵ MODEL RULES OF PROF'L CONDUCT R. 1.13 (2007); see also Jenny E. Cieplak & Michael K. Hibey, Note, *The Sarbanes-Oxley Regulations and Model Rule 1.13: Redundant or Complementary?*, 17 GEO. J. LEGAL ETHICS 715, 715–16 (2004).

¹⁶ MODEL RULES OF PROF'L CONDUCT R. 1.13(b).

¹⁷ See *id.* R. 1.13 cmt. 9. Without identifying the governmental client, an attorney will not know the "higher authority" to whom he or she must report. This identification can make a difference. If one adopts Professor Geoffrey Miller's view, for example, the client is merely the officer with responsibility for a decision. See Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987). If that officer wants to take a harmful action, reporting to him or her would be futile.

II. PAST ATTEMPTS TO DEFINE THE ROLE OF THE GOVERNMENT ATTORNEY

Discussion of the role of attorneys for the government has long been framed by the Supreme Court's statement in *Berger v. United States*¹⁸ that a prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."¹⁹ Though the government attorney's role is clear when serving as a prosecutor,²⁰ ambiguities arise when the attorney acts as a counselor. This Part briefly summarizes and critiques commentators' attempts to clarify the matter, focusing on high-level advisors. These attempts roughly fall along two related axes: commentators define the attorney's client either narrowly or broadly and define the attorney's role as either that of an advocate or that of a neutral adjudicator.

A. Identifying the Client

Scholars and practitioners have proposed a range of definitions for the government attorney's client, but the debate is "primarily between a broader loyalty to 'the public interest' or the government as a whole, on the one hand, and a more restricted vision of the government lawyer as the employee of a particular agency, on the other."²¹ Each has benefits and drawbacks, and neither is ultimately satisfactory.

1. *The Public Interest Model.* — The broadest view of the government attorney's client is based on the reasoning that "the Government is a composite of the people" and "Government counsel therefore has as a client the people as a whole."²² In recent years, scholars have expanded on this, arguing that a government attorney owes duties to a broad "public interest" rather than to any individual member of government.²³ Under this view, a counselor has a duty to formulate legal opinions based on what is best for the public, rather than on the outcome that the attorney's direct employer may desire. This view har-

¹⁸ 295 U.S. 78 (1935).

¹⁹ *Id.* at 88.

²⁰ Cf. Bruce A. Green, *Must Government Lawyers "Seek Justice" In Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 235–37 (2000).

²¹ Cramton, *supra* note 3, at 296.

²² *Id.* at 298 (quoting Judge Charles Fahy, Special Ethical Problems of Counsel for the Government, Lecture at Columbia University School of Law (Apr. 11, 1950), in 33 FED. B.J. 331, 332 (1974)) (internal quotation marks omitted); see also Green, *supra* note 20, at 237–38 (arguing for this rule in government civil litigation).

²³ See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 789–802 (2000); see also Ugarte, *supra* note 4, at 275 (arguing for an approach that views "the common good" as the client).

monizes with the prosecutor's duty to ensure not that the state "shall win a case, but that justice shall be done."²⁴

This model is open to several lines of attack. First, it is seldom clear what action the public interest requires, and each lawyer may have a different conception of the public interest.²⁵ In addition, this approach arguably undermines the separation of powers: "In a system of checks and balances it is not the responsibility of an agency attorney to represent the interests of Congress or the Court. Those departments have their own 'constitutional means and personal motives' to protect their prerogatives."²⁶ Finally, an approach that defines the client broadly and views the attorney as a neutral adjudicator disserves the principle of democratic accountability: voters base their decisions in part on a candidate's legal agenda and an unelected government attorney should not block it or blur the elected official's responsibility.

2. *The Single Client Model.* — The narrowest definition would make the government attorney's duties run to "the officer who has the legitimate power to decide upon the course of action."²⁷ The government attorney would simply owe to his or her direct supervisor the same duties that a private attorney owes to his or her client. In preparing a legal opinion, the attorney would seek to advance the supervisor's interests.

This approach is also open to attack. First, the model ignores the unique nature of the government attorney's work on many levels. Zealous advocacy may be proper in a matter that could later be open to judicial review, but executive branch attorney opinions seldom are. Further, government attorneys' conclusions are backed by the coercive power of the state, even outside of the prosecution context. Opinions that are issued by the Attorney General are controlling in the executive branch, a fact that may have a pronounced effect on the rights of individuals.²⁸ Finally, this model too may undermine democratic accountability: a president who wishes to undertake a controversial act may proceed on the basis of a faulty legal opinion, in secret, rather than seeking the approval of Congress or the American people.²⁹

²⁴ *Berger*, 295 U.S. at 88.

²⁵ See Miller, *supra* note 17, at 1294–95. But see Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty To Serve the Public Interest*, 42 BRANDEIS L.J. 13 (2003).

²⁶ Miller, *supra* note 17, at 1296.

²⁷ *Id.* at 1296 n.7.

²⁸ See Moss, *supra* note 12, at 1318–21.

²⁹ Of course, rejecting the public interest or neutral model does not mean the attorney has no limits in advocating for his or her client. Like any executive branch officer, the attorney takes an oath to preserve, protect, and defend the Constitution. See *In re Lindsey*, 158 F.3d 1263, 1272–73 (D.C. Cir. 1998).

Courts have not fully embraced either of the two models when the issue has arisen in claims of governmental attorney-client privilege. The Second Circuit's approach in *In re Grand Jury Investigation*³⁰ is representative. Like the Eighth³¹ and D.C. Circuits,³² that court had little difficulty concluding that the governmental body (in that case the Office of the Governor of the State of Connecticut) was the client.³³ Courts temper this view, however, by "stress[ing] that a lawyer representing a governmental client must seek to advance the public interest," rather than "merely the partisan or personal interests of the government entity or officer involved."³⁴

B. Defining the Scope of the Attorney's Duty

A related strand of debate, unique to the government attorney's counseling role, focuses on the stance the attorney should adopt in formulating an opinion for the client. Some argue for a neutral, adjudicative role, while others argue that the attorney should act as an advocate for his or her client.³⁵

1. *The Neutral Model.* — Proponents of this model view the government attorney's counseling role as that of a disinterested, impartial observer. For example, Caleb Cushing, Attorney General under President Franklin Pierce, viewed his role as "quasi judicial."³⁶ In his view, he was "not a counsel giving advice to the government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and legal obligation."³⁷ Professor Nancy Baker notes that many Attorneys General who followed adopted a similar view.³⁸ Under this model, the counselor seeks the "best" reading of the law and, since actual judicial review will likely be unavailable, prepares legal advice as one would draft a judicial opinion. Regardless of whom he or she identifies as the client, the attorney seeks to arrive at an outcome that a court would reach. Consequently, the lawyer would

³⁰ 399 F.3d 527 (2d Cir. 2005).

³¹ See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915–16 (8th Cir. 1997).

³² See *Lindsey*, 158 F.3d at 1268.

³³ See *Grand Jury Investigation*, 399 F.3d at 533.

³⁴ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. f (2000); see also *Gray Panthers v. Schweiker*, 716 F.2d 23, 33 (D.C. Cir. 1983) ("[G]overnment counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large.").

³⁵ Professor Nancy Baker first proposed this distinction. See NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789–1990, at 35 (1992).

³⁶ Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 334 (1854).

³⁷ *Id.*

³⁸ BAKER, *supra* note 35, at 35.

owe a duty “to provide the best, as opposed to a merely colorable, view of the law.”³⁹

2. *The Advocate Model.* — The opposing view would have the counselor adopt a position that attempts to advance the goals of his or her client. Justice Robert Jackson, for example, in his famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,⁴⁰ refused to accept as precedent an argument that he had made a decade earlier as President Franklin Roosevelt’s Attorney General. As he described it, “I do not regard it as a precedent for this, but, even if I did, I should not bind present judicial judgment by earlier partisan advocacy.”⁴¹

The neutral and advocate models are open to critiques similar to those raised against the public interest and single client models. The neutral model blurs the line of democratic accountability and deserves the separation of powers. Although there may be more guidance as to what the “best view” of the law requires than what the public interest requires, the model still invites subjectivity. The advocate model fails to take into account the unreviewable nature of much of the work that government attorneys do. All of the models, however, are open to a more serious critique, which has not received academic attention.

C. *A Shortcoming of Past Approaches*

Past proposals suffer from one common shortcoming: they fail to promote a gatekeeper role for government attorneys. A gatekeeper is essentially a watchdog — an independent professional who is able to “prevent wrongdoing by withholding necessary cooperation,” thereby “clos[ing] the gate.”⁴² To supplement the attorney’s power to refuse to participate in wrongdoing,⁴³ the conception of the attorney as gatekeeper imposes an obligation to report within the organizational client’s hierarchy and, if necessary, to report outside the organization.

In practice, a gatekeeper is expected to protect not only the organizational client, but innocent third parties as well. In the corporate context, for example, an attorney who is asked to prepare a materially false disclosure statement could withhold cooperation to prevent harm not only to investors, but also to the corporation itself or to employees and other stakeholders. Extending this model to government attor-

³⁹ Moss, *supra* note 12, at 1316; *see also* Peretz, *supra* note 4, at 58–59 (arguing that government attorneys should seek interagency consultation in order to arrive at the best reading of the law).

⁴⁰ 343 U.S. 579 (1952).

⁴¹ *Id.* at 649 n.17 (Jackson, J., concurring).

⁴² JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 2 (2006).

⁴³ *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2007).

neys, who serve decisionmakers whose acts can have a far more pronounced impact on individuals,⁴⁴ may be a valuable reform.

The true virtue of the gatekeeper model lies in the fact that it imposes reporting obligations and clear duties on attorneys. Proposals that merely urge attorneys to hold themselves to a higher standard without adding concrete duties will, as Professor John Coffee has noted, be “[l]ike a commencement address”: they “will be politely applauded — and largely ignored.”⁴⁵ On this view, adopting even the most idealistic position in the debate over the government attorney’s role may lead to little change in practice. A gatekeeper approach will reinforce ethical norms with clear duties and lead to practical impact. The reforms that followed the accounting scandals of the early part of this decade thus offer an approach that may prove more effective.

III. CORPORATE ATTORNEYS — GATEKEEPER FAILURE AND REFORM

The collapse of Enron, along with other corporate scandals, led to changes in the role of corporate attorneys and an embrace of the gatekeeper model. The reform movement that followed the Enron scandal mirrored efforts by the Securities and Exchange Commission (SEC) in the 1970s⁴⁶ and by banking regulators in the 1980s⁴⁷ to impose gatekeeping duties on corporate attorneys. Those efforts largely failed. In 2001 and 2002, however, reformers succeeded in introducing changes to the role of corporate attorneys. This Part briefly summarizes the role of attorneys in the Enron bankruptcy and analyzes the response of regulators. The Part concludes with a discussion of Professor Coffee’s recent work on the role of gatekeepers in preventing future scandals.

A. *Enron and Its Counselors*

The story of Enron’s bankruptcy is extremely complex but well known. Wrongdoers inside the company benefited from the assistance of attorneys, who provided advice on tactical decisions, structured transactions, and aided in preparing required disclosures. The attorneys’ failure can be summed up succinctly: “If there is no watchdog, it cannot bark.”⁴⁸ According to Professor Roger Cramton, the attorneys failed to function as watchdogs because they took “the position that they must do everything for the client that the client’s managers want

⁴⁴ See generally Jackson, *supra* note 5.

⁴⁵ COFFEE, *supra* note 42, at 228.

⁴⁶ See *id.* at 207–09; see also Susan P. Koniak, *When the Hurlyburly’s Done: The Bar’s Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1248 (2003).

⁴⁷ See COFFEE, *supra* note 42, at 213–15.

⁴⁸ *Id.* at 34.

them to do, providing the conduct is permitted by law,” but in doing so, they “gradually adopt[ed] a mindset that ignores and may eventually assist the client’s managers in illegality that harms third persons and the client entity.”⁴⁹ Contributing to the problem was the fact that Enron’s lawyers “confused the role of advocate in litigation or adversary negotiation with the need of corporate clients for independent, objective advice in the course of corporate decision-making.”⁵⁰

Enron was a Texas energy trading company that collapsed in the fall of 2001, costing ten thousand employees their jobs and approximately \$1.2 billion of their life savings.⁵¹ The roots of Enron’s failure lay in the company’s use of special purpose entities (SPEs) to finance transactions. The company sold assets to its SPEs, which were themselves owned by Enron and Enron insiders, to disguise asset losses and manipulate earnings.⁵² On October 16, 2001, the company announced that it was taking a \$544 million charge against earnings and reducing shareholders’ equity by \$1.2 billion because of transactions with an SPE.⁵³ This came on the heels of Jeffrey Skilling’s August 14 resignation as CEO and was shortly followed by another, larger restatement. The company filed for bankruptcy in December 2001.⁵⁴

Enron’s attorneys played a significant role in the scandal. Two months before the company’s bankruptcy, Sherron Watkins, an Enron Vice President, sent CEO Kenneth Lay a now-famous memorandum warning that Enron might “implode in a wave of accounting scandals.”⁵⁵ The company commissioned Vinson & Elkins, a prominent Houston law firm, to conduct an investigation of the issues the memorandum raised, even though the firm had helped to form the SPEs that were at the root of the company’s current troubles. The law firm compounded this problem when it conducted a perfunctory review,⁵⁶ interviewing only eight Enron managers, and issued a report that downplayed the risk to the company. Reviewing this a year later, the Special Investigative Committee of Enron’s board concluded that

⁴⁹ Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 173 (2002).

⁵⁰ *Id.*

⁵¹ See Jeffrey Toobin, *End Run at Enron*, NEW YORKER, Oct. 27, 2003, at 48, 48.

⁵² *Id.* at 49.

⁵³ See WILLIAM C. POWERS, JR. ET AL., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP. (2002), *excerpted in* ARTHUR L. BERKOWITZ, ENRON: A PROFESSIONAL’S GUIDE TO THE EVENTS, ETHICAL ISSUES, AND PROPOSED REFORMS 143, 145 (2002) [hereinafter ENRON REPORT].

⁵⁴ COFFEE, *supra* note 42, at 18.

⁵⁵ Memorandum from Sherron Watkins to Kenneth Lay (Aug. 2001), *in* BERKOWITZ, *supra* note 53, at 137, 137.

⁵⁶ See Cramton, *supra* note 49, at 162–63.

“Vinson & Elkins should have brought a stronger, more objective and more critical voice to the disclosure process.”⁵⁷

This investigation was far from the only involvement by lawyers in the Enron scandal. For example, Kirkland & Ellis, a major Chicago-based law firm, represented several SPEs and signed off on related-party transactions that later raised questions.⁵⁸ Lawyers counseled the securities firms that promoted SPEs to investors.⁵⁹ Indeed, even Enron’s accountants relied on lawyers in preparing the company’s auditing statements.⁶⁰ Moreover, Enron’s lawyers had counterparts in a number of other failed companies, such as Arthur Andersen, Parmalat, and WorldCom. Reform was not long in coming.

B. The Regulatory Response

In 2002, Congress passed the Sarbanes-Oxley Act,⁶¹ which responded to the crisis on a number of fronts, including ethical reform for accountants and attorneys. Section 307 required the SEC to issue rules to regulate the attorneys that practice before it, including a requirement that they “report evidence of a material violation of securities law or breach of fiduciary duty . . . to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof)”⁶² and that they report to the audit committee or the full board of directors if the officer did not “appropriately respond to the evidence.”⁶³ The SEC issued rules in accordance with this “up-the-ladder” reporting requirement,⁶⁴ and went a step further. It proposed adding a “noisy withdrawal” rule, which would require lawyers to withdraw and notify the SEC if a company has failed to respond to up-the-ladder reporting and the violation is ongoing and likely to result in financial injury to investors or the company.⁶⁵

The ABA responded quickly. The bar lobbied against the SEC’s attempt to make reporting mandatory, even though such reporting had arguably been permissive under past ABA rules,⁶⁶ leading the SEC to abandon its efforts to impose a mandatory noisy withdrawal obliga-

⁵⁷ ENRON REPORT, *supra* note 53, at 169.

⁵⁸ See Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL’Y 195, 196–97 (2003).

⁵⁹ *Id.* at 201–03.

⁶⁰ *Id.* at 197.

⁶¹ Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

⁶² *Id.* § 307(1), 116 Stat. at 784 (codified at 15 U.S.C. § 7245(1) (Supp. IV 2004)).

⁶³ *Id.* § 307(2), 116 Stat. at 784 (codified at 15 U.S.C. § 7245(2) (Supp. IV 2004)).

⁶⁴ COFFEE, *supra* note 42, at 219.

⁶⁵ See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,705–06 (proposed Dec. 2, 2002).

⁶⁶ See COFFEE, *supra* note 42, at 219–20; Koniak, *supra* note 46, at 1270.

tion. However, the ABA later approved a modified version of Model Rule 1.6 that allows a lawyer to reveal information that would otherwise be confidential if the lawyer believes it necessary to prevent “a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another” and if the client had used the lawyer’s services to perpetrate the misdeed.⁶⁷ In addition, it retained a permissive noisy withdrawal procedure in the Rules.⁶⁸

C. *Enhancing the Corporate Attorney’s Gatekeeper Function*

A desire to strengthen the attorney’s gatekeeper role fueled this reform.⁶⁹ Although gatekeepers can exist outside an organization, the most effective and the most common are internal. The presence of a gatekeeper in an organization is a critical means of addressing the agency problem. Absent any oversight, insiders can mislead investors and regulators and engage in self-dealing or outright theft.

Attorneys can fulfill their gatekeeper function in a variety of ways.⁷⁰ Most directly, the attorney could utilize his or her role as a counselor. As Elihu Root famously put it, “About half of the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.”⁷¹ In effect, the attorney would be using the power connected to his or her position to persuade the client to change course. Another approach would have the attorney close the gate entirely, refusing to assist in the client’s course of action if the client is not dissuaded from proceeding.⁷² Finally, the attorney can alert others, using the information gleaned from his or her role to involve outside authorities or to warn third parties.

The concept of the attorney as gatekeeper is not new. Professor Coffee points to a “Brandeisian ideal,” prevalent in the Progressive Era, under which attorneys were to preserve the independence of their

⁶⁷ MODEL RULES OF PROF’L CONDUCT R. 1.6 (2007); see COFFEE, *supra* note 42, at 220.

⁶⁸ See MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 10; COFFEE, *supra* note 42, at 220–21.

⁶⁹ SEC Commissioner Harvey Goldschmid, speaking the following year, made this point explicitly, finding “a broad consensus that lawyers should play a critical gatekeeping role in large public corporations” and noting that “this was a virtually unanimous view of Congress” in passing section 307. Harvey J. Goldschmid, Comm’r, U.S. Sec. & Exch. Comm’n, A Lawyer’s Role in Corporate Governance: The Myth of Absolute Confidentiality and the Complexity of the Counseling Task, Address Before the Association of the Bar of the City of New York (Nov. 17, 2003) (transcript available at <http://www.sec.gov/news/speech/spch111703hjh.htm>).

⁷⁰ See generally Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387 (2004).

⁷¹ PHILLIP C. JESSUP, ELIHU ROOT 133 (1938) (internal quotation marks omitted).

⁷² Cf. David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 (arguing that lawyers should have discretion to refuse to assist behavior they find immoral).

role and use it to protect the public.⁷³ This view has never served as the standard for attorney conduct,⁷⁴ but it has remained influential. The bar has often come under special scrutiny after business failures, such as those involved in the savings and loan crisis of the 1980s.⁷⁵ This attention likely comes not only from the direct role that lawyers played in furthering the scandals, but also from the view that they have a higher duty to ensure that the law is followed.

Commentators have tried to answer the question of why gatekeepers, particularly attorneys, failed to fulfill their oversight role in the most recent round of corporate scandals. The hypotheses range from the theory that changes in the law reduced the deterrent effect of private suits to the idea that the market bubble reduced the perceived value of strong gatekeepers.⁷⁶ As the above discussion of Enron demonstrates, attorneys also failed in their duties because of their past relationships with the wrongdoers themselves, because of their failure to understand the scope of the problem, or simply because of their own self-interest.

The regulatory response, detailed above, focused on several aspects of the attorney's gatekeeper role. With regard to the counseling function, the post-Enron reforms strengthened attorneys' leverage, ensuring that an attorney's advice that a client abandon a course of conduct is now bolstered by the possibility that the client's refusal will be reported up the ladder. The reforms further ensure that the advice is heard at all levels of the organization. The attorney's power to close the gate is also strengthened — under the package of reforms, which came at the state level as well as through the SEC and the ABA, he or she may withdraw noisily, not only closing the gate to current actions, but also preventing the client from benefiting from related documents and transactions completed with the attorney's past assistance. Finally, the reforms explicitly address the attorney's warning role: an attorney's withdrawal alerts regulators and the general public to malfeasance within the organization.

⁷³ COFFEE, *supra* note 42, at 202; *see also* Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555 (1905).

⁷⁴ *Cf.* Lisa H. Nicholson, *A Hobson's Choice for Securities Lawyers in the Post-Enron Environment: Striking a Balance Between the Obligation of Client Loyalty and Market Gatekeeper*, 16 GEO. J. LEGAL ETHICS 91, 93–95 (2002) (noting the conflict between an attorney's role as gatekeeper and the overriding duty of confidentiality).

⁷⁵ *See, e.g.*, Stephen Labaton, *Business and the Law: Putting Lawyers Under Scrutiny*, N.Y. TIMES, Mar. 21, 1991, at D2 (reporting Judge Stanley Sporkin's criticism of the lawyers involved in the Lincoln Savings & Loan collapse and the view of an NYU law professor that "[e]very decade, there is a crisis that allows Stanley Sporkin to scream 'Where were the lawyers'" (internal quotation marks omitted)).

⁷⁶ *See generally* COFFEE, *supra* note 42, at 60–69; *see also* Gary J. Aguirre, *The Enron Decision: Closing the Fraud-Free Zone on Errant Gatekeepers?*, 28 DEL. J. CORP. L. 447 (2003).

Professor Coffee argues that reforms should go further. Corporate gatekeepers serve an important function in addition to their watchdog role — they vouch for others who may have an incentive to mislead investors, signaling to outsiders that the organization’s communications are honest.⁷⁷ Professor Coffee thus argues for separating attorneys’ roles. Some lawyers would serve as litigation advocates or “transaction engineers,” while others would serve as “disclosure counsel.” These independent outside attorneys would certify the corporation’s disclosure documents. They would be retained by the corporation’s audit committee, rather than by its general counsel.⁷⁸ Though Professor Coffee acknowledges that many details of this new role would be highly technical, it would “have a profound symbolic and psychological effect on the bar because it would recognize the attorney’s obligations as a gatekeeper.”⁷⁹

IV. THE GOVERNMENT ATTORNEY AS GATEKEEPER

This Part discusses the recent controversies involving high-level government lawyers and argues for a response that strengthens their role as gatekeepers. As was the case in earlier corporate scandals, attorneys played a key role in these controversies. They identified too closely with the officers that sought their advice — rather than seeking to provide a fair reading of the law, they sought to provide cover for policy goals. As occurred in Enron, dissenters were marginalized or ignored. Because government lawyers’ involvement in recent controversies mirrors that of the Enron attorneys, regulators and courts should adopt a new model, drawn from the lessons of Enron, to prevent future lapses.

A. *Recent Scandals Involving Government Attorneys*

Government attorneys have been implicated in a number of scandals in recent years in a manner that echoes corporate attorneys’ behavior in the Enron scandal. Allegations have ranged from reports of politicized hiring and firing decisions to charges that U.S. Attorneys have engaged in politically motivated prosecutions.⁸⁰ In addition, high-level government counselors may have provided faulty legal advice in a series of memoranda. Their conclusions were used to justify coercive interrogation, detention without judicial oversight, warrantless wiretapping, and an expansive view of executive power. At-

⁷⁷ COFFEE, *supra* note 42, at 2.

⁷⁸ *Id.* at 347–52.

⁷⁹ *Id.* at 350–51.

⁸⁰ See Lipton & Johnston, *supra* note 9; Adam Zagorin, *Rove Named in Alabama Controversy*, TIME, June 1, 2007, <http://www.time.com/time/nation/article/0,8599,1627427,00.html>.

torneys in the OLC and other offices provided potentially partisan legal opinions as to whether the Geneva Conventions applied to combatants captured on the field in Afghanistan or Iraq and what methods interrogators could use to remain within the bounds of treaty and statutory law.⁸¹ These memoranda, drawing on the government counselor's dual role as a legal and political advisor, demonstrate the need for reform.

The memoranda have come under fire. Commentators have argued that the memoranda displayed an "unusual lack of care and sobriety in their legal analysis."⁸² Their analysis of executive power was particularly problematic. One memorandum, completed in August of 2002, stated that "[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President,"⁸³ a conclusion that Professor Goldsmith finds "extreme" and with "no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law."⁸⁴ Indeed, not only did this conclusion lack a foundation, but the memorandum's authors failed to distinguish, much less cite, the key Supreme Court case on presidential power, *Youngstown*.⁸⁵ Professor David Luban unsurprisingly found a "near consensus that the legal analysis in the [memorandum] was bizarre."⁸⁶ After the scandal at Abu Ghraib prison had come to light, OLC issued a replacement memorandum.⁸⁷

Details on the government's wiretapping program are not as readily available, but problems are still apparent. One key point is that the program almost certainly violated statutory law, namely the Foreign Intelligence Surveillance Act of 1978⁸⁸ (FISA).⁸⁹ Some time in 2001,

⁸¹ See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 706–11 (2008); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1452–56 (2005).

⁸² GOLDSMITH, *supra* note 7, at 148.

⁸³ Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto Gonzales, Counsel to the President 39 (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

⁸⁴ GOLDSMITH, *supra* note 7, at 149.

⁸⁵ See SCHWARZ & HUQ, *supra* note 8, at 195–96.

⁸⁶ Luban, *supra* note 81, at 1455. Professor Luban pointed to several passages of the memorandum dealing with presidential power, abortion, and the legal definition of torture.

⁸⁷ See *id.* at 1456 (citing Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, to James B. Comey, Deputy Att'y Gen., U.S. Dep't of Justice (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/18usc23402340a2.htm>).

⁸⁸ Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C.A. §§ 1801–1862 (West 2003 & Supp. 2007)).

⁸⁹ See Evan Tsen Lee, *The Legality of the NSA Wiretapping Program*, 12 TEX. J. C.L. & C.R. 1 (2006). But see *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) (suggesting that the President has "inherent authority to conduct warrantless searches to obtain foreign intelligence

the government instituted a “terrorist surveillance program,” which included the warrantless wiretapping of domestic communications with overseas parties suspected of having connections to the al Qaeda network.⁹⁰ Though the Administration argued that its actions were legal, it did not dispute the claim that it had acted outside of the procedure Congress established in FISA for domestic surveillance.⁹¹

A number of forces combined to produce the flawed legal opinions in the torture memoranda and the Administration’s extralegal action in the surveillance operation. First, the Administration sought out attorneys who would agree with its agenda and would not present obstacles.⁹² Moreover, Administration insiders sought to advance a theory of the “unitary executive,” a legal view that resisted congressional efforts to limit the President’s power.⁹³ Finally, it should be noted that Administration insiders were keenly aware of the threat of another terrorist attack.⁹⁴ Investigations had begun into the nation’s failure to prevent the attacks of September 11, 2001, and lawyers likely sought to ensure that the Administration could act as aggressively as necessary to prevent a future attack.⁹⁵

The factors that led government attorneys to draft the torture memoranda roughly parallel those present in the corporate scandals of the recent past. First, the “managers” in this case, Administration decisionmakers, sought to increase executive power⁹⁶ much as Enron’s

information” and that, “assuming that is so, FISA could not encroach on the President’s constitutional power”).

⁹⁰ See *ACLU v. NSA*, 493 F.3d 644, 648 & n.1 (6th Cir. 2007); Risen & Lichtblau, *supra* note 10.

⁹¹ See Letter from William E. Moschella, Assistant Att’y Gen., to Sen. Pat Roberts et al. (Dec. 22, 2005), available at http://www.eff.org/files/filenode/nsaspying/doj_letter.pdf (arguing that the program was authorized under Congress’s Authorization for the Use of Military Force resolution and that FISA could not constitutionally limit the President’s power to authorize surveillance).

⁹² See, e.g., GOLDSMITH, *supra* note 7, at 26 (describing the author’s interview for a position at the OLC, which began with a question about his political contributions); *id.* at 41 (reporting a conversation with a deputy who noted that the Administration would be upset about a legal conclusion that ran counter to their desired outcome because “[t]hey’ve never been told ‘no’”).

⁹³ See Klaidman et al., *supra* note 8 (detailing the difficulties that Administration lawyers faced when they disagreed with assertions of broad executive power); see also Barron & Lederman, *supra* note 81, at 704–05 (detailing the Administration’s related view that Congress cannot cabin the President’s power to control the conduct of war).

⁹⁴ See GOLDSMITH, *supra* note 7, at 165–67.

⁹⁵ *But see* SCHWARZ & HUQ, *supra* note 8, at 193 (noting that the crisis mentality could not alone justify the rigorous support of presidential powers for years after September 11 and that the Administration’s legal analysis “reflected the sweeping vision of executive supremacy” advanced by Administration insiders for over a decade).

⁹⁶ It bears noting that this Administration is not alone in seeking to do so. See Rita W. Nealon, *The Opinion Function of the Federal Attorney General*, 25 N.Y.U. L. REV. 825, 839 (1950) (noting that Attorneys General have often authorized executive action in the absence of express congressional authorization, particularly where national security is concerned). What sets the torture memoranda apart is that “their legal arguments were wildly broader than was neces-

managers sought to increase their own profit. Second, both proceeded outside of the law — Enron insiders likely knew that they were breaking the law while the Administration argued that statutory law simply did not apply to it. Third, Administration insiders sought to cut dissenters out of the decisionmaking process, as did Enron’s managers.⁹⁷ Fourth, like Enron, the Administration relied heavily on its lawyers — not in structuring transactions, but in providing legal guidance on how to proceed, or in the case of surveillance, in directly reviewing and authorizing the program.⁹⁸ Just as Enron could not have occurred without the active participation of inside and outside counsel, the Administration’s efforts would have been futile without the aid of lawyers. Fifth, the faulty analysis in the torture memoranda parallels Vinson & Elkins’s cursory investigation into the legality of Enron’s transactions. Finally, and crucially, the watchdogs in both cases failed to put a stop to the misdeeds until it was too late. Enron did indeed “implode in a wave of accounting scandals,”⁹⁹ while an unknown number of detainees and targets of surveillance had their rights infringed and America’s standing in the world and its mission in the Middle East suffered as a result of the Abu Ghraib scandal.¹⁰⁰

Though many attorneys within the Bush Administration did seek to prevent violations of the law, these scandals represent a gatekeeper failure as serious as any at Enron. This failure points to a need for similarly broad reform.

B. *The Gatekeeper Role of the Government Attorney*

As discussed above, past efforts to clarify the role of the government attorney are insufficient both because they fail to provide ade-

sary to support what was actually being done.” GOLDSMITH, *supra* note 7, at 150. The drafters sought to advance a broader agenda rather than to justify the specific actions.

⁹⁷ Compare SCHWARZ & HUQ, *supra* note 8, at 197 (noting that hardliners in the Administration sought to replace dissenters, or simply to go around them), and Klaidman et al., *supra* note 8 (same), with COFFEE, *supra* note 42, at 33 (“[G]atekeepers were either removed from the process [of overseeing Enron’s disclosures] or given no more than a brief opportunity to comment.”). Famously, then-White House Counsel Alberto Gonzales and then-Chief of Staff Andrew Card visited Attorney General John Ashcroft’s hospital room late at night to ask him to overrule Acting Attorney General James Comey’s decision to refuse to recertify the domestic surveillance program. See Klaidman et al., *supra* note 8, at 39.

⁹⁸ See The President’s Radio Address, 41 WEEKLY COMP. PRES. DOC. 1880, 1881 (Dec. 17, 2005) (noting the role of “our Nation’s top legal officials, including the Attorney General and the Counsel to the President,” in the reauthorizations of the surveillance program).

⁹⁹ Memorandum from Sherron Watkins to Kenneth Lay, *supra* note 55, at 137.

¹⁰⁰ It should be noted that the Administration’s supporters have argued that the Abu Ghraib scandal was not a product of its interrogation policy. See Phillip Carter, *The Road to Abu Ghraib*, WASH. MONTHLY, Nov. 2004, at 20, 21 (“The Bush administration has condemned the abuses as the work of a ‘few bad apples . . .’”). Professor Luban suggests, however, that the abuses at Abu Ghraib grew out of a larger “torture culture,” in which the OLC memoranda played a significant role. Luban, *supra* note 81, at 1452–60.

quate guidance and because they fail to account fully for the gatekeeper function of the government attorney. As developments in the corporate world show, effective reform requires not only a reaffirmation of the identity of the attorney's client, but also the imposition of well-defined obligations to ensure that the attorney is an effective gatekeeper. Although Professor Coffee's proposed "disclosure counsel" model provides a useful starting point, any reform must take into account the unique role of the government attorney.

Reform should be effected through a default rule under which a government attorney in the executive branch is expected to serve three "clients": the current President, the executive branch, and the public (through Congress).¹⁰¹ To reap the benefits of up-the-ladder reporting, the attorney's obligations should also include a duty to report up the chain of command through the agency to the President and finally to Congress, if the attorney suspects that his or her assistance will be used in violating the law.

1. *A Three-Tiered Conception of the Governmental Client.* — A rule that defines the government attorney's client along three dimensions addresses several weaknesses in the extant models. In contrast to the public interest model, it ensures that democratic accountability remains with the President or Congress, instead of allowing unelected attorneys to substitute their vision of what the public interest requires.¹⁰² Moreover, it provides clearer guidance in the vast majority of cases, where the interests of clients other than one's direct supervisor are not implicated. In such cases, the attorney will not be forced to undermine client autonomy by second-guessing the client's appraisal of the public interest. Further, just as corporate managers would hesitate to turn to their attorneys if they thought their attorneys would report on their questionable decisions, elected officials would likely avoid consultation with their own attorneys if they felt that the attorneys primarily served an interest opposed to them.¹⁰³ Identifying a primary, secondary, and tertiary client ensures that decisionmakers will not hesitate to seek legal advice in the vast majority of cases. Finally, ensuring that specific persons or entities are identified as the client avoids the needless complexity of ascertaining what the "public interest" requires in any particular instance.

¹⁰¹ Of course, the roles of the thousands of lawyers throughout the government differ substantially. This default rule may need to be altered to fit a particular attorney's role.

¹⁰² See Miller, *supra* note 17, at 1293–94.

¹⁰³ See Michael Strine, *Counsels to the President: The Rise of Organizational Competition*, in *GOVERNMENT LAWYERS* 257, 264 (Cornell W. Clayton ed., 1995) (reporting the observation of then-Assistant Attorney General for OLC Antonin Scalia that "[t]he White House will accept distasteful advice from a lawyer who is unquestionably 'on the team'; it will reject it, and indeed not even seek it, from an outsider — when more permissive and congenial advice can be obtained closer to home," which "it almost always can be").

Unlike the single client approach, a three-tiered model accounts for the realities of executive branch legal practice. Because legal opinions are numerous, completed without judicial review, and sometimes executed without anyone outside the executive branch learning of them, it would be improper for government attorneys to act solely on behalf of the President. Such a role conception magnifies the risk of executive branch aggrandizement.¹⁰⁴ Moreover, this model avoids the anomaly that would result from a government attorney's acting as the "representative not of an ordinary party to a controversy, but of a sovereignty," when serving as a prosecutor, but a zealous representative of an ordinary party when serving as a counselor.¹⁰⁵ Finally, the single client approach substantially undercuts the attorney's gatekeeper function. As in the corporate world, the risk that an attorney will identify with an insider is magnified if the identity of the client is drawn narrowly,¹⁰⁶ and the insider will often have interests at odds with those of the organization.¹⁰⁷

An example demonstrates how this model would work in practice. An administration might seek to provide funds for religious instruction at a service academy, despite a recent Supreme Court opinion that held unconstitutional the granting of funds for such instruction at other schools and the existence of a statute to the same effect.¹⁰⁸ It might ask for an opinion on whether Congress can regulate the President's authority to decide how the military is to be instructed. Under the single client approach, the attorney would seek to provide an opinion that allows the President to accomplish this policy goal.¹⁰⁹ Under the public interest approach, assuming that the attorney feels that a clear separation between church and state is in the public interest, the attorney would simply opine that the program is unlawful. The answer becomes complicated if the attorney feels that the public interest requires just the opposite.¹¹⁰ In that case, he or she would find a way to justify the instruction. Under the three-tiered model, by contrast, the

¹⁰⁴ Cf. GOLDSMITH, *supra* note 7, at 33 (noting that, although the OLC strives to analyze the law objectively, "[t]he danger, of course, is that OLC lives inside the very political executive branch"). Without an objective approach to temper this pressure, the result is likely to be legal opinions that mirror precisely the political aims of the Executive.

¹⁰⁵ *Berger v. United States*, 295 U.S. 78, 88 (1935); see also *In re Lindsey*, 158 F.3d 1263, 1272-73 (D.C. Cir. 1998) (stating that, because officers of the executive branch have taken an oath to preserve, protect and defend the Constitution, "the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency").

¹⁰⁶ See *supra* pp. 1416-17.

¹⁰⁷ The proposed model addresses this risk by clarifying, through added reporting duties, that the lawyer must remain cognizant of the broader client's interests.

¹⁰⁸ This example is drawn from Miller, *supra* note 17, at 1293.

¹⁰⁹ See *id.* at 1297.

¹¹⁰ See *id.* at 1294-95 ("[T]here are as many ideas of the 'public interest' as there are people who think about the subject.").

attorney would first seek to advance the President's agenda. On discovering that the action raises a question of illegality, the attorney would inquire into whether proceeding would harm the presidency.¹¹¹ Such harm would arise in cases of clear illegality by the occupant of the office, but likely would not arise in the case of a spending decision. The final inquiry would focus on whether the people, through their representatives in Congress, are well served by the expenditure. Because the administration seeks an opinion that implicates Congress's power as well as the separation of powers, the interests of the public are certainly at stake.¹¹²

The three-tiered model also has its share of weaknesses. Arguably, the attorney could still arrive at the client's preferred outcome, particularly if he or she has been selected based on an ideological fit with the administration. Further, it may be the responsibility of Congress, rather than that of an employee of the President, to defend against executive encroachment. Finally, this model may not go far enough — merely taking the interests of the public into account through their representatives in Congress would not address those cases in which Congress has not spoken or in which the Constitution's limits on the Executive are not clear. Since clarifying the client definition may alone be insufficient to fulfill the government attorney's gatekeeping function, reform should also include new duties.

2. *A New Reporting Obligation.* — As mentioned above, government attorneys should have a duty to report up the ladder through the executive branch and to Congress if they suspect a violation. But pure up-the-ladder reporting, as practiced in the corporate world, cannot alone ensure that government attorneys fulfill their duties to the public.¹¹³ As noted above, the government attorney may have been selected for his or her ideological fit with the administration. He or she may face greater uncertainty over whether a course of action is legally questionable when dealing with exercises of executive power, where

¹¹¹ Cf. Nelson Lund, *Guardians of the Presidency: The Office of the Counsel to the President and the Office of Legal Counsel*, in *GOVERNMENT LAWYERS*, *supra* note 103, at 209, 213 (arguing that "[a]lthough the president's lawyers have no legal right to substitute the presidency for the president as their client," they may do so with the President's approval).

¹¹² As this example demonstrates, there are many areas where the law is unclear or where an administration could make strong, good-faith arguments that current law is unconstitutional or in need of change. In such cases, empowering attorneys to blow the whistle could risk hampering evolution in the law. However, as noted above, most actions by government attorneys are unreviewable. Without reporting, a court cannot weigh the Executive's position and Congress may not be apprised of the need for change in the law. Reporting, by contrast, avoids both a freeze in current law and a change without review by allowing other branches to add their views. *See also infra* note 127 and accompanying text.

¹¹³ Although the parallel between the structure of a corporation and the structure of government is far from exact, the goals of both reporting obligations are identical — both types of reporting strengthen the gatekeeper function of the attorney.

legal limits are not as clear as in the business world. Further, reporting to Congress carries greater professional risk for an attorney than does reporting to a corporate board or an audit committee. Moreover, the President has a recognized need for unfettered advice from subordinates,¹¹⁴ increasing pressure on individual attorneys not to report.

To address these issues, the Attorney General should be required to report to Congress regularly on the substance of the legal opinions his or her office has provided to the President. The Attorney General currently issues detailed reports on the fiscal state of the Department of Justice and its accomplishment of law enforcement goals,¹¹⁵ but its disclosures to Congress about important matters of legal policy are done on an ad hoc basis.¹¹⁶ Reporting would include protections for confidential information and would not extend to discussions between the President and his or her private attorneys. At minimum, the Attorney General would point to the sources of authority under which the President has authorized action and the interpretations of congressional statutes the executive branch has made.¹¹⁷ Individual government attorneys should have discretion to supplement this reporting, but should be obligated to do so only if the Attorney General's report is incomplete or if the matter is urgent.¹¹⁸

Such a reporting obligation is admittedly open to criticism. As with the broad view of the attorney's client, reporting may reduce the President's ability to rely on advice from attorneys. If Congress is controlled by the other party, the President may choose not to seek legal advice at all. Moreover, annual reporting and up-the-ladder reporting

¹¹⁴ See *In re Lindsey*, 158 F.3d 1263, 1286 (D.C. Cir. 1998) (Tatel, J., concurring in part and dissenting in part); cf. *United States v. Nixon*, 418 U.S. 683, 706 (1974) (noting the President's need for advisors who can give unfettered advice).

¹¹⁵ See Office of the Attorney General — Annual Reports, <http://www.usdoj.gov/ag/annualreports.html> (last visited Feb. 9, 2008).

¹¹⁶ See, e.g., Charles Babington & Dan Eggen, *Gonzales Seeks to Clarify Testimony on Spying*, WASH. POST, Mar. 1, 2006, at A8 (reporting on the Attorney General's letter to Congress attempting to clarify his testimony, which "seemed to imply that the administration's original legal justification for the program was not as clear-cut as he had indicated" and that the program was not as limited as he had claimed).

¹¹⁷ Though this recommendation may seem controversial, it echoes one made over 150 years ago by Attorney General Caleb Cushing. See Office and Duties of Attorney General, *supra* note 36, at 348 (urging "provision, either by law or regulation, for a periodical report by the Attorney General to the President, and through him to Congress, of the business of his office, including the official opinions given by him, and any pertinent suggestions regarding the interests of the Government").

¹¹⁸ Such independent reporting admittedly raises separation of powers concerns. However, if the attorney's client is conceptualized on a three-tiered basis, the attorney is not "reporting out" or blowing the whistle. Instead, the attorney is reporting to the ultimate client, through its chosen representatives. Nonetheless, in light of the separation of powers concerns that this does raise (that is, some situations may call for disclosure of facts that the executive branch does not want revealed), individual reporting should be the exception, not the rule.

by individual attorneys could erode the trust relationship between decisionmakers and attorneys. The sheer volume of legal opinions may render the reporting function an empty exercise or a waste of resources. For every opinion that has the potential to redefine the balance of power between the executive and legislative branches, there are dozens that address far more mundane matters. Finally and most importantly, a reporting obligation may increase the risk aversion of lawyers, particularly those counseling intelligence agencies. The 9/11 Commission faulted the CIA for being “institutionally averse to risk,”¹¹⁹ a culture that Professor Goldsmith traced to excessive caution by agency lawyers.¹²⁰

It is important to note that there is a broad historical practice supporting interbranch reporting. Government attorneys, and the Attorney General in particular, have historically been thought of not as the President’s attorneys, but as the people’s.¹²¹ More importantly, the text of the Constitution makes it clear that the interests of the legislative branch are implicated when the Executive receives legal advice. Article II, Section 3 commands that the President “shall take Care that the Laws be faithfully executed.” By specifying that the President’s duty was to execute the law “faithfully,” the Framers sought to stress the President’s duty to act “with a steadfast and principled adherence to the law.”¹²² Though he or she may disagree with the law or with Congress’s intent, the President is bound to carry it out. Potential critiques that are based on assumptions about the role of government attorneys, or on the President’s independent duty to define the law,¹²³ are thus misplaced.

There are also strong policy reasons for imposing new reporting obligations on government attorneys. Professor Goldsmith notes that there is a tradition of the Executive acting extralegally when circumstances demand it.¹²⁴ Professor Goldsmith looks to the writings of

¹¹⁹ 9/11 COMMISSION REPORT, *supra* note 14, at 93.

¹²⁰ GOLDSMITH, *supra* note 7, at 94–95. This criticism is potentially the most serious. However, if this effect is based on a law that should be changed, interbranch communication can only help in ensuring that Congress drafts a better, clearer law to take its place.

¹²¹ See BAKER, *supra* note 35, at 3, 11 (noting that President Washington turned to private attorneys, Supreme Court Justices, and even members of Congress for legal advice); Luther A. Huston, *History of the Office of the Attorney General*, in LUTHER A. HUSTON ET AL., ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 1, 6 (1968) (“[F]rom the outset, Congress looked upon the attorney general as its lawyer and asked for opinions as to the drafting and constitutionality of legislative proposals.”).

¹²² Moss, *supra* note 12, at 1313.

¹²³ See *id.* at 1312 (“There can be little doubt that the Framers understood that in charging the President with executing the law, they were necessarily conferring on the Executive the incidental authority to interpret the law.”).

¹²⁴ See GOLDSMITH, *supra* note 7, at 80–81; see also Barron & Lederman, *supra* note 81, at 745–48. This is related to the theory that the President has an independent duty to refuse to en-

Thomas Jefferson and John Locke, which support the idea that “a leader’s first duty [is] to protect the country, not follow the law.”¹²⁵ One vital component of this idea is that “the leader who disregards the law should do so publicly, throwing himself at the mercy of Congress and the people so that they [can] decide whether the emergency was severe enough to warrant extralegal action.”¹²⁶ Professor Goldsmith points to this as serving a limiting and legitimizing function, but there is an added policy reason underlying it — if a law is unwise or unjust, civil disobedience must be done publicly to ensure that the law is changed.¹²⁷ In some cases, an attorney may conclude that the law must be defied if the interests of his or her ultimate client demand it. A law may fail to adapt to changed technology, or it may be so unclear as to prevent necessary action. In such cases, disclosure to the public at large may be unwise,¹²⁸ but disclosure to Congress, with certain safeguards, may be the best way to ensure that the law is improved.

V. CONCLUSION

Events in recent years have understandably shaken the public’s faith in business leaders, public servants, and the legal profession. Gatekeeper failures in the world of government attorneys find parallels in those of the business world. Reforms in the role and obligations of corporate attorneys, aimed at strengthening their gatekeeper role, provide a valuable guide for much-needed changes in the role of the government attorney. This Note proposes reforms aimed primarily at high-level government counselors. Even if a proposal of this type is not adopted, events in the past several years demonstrate the power and influence of government attorneys in American democracy. These stakes point to an urgent need to clarify their roles and obligations.

force unconstitutional laws. See *Presidential Authority To Decline To Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel 199 (1994).

¹²⁵ GOLDSMITH, *supra* note 7, at 80–81.

¹²⁶ *Id.* at 81; see also Barron & Lederman, *supra* note 81, at 746.

¹²⁷ See MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN’T WAIT* 77, 86 (1964) (“One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.”).

¹²⁸ See GOLDSMITH, *supra* note 7, at 81 (noting the reluctance by Administration insiders to publicize their actions as required by the Jefferson/Locke option because “doing so would tip off the enemy”).