

The Ethical Dilemmas of the Office of Legal Counsel in the Wake of a Whistleblower Complaint

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INTRODUCTION

In the fall of 2019, nearly three years into the Trump presidency, an unnamed intelligence official filed a whistleblower complaint with the Intelligence Community Inspector General (ICIG).¹ The complaint detailed allegations of President Trump soliciting interference from a foreign country in the 2020 presidential election.² The unknown intelligence official filed the complaint in accordance with the procedures specified in the federal law protecting whistleblowers.³ Despite taking the proper course of action, senior members of the Trump Administration initially refused to disclose the complaint to Congress, and instead consulted with the Justice Department's Office of Legal Counsel (OLC) for an assessment of the complaint's credibility.⁴ This instance of withholding the complaint from Congress in the 2019 investigation was the first time such an issue was raised since the enactment of the Federal Intelligence Community Whistleblower Protection Act (ICWPA), which requires the Director of National Intelligence (DNI) to disclose the complaint to Congress.⁵ The question arises whether the government lawyers in the OLC had the proper authority under the ICWPA to challenge the determination of the ICIG. Answering this question requires a broader look at the functions and duties of the OLC and the ethical concerns raised by an attorney's appointment within this office. In order to do so, this Note will first detail the OLC's most recent response to a significant Intelligence Community whistleblower complaint.

On August 12, 2019, an anonymous intelligence official filed a complaint with Michael Atkinson, the ICIG.⁶ News of the then-unreleased complaint broke by

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1. *See generally* Letter from Whistleblower to Adam Schiff, Chairman, Permanent Select Committee on Intelligence (Aug. 12, 2019) [hereinafter Whistleblower Complaint].

2. *See id.*

3. *See* Bill McCarthy, *What the Whistleblower Law Says About Sharing Complaints with Congress*, POLITIFACT (Sept. 25, 2019), <https://www.politifact.com/truth-o-meter/article/2019/sep/25/what-whistleblower-law-says-about-sharing-complain/> [https://perma.cc/62AG-ZU4M].

4. *See id.*

5. *See id.*

6. *Id.* President Trump has since informed Congress of his intention to remove Michael Atkinson from the position of ICIG. Kyle Cheney, *Atkinson: Trump Fired Me Because I Handled Whistleblower Complaint*

way of a letter and subpoena addressed to the DNI from Democratic Representative Adam Schiff, Chairman of the House Intelligence Committee.⁷ Initial reports speculated on the contents of the complaint as detailing multiple attempts made by President Trump to solicit foreign interference, including one phone call between President Trump and Ukrainian President Volodymyr Zelensky.⁸ While the complaint was still in the hands of the DNI, the White House responded to press inquiries by releasing an unclassified readout of the July 25 phone call between President Trump and President Zelensky, thus corroborating aspects of the allegations made by Schiff in his letter detailing the complaint.⁹ The call summary indicated that President Trump told President Zelensky to work with his personal lawyer, Rudy Giuliani, and Attorney General William Barr to investigate allegations of corruption against former Vice President Joe Biden and his son, Hunter Biden, arising from Hunter Biden's work for an oil company in Ukraine.¹⁰

According to Schiff's letter to Acting DNI, Joseph Maguire, the ICIG had found the whistleblower complaint credible and a matter of "urgent concern," at which point the ICIG proceeded to transmit the complaint to the DNI on August 26.¹¹ In the letter from Schiff to the DNI that followed, dated September 13, Schiff alleged that the congressional committees had yet to receive the complaint from the DNI more than two weeks after receipt of the first letter "in violation of the [ICWPA's] explicit command" for disclosure within seven days.¹² Schiff's letter described how the DNI had consulted the OLC about the complaint, and he alleged that the statute did not provide the DNI "discretion to review, appeal, reverse, or countermand in any way the [ICIG's] independent determination, let alone to involve another entity within the Executive Branch in the handling of a whistleblower complaint."¹³ In response to the DNI contacting the OLC, the OLC expressly rebutted the ICIG's determination and instead substituted its own determination that the complaint was not of "urgent concern."¹⁴ Following the advice of the OLC, the DNI withheld disclosure of the complaint to Congress on the basis that the complaint concerned conduct by someone outside of the

Properly, POLITICO (Apr. 5, 2020), <https://www.politico.com/news/2020/04/05/atkinson-trump-fired-whistleblower-complaint-167371> [<https://perma.cc/F3T2-BCCG>].

7. See Letter from Adam Schiff, Chairman, Permanent Select Comm. on Intelligence, to Joseph Maguire, Acting Dir. of Nat'l Intelligence, Office of the Dir. of Nat'l Intelligence (Sep. 13, 2019) [hereinafter Letter from Schiff to DNI].

8. See McCarthy, *supra* note 3.

9. See generally Unclassified Memorandum of Telephone Conversation with President Zelensky of Ukraine (Sep. 24, 2019); McCarthy, *supra* note 3.

10. McCarthy, *supra* note 3.

11. See Letter from Schiff to DNI, *supra* note 7, at 1.

12. *Id.*; 50 U.S.C.A. §§ 3033(k)(5)(B)(C) (West 2015).

13. Letter from Schiff to DNI, *supra* note 7, at 2.

14. "Urgent Concern" Determination by the Inspector General of the Intelligence Community, Op. O.L.C. (2019) [hereinafter OLC Memo].

Intelligence Community and was not sufficiently related to intelligence activities.¹⁵

This Note seeks to evaluate the OLC's statutory ability to consult the DNI on an ICIG's determination of an urgent concern brought on by a whistleblower complaint. This Note will further assess the potential ethical implications of the OLC involvement in matters of this type generally. Justice Department lawyers are subject to both the ethical guidelines issued by the Justice Department itself, in addition to the rules of professional responsibility effective in the states where they conduct their activities, in this case the District of Columbia.¹⁶ This Note will analyze the legality of the DNI's consultation with the OLC regarding the ICIG determination and the substantive merits of the OLC memo. More broadly, this Note will argue that the OLC should be held further accountable for its conduct under the District of Columbia Model Rules of Professional Conduct. Part I will analyze the legality of the DNI's consultation with the OLC and of the OLC's substantive assessment of the whistleblower complaint. Part II will discuss the function of the OLC generally and the duties of the attorneys within the OLC.

I. AUTHORITY UNDER THE WHISTLEBLOWER STATUTE FOR THE DNI TO CONSULT THE OLC AND DELAY DISCLOSURE OF THE WHISTLEBLOWER COMPLAINT TO CONGRESS

The ICWPA, passed in 1998, protects intelligence officials from retaliation after divulging what they perceive or know to be government misconduct.¹⁷ Congress enacted the ICWPA to encourage reporting of classified information regarding wrongdoing within the Intelligence Community, finding that “[a] procedure should be established that provides a means . . . to report to Congress while safeguarding the classified information involved”¹⁸ The reporting procedure outlined in the ICWPA is as follows: an intelligence official intending to report a complaint pertaining to an urgent concern may report to the ICIG,¹⁹ who then has fourteen days to determine whether the complaint is credible and whether the substance is a matter of urgent concern.²⁰ Upon a determination that the complaint is credible, the ICIG then transmits the complaint to the DNI, who then adds any additional comments deemed appropriate and forwards such transmittal to the Permanent Select Committee on Intelligence of the House of Representative and the Select Committee on Intelligence of the Senate within

15. *See id.* at 1.

16. McDade-Murtha Amendment, 28 U.S.C.A. § 530B(a) (West 1998).

17. *See generally* 50 U.S.C.A. § 3033(k)(5).

18. H.R. 3829, 105th Cong. (1998).

19. Matters of urgent concern include a serious problem, abuse, or violation of the law relating to the funding, administration, or operation of an intelligence activity within the responsibility and authority of the director of national intelligence involving classified information. § 3033(k)(5)(G).

20. § 3033(k)(5)(B).

seven days.²¹ The ICWPA further provides guidelines for intelligence officials to submit complaints directly to Congress *only* if the ICIG deems the complaint *not* credible, at which time the DNI must provide the whistleblower with direction on how to contact the Committees independently and in a secure manner.²² Lacking in the statute is the explicit procedure in the event that the ICIG deems a complaint credible but the DNI disagrees and seeks further consultation which delays disclosure of the complaint to the Committees.

Despite the lack of the statute's specificity regarding the DNI seeking the consultation of the OLC, the DNI proceeded to do so in the 2019 investigation, and the OLC attorneys advised the DNI that it had the ability to set forth its own interpretation of "urgent concern" in place of the ICIG's opinion.²³ Following this logic, the OLC issued a slip opinion denouncing the ICIG's determination that the whistleblower complaint involved an "urgent concern."²⁴ The OLC opinion maintained that the "urgent concern" condition imposed by the ICWPA did "not relate to 'the funding, administration, or operation of an intelligence activity' under the authority of the [DNI]."²⁵

A. THE DNI'S CONSULTATION OF THE OLC UNDER THE ICWPA

Speculation exists regarding whether the OLC had the authority to review the ICIG's determination in the first place because nothing in the ICWPA explicitly informs the situation at hand.²⁶ Those that oppose the OLC memo argue that the OLC lacked the initial authority to review the ICIG's determination.²⁷ The ICWPA states that "[u]pon receipt of a transmittal from the [ICIG] under subparagraph (B), the [DNI] shall, within 7 calendar days of such receipt, forward such transmittal to the congressional intelligence committees, together with any comments the [DNI] considers appropriate."²⁸ It is less clear whether the ICWPA's use of the word "shall" denotes authorization for agency heads to review the ICIG's good faith determination that the complaint is credible and a matter of urgent concern.²⁹

In addition to the statutory language of the ICWPA, the policy incentives behind passing the ICWPA should also be considered. To be sure, the purpose of the statute is to afford whistleblower protection from reprisal.³⁰ Any uncertainty regarding whether the statutory protections against reprisal apply where the

21. §§ 3033(k)(5)(B)–(C).

22. § 3033(k)(5)(D).

23. See Letter from Council of the Inspectors Gen. on Integrity and Efficiency, to Steven Engel, Assistant Attorney Gen., Office of Legal Counsel, Dep't of Justice (Oct. 22, 2019) [hereinafter CIGIE Letter].

24. See generally OLC Memo, *supra* note 14.

25. *Id.* (citing § 3033(k)(5)(G)(i)).

26. See, e.g., McCarthy, *supra* note 3.

27. See CIGIE Letter, *supra* note 23.

28. § 3033(k)(5)(C).

29. CIGIE Letter, *supra* note 23, at 1.

30. See generally 50 U.S.C.A. § 3033(k).

matter is later determined to be outside the authority of the DNI might negatively impact the “essential public service” that whistleblowers play.³¹ As a result, the Intelligence Community may begin to question the effectiveness of reporting allegations of wrongdoing under the ICWPA, thus deterring individuals from sharing credible complaints in fear of retaliation. Allowing such review by the OLC could “seriously impair whistleblowing.”³² The DNI does, however, have express statutory power to override an ICIG’s determination that the complaint is not credible;³³ therefore, it is likely that Congress foresaw the possibility of the ICIG making a decision with which a whistleblower disagrees in passing the ICWPA.³⁴ On the contrary, Congress likely did not include provisions which detailed the situation at hand, for it likely did not envision the DNI “obstructing the process” as an agency head.³⁵ Given that it remains an open question whether the OLC had the initial authority to advise the DNI in this instance, the section to follow will discuss the arguments made in the OLC memo and the counterarguments provided by the ICIG.

B. SUBSTANTIVE ASSESSMENT OF THE ARGUMENTS RAISED IN THE OLC MEMO

The OLC memo first and foremost addressed whether the DNI had a statutory obligation to forward the complaint to the intelligence committees.³⁶ Concluding that the DNI did not, the OLC memo provided that because the report concerned alleged misconduct by someone outside the Intelligence Community, the matter could not be of urgent concern.³⁷ The memo also stated that the relevant provision in the ICWPA “does not cover every alleged violation of federal law or other abuse that comes to the attention of a member of the [I]ntelligence [C]ommunity.”³⁸ For this reason, the OLC was of the opinion that the alleged misconduct was independent of intelligence activity within the DNI’s authority.³⁹

In addition to the affirmative assertion of the OLC’s right to review the urgent concern determination of the ICIG, the memo also provided that the ICIG’s determination was incorrect on the merits.⁴⁰ The memo concluded that because the

31. See CIGIE Letter, *supra* note 23, at 2.

32. *Id.*

33. See 50 U.S.C.A. § 3033(k).

34. See Deanna Paul, *The Whistleblower Complaint Has Congress and Trump at an Impasse. Here’s What the Law Says.*, WASH. POST (Sep. 22, 2019), <https://www.washingtonpost.com/politics/2019/09/22/whistleblower-complaint-has-congress-trump-an-impasse-heres-what-law-says/> [<https://perma.cc/ZF5L-4XSD>].

35. Kel McClanahan, *Q&A on Whistleblower Complaint Being Withheld from Congressional Intelligence Committees*, JUST SECURITY (Sep. 17, 2019), <https://www.justsecurity.org/66211/qa-on-whistleblower-complaint-being-withheld-from-congressional-intelligence-committees/> [<https://perma.cc/W63W-X9UM>].

36. OLC Memo, *supra* note 14, at 1.

37. *Id.* at 2.

38. See *id.* at 5 n.5 (citing *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 100 (1998)).

39. See *id.* at 2.

40. See *id.*

complaint did not fall within the statutory definition of “urgent concern,” the law did not require the DNI to forward the complaint to the Congressional intelligence committees.⁴¹ First, the OLC argued that the complaint did not “arise in connection with the operation of any [United States] government intelligence activity,”⁴² nor did it involve a member of the Intelligence Community because the complainant received the information contained in the complaint secondhand.⁴³ Furthermore, the memo provided that “[c]onsistent with 28 U.S.C. § 535, the ICIG’s letter and [the complaint]” should properly “have been referred to the Criminal Division of the Department of Justice for appropriate review,” rather than the intelligence committees.⁴⁴

In contrast, the ICIG argued that one of the DNI’s significant responsibilities as head of the Intelligence Community is to protect federal elections through vigilant oversight and investigation of information related to potential interference on behalf of a foreign government.⁴⁵ Specifically, the ICIG noted that “alleged conduct by a senior [United States] public official to seek foreign assistance to interfere in or influence a Federal election . . . [could] potentially expose [the official] to serious national security and counterintelligence risks.”⁴⁶ According to the ICIG, if the allegations in the complaint were proven to be true, the Intelligence Community would have reason to be concerned over the security of United States elections and would stand to take measures against the possible interference of Ukraine.⁴⁷ The OLC responded to this argument made by the ICIG by pointing out the lack of statutory authority for the assertion that the DNI is charged with the operational responsibility to prevent foreign election interference.⁴⁸

Whether or not the OLC had the authority to review the ICIG’s decision, the substantive assessment of whether the whistleblower complaint was a matter of urgent concern raises the question of what measures exist to ensure the accountability of the OLC generally. This requires a look into the unique role of the OLC and the legal ethics principles under which its attorneys must abide.

41. *See id.*

42. “The alleged misconduct is not an ‘urgent concern’ within the meaning of the statute because it does not concern ‘the funding, administration, or operation of an intelligence activity’ under the authority of the DNI.” *Id.* (citing § 3033(k)(5)(G)(i)).

43. *Id.* at 2.

44. *Id.*

45. Letter from Michael Atkinson, Inspector Gen. of the Intelligence Cmty, to Steven Engel, Assistant Attorney Gen, Office of Legal Counsel, Dep’t of Justice (Sept. 17, 2019) [hereinafter Letter from ICIG to OLC].

46. *Id.* at 3.

47. *Id.* at 6.

48. *See* OLC Memo, *supra* note 14, at 7, n.7.

II. THE ROLE OF THE OLC AND THE ETHICAL IMPLICATIONS OF ITS ATTORNEYS

The fair administration of law in the political system requires the establishment of bodies exercising impartial judgment and objective analysis. When Congress passed the ICWPA, it entrusted the ICIG to independently evaluate the credibility of alleged wrongdoing within the Intelligence Community and to assist Congress with intelligence oversight.⁴⁹ Similarly, the function of the OLC is to provide objective analysis of pressing and complex issues of law within the executive branch.⁵⁰ In analyzing the legal ethics implications of the OLC, it is important to recognize that lawyers working in this office are subject to the state's ethics rules in which they practice. Nonetheless, the OLC has historically been subject to legal ethics criticisms. Moreover, the accountability of OLC lawyers and the extent to which the legal ethics rules are upheld and enforced against OLC lawyers has been called into question.

A. THE OFFICE OF LEGAL COUNSEL IN THE LEGAL ETHICS CONTEXT

The OLC is headed by the Assistant Attorney General—appointed by the President and confirmed by the Senate—with twenty-four Attorney-Advisers making up the remainder of the office.⁵¹ The chief duty of the OLC is to advise the executive branch on the legality of proposed actions.⁵² More specifically, the function of the OLC is to “provide controlling advice to executive branch officials on questions of law that are centrally important to the functioning of the Federal Government.”⁵³ Yet, the idea of “controlling advice” is potentially problematic because the distinction between OLC opinions—which legally bind the executive branch—and the legal advice that OLC lawyers provide to their clients is somewhat uncertain.⁵⁴ When an OLC lawyer writes an opinion, that opinion effectively binds the executive branch to that interpretation, and it has the ability to change the de facto meaning of a law.⁵⁵ Unlike in advocacy, a lawyer acting in

49. See CIGIE Letter, *supra* note 23, at 4; see also Andrew McCanse Wright, *Executive Privilege and Inspectors General*, 97 TEX. L. REV. 1295, 1298 (2019).

50. Dawn Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1576–77 (2007).

51. *Employment Opportunities*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/olc/employment-opportunities> [https://perma.cc/Z7V7-CW7P] (last visited Apr. 19, 2020).

52. See *Office of Legal Counsel*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/olc> [https://perma.cc/DY4A-N5UR] (last visited Apr. 19, 2020).

53. *Best Practices for OLC Legal Advice and Written Opinions*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/olc/best-practices-olc-legal-advice-and-written-opinions> [https://perma.cc/A8VF-JGHP] (last visited Apr. 19, 2020).

54. Kel McClanahan, *How One Secretive Justice Department Office Can Sway the Whole Government*, WASH. POST (Sept. 26, 2019), <https://www.washingtonpost.com/outlook/2019/09/26/how-one-secretive-justice-department-office-can-sway-whole-government/> [https://perma.cc/JF7C-ANAQ].

55. Steven Giballa, *Saving the Law from the Office of Legal Counsel*, 22 GEO. J. LEGAL ETHICS 845, 845 (2009).

an advisory role does not purport to seek legal justification for a particular course of action. Rather, OLC Attorney-Advisers possess heightened responsibility to provide neutral legal assessments that weigh each side of a legal issue prior to rendering a decision.⁵⁶ In reaching the most appropriate outcome, “the ethical analysis of [OLC] lawyers in an advisory role should focus on whether the advice represents a reasonable application of relevant authority.”⁵⁷

All Justice Department lawyers must follow general government ethics rules while adhering to their commitment to take actions and make decisions “in the best interests of the American people.”⁵⁸ As such, the McDade Murtha Amendment of 2001 established by law that Justice Department lawyers are subject to both the ethical guidelines issued by the Justice Department and the state rules of professional responsibility effective in the states where they practice law.⁵⁹ The ABA *Model Rules of Professional Conduct* serve as a model for legal ethics across most states and are also applicable to federal government attorneys providing legal services, including in the District of Columbia under the D.C. Rules of Professional Conduct.⁶⁰ OLC lawyers are in unique positions as federal government lawyers involved in intragovernmental legal issues. The Preamble and Scope of the *Model Rules* specify the following exception for lawyers working in the federal government: “lawyers under the supervision of [an Attorney General] may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.”⁶¹ However, both the *Model Rules* and D.C. Rules of Professional Conduct supply an ambiguous rationale for the modified ethical standards imposed on government lawyers, and the *Model Rules* acknowledge the potential challenges associated with defining the government lawyer’s client.⁶²

B. PAST ETHICAL CONCERNS ABOUT THE OLC

The unique role of the OLC has previously been called into question, prompting scholars to evaluate the legal ethics accountability of OLC lawyers. In 2002, the OLC issued opinions known as the Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, which authorized waterboarding as an

56. Michelle Querijero, *Without Lawyers: An Ethical View of the Torture Memos*, 23 GEO. J. LEGAL ETHICS 241, 265 (2010).

57. W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 340 (2017). “The term ‘reasonable application’ should be understood as a criterion for how well a practical activity is carried out, not a standard for the accuracy of the conclusion.” *Id.* at 340–41.

58. See Justice Manual 1-4010; see also 5 C.F.R. § 2635.101 (1978).

59. See McDade-Murtha Amendment, 28 U.S.C.A. § 530B (1998).

60. See generally D.C. RULES OF PROF'L CONDUCT (2015) [hereinafter D.C. RULES].

61. MODEL RULES OF PROF'L CONDUCT pmb1. & scope (2018).

62. Francis J. Aul, *Out of Many Clients, One: Conflict of Interest and the Office of the Solicitor General*, 31 GEO. J. LEGAL ETHICS 475, 489 (2018).

interrogation technique despite the criminal prohibition in place against torture.⁶³ The issuance of the opinions, which provided that such a policy would be lawful, effectively shielded government actors from criminal prosecution for enhanced interrogation techniques.⁶⁴ Nevertheless, opposition to the memos was so strong that the Justice Department repudiated the opinions in 2004 and expressly rebutted its prior assertions.⁶⁵ The Justice Department, in assessing the possibility of imposing disciplinary measures on the OLC lawyers who provided the opinion's legal justifications, concluded in a 2010 report that the OLC lawyers were not guilty of professional misconduct.⁶⁶

Not long after denunciations of the 2002 Standards of Conduct for Interrogation came to light, nineteen former OLC attorneys signed the Principles to Guide the Office of Legal Counsel.⁶⁷ The Principles have served as a procedural standards guide for OLC appointees since their drafting in 2004; however, they omit any mention of the OLC lawyer's *ethical* obligations.⁶⁸ Furthermore, the Principles are not professionally binding on the OLC lawyers and lack a method of enforcement.⁶⁹ They do, however, represent many of the same ideals prevalent throughout the D.C. Rules.⁷⁰ For example, the first Principle supports the notion that the OLC must act in its capacity as an adviser rather than an advocate for the executive branch.⁷¹ The Principles remind OLC attorneys to provide "an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies."⁷² Due to the invocation of many of the same ideals justifying the D.C. Rules, the Principles implicitly justify

63. Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803, 818 (2018); see also Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002).

64. Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 831–32 (2017).

65. Querijero, *supra* note 56, at 263.

66. See Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Center Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists, Office of the Deputy Attorney Gen. (Jan. 5, 2010).

67. Johnsen, *supra* note 50, at 1578, 1602; Giballa, *supra* note 55, at 858.

68. Giballa, *supra* note 55, at 858.

69. *Id.*

70. *Id.*

71. See *id.* at 859. The first of the Principles states that when providing legal advice to guide contemplated executive branch action:

OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

Johnsen, *supra* note 50, at 1580 (citing Walter E. Dellinger, Dawn Johnsen et al., Principles to Guide the Office of Legal Counsel (2004), reprinted in 54 UCLA L. REV. 1559 app. 2).

72. Walter E. Dellinger et al., Office of Legal Counsel, *Principles to Guide the Office of Legal Counsel* 1, at 1 (2004).

the imposition of legal ethics accountability onto OLC lawyers.⁷³ This supports the argument set forth by a number of legal scholars that the D.C. Rules should be more stringently applied to OLC lawyers.⁷⁴

C. LEGAL ETHICS RECOMMENDATIONS FOR THE OLC

The OLC purports to offer candid legal advice to its client—the executive branch. However, scholars have questioned whether the OLC is generally at risk of offering opinions contrary to the law as it stands at the behest of its clients’ wishes.⁷⁵ The desired effect of such contrived advice would be to protect clients from potential liability or criticism. William H. Simon described this type of bad advice supplied by lawyers when asked to by their client as “quasi-third-party” advice.⁷⁶ Nonetheless, legal ethics have yet to be formally applied to the notion of quasi-third-party advice, particularly in the government setting.

The OLC should abide by the legal ethics rules pertaining to the representation of organizations.⁷⁷ Lawyers representing organizations are responsible for protecting the organization from potential wrongdoing by the organization’s representatives.⁷⁸ Rule 1.13 states that a lawyer must take action to prevent or mitigate harm when the lawyer knows that a member of an organization is acting in such a way that is harmful to the organization as a whole.⁷⁹ In instances of potential

73. See Giballa, *supra* note 55, at 858.

74. *Id.* at 855; see also Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SECURITY L. & POL’Y 455, 465 (2005). See generally Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557 (2005).

75. See, e.g., Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SECURITY L. & POL’Y 455, 465 (2005).

76. Giballa, *supra* note 55, at 845 (citing William H. Simon, *The Market for Bad Legal Advice*, 60 STAN. L. REV. 1555, 1557 (2008)).

77. Clark, *supra* note 74, at 468.

78. *Id.*; see also D.C. RULES R. 1.13.

79. See D.C. RULES R. 1.13. Comment 4 to Rule 1.13 further describes the lawyer’s obligations in such circumstances:

[T]he lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer’s advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

wrongdoing, Rule 1.13 directs lawyers to refer matters to the higher authority within an organization.⁸⁰ The rule does not, however, inform lawyers what to do “if the highest authority in an organization refuses to alter the course of conduct that contradicts the law or the organization’s interests.”⁸¹ The entire executive branch—an organization under Rule 1.13—is the client of the OLC.⁸² If the lawyers believed that the DNI was requesting justification for its desired outcome, the OLC lawyers would have had a duty to refer to a higher authority.⁸³ Although Rule 1.13 should apply given that the executive branch is an organizational client of the OLC, the unique role of the OLC requires consideration of additional legal ethics principles.

OLC lawyers should also be held accountable by the legal ethics rules pertaining to legal advisers.⁸⁴ Acting in their role as advisers to the executive branch, the OLC lawyers must impart the best assessment of what the law requires as objectively as possible.⁸⁵ Although the DNI may have intended to seek corroboration from the OLC on its determination that ICIG’s finding of an “urgent concern” was invalid, the OLC lawyers nevertheless had a professional obligation to give candid and accurate legal advice to their client.⁸⁶ If indeed the OLC memo was substantively wrong, discussed *infra*, the OLC’s failure to provide candid legal advice would have been in violation of Rule 2.1, which should be interpreted to require OLC lawyers to provide the best and most accurate—rather than merely plausible—view of the law.⁸⁷ Likewise, Rule 2.1 should be understood to prohibit OLC lawyers from supplying contrived justifications for a desired outcome at the behest of their client, the executive branch.⁸⁸ The application of Rule 2.1 is principally important in this context because the opinions published by the OLC are “likely to be the last word on the legality or illegality of a proposed course of action,”⁸⁹ thus demanding the utmost deference for legal ethics principles.

CONCLUSION

The response to the whistleblower complaint of fall 2019 provides both an opportunity for clarification of the ICWPA and an opportunity to revisit the impact of legal ethics on government lawyers in the OLC. The unprecedented challenge

80. D.C. RULES R. 1.13.

81. Querijero, *supra* note 56, at 255.

82. Clark, *supra* note 74, at 464 (citing D.C. RULES R. 1.13).

83. *See* D.C. RULES R. 1.13.

84. *See* D.C. RULES R. 1.13 cmt. 4.

85. Clark, *supra* note 74, at 465–66; *see also* D.C. RULES R. 2.1. “[A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.” D.C. RULES R. 2.1 cmt. 1.

86. *See* D.C. RULES R. 2.1.

87. *See* Giballa, *supra* note 55, at 845.

88. *See id.*

89. *Id.* at 846. Only the President or Attorney General can overturn an OLC opinion. *See id.* at 850 (citing Randolph Moss, Executive Branch Legal Interpretation, 52 Admin. L. Rev. 1303, 1316 (2000)).

of an ICIG's urgent concern determination by the DNI warrants contemplating the proper course of action proscribed by the ICWPA. Moreover, the DNI's consultation of the OLC highlights ambiguities surrounding both the legal ethics duties of OLC lawyers generally and the appropriate course of action for an OLC lawyer facing a potential legal ethics violation. As it stands, the legal ethics standards for OLC lawyers are largely inadequate. The potential failure of government lawyers to fulfill their legal ethics obligations threatens the OLC's crucial role in providing neutral legal assessments of the legality of proposed actions in the executive branch. To ensure that OLC advice is independent of executive administration's influence, OLC lawyers should be held increasingly accountable to their legal ethics duties.⁹⁰

90. *See id.* at 851.