# Government Gray Space: Exploring Government Legal Ethics Through the U.S. Agreements with the Northern Triangle Countries

SARAH SHANOUDY*

## INTRODUCTION

U.S. immigration policy is presently a hotly debated topic in public discourse. Politicians run on platforms that highlight solutions to mending our "broken"[1] immigration system. Once in office, government officials are faced with the reality that navigating U.S. immigration laws while keeping an eye on public sentiments is no easy task. Today, U.S. immigration numbers remain steady and backlog processing times for immigration applications can reach staggering periods.[2]

President Donald Trump has been no stranger to immigration policy rhetoric. Some of the phrases he has employed include "build a wall"[3] and "send her back."[4] It is then up to government lawyers who serve in various capacities in the Trump administration to draft new immigration solutions for the President. History has exhibited that U.S. government lawyers may sometimes find

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* J.D., Georgetown University Law Center (expected May 2021); B.A., George Mason University (2015).
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1. *See* Pia M. Orrenius & Madeline Zavodny, *Creating Cohesive, Coherent Immigration Policy*, 5 J. MIGRATION & HUM. SECURITY 180, 180 (2017); Jeanne Batalova & Aaron Terrazas, *The Long View: The Past, Present, and Future of U.S. Immigration*, *in* U.S. IMMIGR. AND EDUC.: CULTURAL AND POL'Y ISSUES ACROSS THE LIFESPAN 17, 18 (Elena L. Grigorenko ed., 2012).

2. *See* David J. Bier, *Immigration Wait Times from Quotas Have Doubled*, CATO INSTITUTE (June 18, 2019), https://www.cato.org/publications/policy-analysis/immigration-wait-times-quotas-have-doubled-green-card-backlogs-are-long [https://perma.cc/NF2Z-DNE8] ("Behind those immigrants who applied for green cards in 2018 stand nearly five million people waiting in the applicant backlog. Without significant reforms, wait times will become impossibly long for these immigrants.")

3. *See* Stuart Anderson, *Where the Idea for Donald Trump's Wall Came From*, FORBES (Jan. 4, 2019), https://www.forbes.com/sites/stuartanderson/2019/01/04/where-the-idea-for-donald-trumps-wall-came-from/#32e548194415 [https://perma.cc/ZA9V-5YS9] (describing where the "mnemonic device" of build that wall originated).

4. *See* Michael Crowley, *At Rally, President Accuses Liberal Critics of Seeking the Nation's 'Destruction'*, N.Y. TIMES (July 17, 2019), https://www.nytimes.com/2019/07/17/us/politics/trump-send-her-back-ilhan-omar.html?module=inline [https://perma.cc/7E4H-BT2G] ("President Trump road-tested his attacks on four Democratic congresswomen . . . casting them as avatars of anti-American radicalism and reiterating his call for them to leave the country, as a raucous crowd chanted, 'Send her back! Send her back!'"); Julie Hirschfeld Davis, Maggie Haberman & Michael Crowley, *Trump Disavows 'Send Her Back' Chant After Pressure from G.O.P.*, N.Y. TIMES (July 18, 2019), https://www.nytimes.com/2019/07/18/us/politics/ilhan-omar-donald-trump.html [https://perma.cc/ZJK3-58U6] (explaining that, "Mr. Trump disavowed the behavior of his own supporters in comments to reporters at the White House and claimed that he had tried to contain it").

themselves in ethically comprising situations, as was demonstrated during the Iraq War era and the drafting of what came to be known as the Torture Memos.[5]

In Part I, this Note will examine the *Model Rules of Professional Conduct* under which all lawyers are governed.[6] Part I will pay close attention to Rules 1.3, 5.7, and 8.4. Part II will explain the broad role of government lawyers and the unique challenges these lawyers face operating within a government context. This Part will delve into the role of the government lawyer, who the client is, and what duties exist to the client in certain circumstances, such as when proposing policy solutions to legal questions. Part III will switch over to the history of U.S. immigration law, tracing the evolution of immigration law by highlighting important asylum and refugee laws, why these laws exist, and why they are important. Part IV will examine the three recent Asylum Cooperative Agreements between the United States and Guatemala, United States and El Salvador, and United States and Honduras (collectively the "Northern Triangle Agreements").[7] This Part dives into the language of these Agreements, the circumstances surrounding their creation, both criticisms and defenses of the Agreements, and some of their repercussions. Part V will explain how government lawyers have toed the legal ethics line in the past and how the consequences of these actions have resulted in little more than a slap on the wrist. This Note will conclude that government lawyers operate in a gray space where legal ethics have unfortunately fallen victim to the desires of government lawyers to satisfy the needs of a client that is much stronger and more influential than the individual lawyers. The recent Northern Triangle Agreements are one such example.

## I. OVERVIEW OF LEGAL ETHICS

Lawyers are no strangers to the rules governing their responsibilities. Budding lawyers are generally required to complete a professional responsibility course and pass the Multistate Professional Responsibility Examination (MPRE), which tests students on their successful understanding of the standards related to a lawyer's professional conduct.[8] The *Model Rules of Professional Conduct* continue

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5. Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1410, 1423 (2008).

6. *See About the Model Rules of Professional Conduct*, AM. BAR ASS'N (Oct. 30, 2019), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [https://perma.cc/F8ML-NBKG].

7. Agreement between the Government of the United States of America and the Government of the Republic of Guatemala for Cooperation in the Examination of Protection Claims, Guat.-U.S., July 26, 2019, T.I.A.S. No. 19-1115 [hereinafter Agreement with Guatemala]; Agreement between the Government of the United States of America and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims, Sept. 20, 2019, *available at* https://fingfx.thomsonreuters.com/gfx/mkt/12/6447/6378/DHS%20Cooperative%20Agreement%20with%20El%20Salvador.pdf [https://perma.cc/D6CV-2GD5]; Agreement between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims, Sept. 25, 2019.

8. *The Multistate Professional Responsibility Exam*, NCBE , http://www.ncbex.org/exams/mpre/ [https://perma.cc/W6WF-4HGL] (last visited Mar. 22, 2020) ("[The MPRE] is required for admission to the bars of all but two US jurisdictions (Wisconsin and Puerto Rico.) (Note that Connecticut and New Jersey accept

to govern the conduct of legal professionals beyond law school. As the American Bar Association (ABA) clearly states:

> The ABA *Model Rules of Professional Conduct* were adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most jurisdictions. Before the adoption of the Model Rules, the ABA model was the 1969 *Model Code of Professional Responsibility*. Preceding the Model Code were the 1908 *Canons of Professional Ethics* (last amended in 1963).[9]

Although this Note will focus on the *Model Rules*, government lawyers are not only bound by these sets of rules, which govern private practitioners, they must also pay close attention to the ethics rules binding those serving in the government.[10] It is also worth noting that not all states have adopted the *Model Rules*, and government lawyers operating within the bounds of certain states should be privy to those states' specific rules.[11] That said, the *Model Rules* most relevant to this Note's analysis of government lawyers include Model Rule 5.7 on law-related services, Model Rule 1.3 on diligence, and Model Rule 8.4 on misconduct.

To start, even when a lawyer works in the government in a role other than an acting attorney, the attorney is governed by Model Rule 5.7 concerning "law-related services."[12] Law-related services are those "performed in conjunction with and in substance are related to the provision of legal services."[13] Model Rule 5.7 is designed to provide guidance for lawyers in the public sector who may have duties or roles that do not, on their face, appear to involve legal work.[14] For example, prior to serving in the government, Kevin McAleenan, former United States Secretary of Homeland Security and signatory of the Agreements discussed below, practiced law in California, having earlier earned his law degree from the University of Chicago.[15] Someone such as McAleenan is bound by the *Model Rules* whether acting in or outside of an official legal role in the government.

The second rule that is significant to this Note's analysis is Model Rule 1.3, which states, "[a] lawyer shall act with reasonable diligence and promptness in

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successful completion of a law school course on professional responsibility in lieu of a passing score on the MPRE.)").

9. *About the Model Rules of Professional Conduct*, *supra* note 6.

10. Peggy Love, *Ethics and Professional Conduct for Federal Government Attorneys*, 25 NAT. RESOURCES & ENV'T 40, 40 (2011). For example, federal government attorneys are bound by the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct). *Id.*

11. *Id.*

12. MODEL RULES OF PROF'L CONDUCT R. 5.7 (2019) [hereinafter MODEL RULES].

13. MODEL RULES R. 5.7(b).

14. Hugh D. Spitzer, *Model Rule 5.7 and Lawyers in Government Jobs – How Can They Ever Be "Non-lawyers"?*, 30 GEO. J. LEGAL ETHICS 45, 61 (2017).

15. *Kevin K. McAleenan*, U.S. DEP'T OF HOMELAND SECURITY (Aug. 1, 2019), https://www.dhs.gov/person/kevin-k-mcaleenan [https://perma.cc/S28D-7NML].

representing a client."[16] The brevity of this rule masks its incredible weight. Some have criticized the Rules for eliminating an explicit requirement that lawyers *zealously* represent their clients.[17] However, the Comments to Rule 1.3 reveal that hidden in its thirteen words is a required "commitment and dedication to the interests of the client" and to perform duties "with zeal in advocacy upon the client's behalf."[18] For private practitioners operating within an adversarial system, this means making whatever argument is possible—without being frivolous[19]—and fighting as hard as possible for the client's benefit.[20] One issue in particular that arises when a lawyer seeks to faithfully and zealously represent a client is that she must uphold the attorney-client relationship by avoiding conflicts of interest.[21] As will be discussed below, for government lawyers, this type of representation poses a dilemma because determining who the client is and what conflicts of interest exist can be difficult to determine.

The third rule to consider when analyzing the ethical role of the government lawyer is Model Rule 8.4. One such danger that may result from over-zealous representation or an eagerness to please the client—in the case of government lawyers this client can be quite powerful—is succumbing to misconduct to reach the client's desired result. Model Rule 8.4 attempts to uphold the integrity of the legal profession by prohibiting, inter alia, engagement in fraudulent, deceitful, or misrepresentative activities.[22] This is further emphasized by Rule 1.2(d), which makes clear that zealous representation does not allow for dishonesty.[23] A prohibition against misconduct and dishonesty may seem intuitive to ethical rules but the problem arises, as will be demonstrated below, when the line between zealous representation and wrongdoing is not clearly marked.

## II. DILEMMAS OF GOVERNMENT LAWYERS

Given that government lawyers are bound by the same set of ethical responsibilities as private practitioners,[24] one must understand who the government lawyers' client is and what unique challenges they face when performing such duties for the client.[25] Often, government lawyers are faced with a dilemma: do they

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16. MODEL RULES R. 1.3.

17. *See* Lawrence J. Vilardo & Vincent E. Doyle, *Where Did the Zeal Go?*, 38 ABA J. 1, 4 (2011) (arguing that the requirement of zeal is largely missing from the rules of professional conduct).

18. MODEL RULES R. 1.3 cmt. 1.

19. MODEL RULES R. 3.1.

20. *See* Vilardo & Doyle, *supra* note 17, at 5.

21. *See* MODEL RULES R. 1.7.

22. MODEL RULES R. 8.4(c).

23. MODEL RULES R. 1.2(d); *see* Cyrus D. Mehta & Alan Goldfarb, *Executive Disorder: Ethical Challenges for Immigration Lawyers Under the Trump Administration*, AM. IMMIGR. LAW.S ASS'N (July 7, 2017), https://www.houstonimmigration.org/wp-content/uploads/2017/04/Ethics-under-Trump.pdf [https://perma.cc/C589-KMDJ].

24. Charles B. Howland, *"Who is the 'Client' at a Federal Agency?"*, PA. BAR INST., ENVTL. L.F. (Apr. 5, 2017).

25. *See* Spitzer, *supra* note 14, at 54.

represent the people, the government, or both?[26] If the answer is both, it is difficult to see how such a representation could occur without a conflict of interest.[27] For example, a lawyer may find that if she is to serve the best interests of the government client, this representation would directly conflict with the desired course of action if she were representing the people at large.

Additionally, a power discrepancy becomes immediately apparent. One client—the government—may involve powerful people in powerful positions. Another client—the people—may largely go unnoticed in day-to-day duties. When representing the people, often referred to as "public interest," a government lawyer may have to weigh the duties owed to the government—or more specifically to the agency she serves or the President—against what she considers to be appropriate under the circumstances.[28] This issue is one that has "vexed decision-makers and commentators for many years."[29] Although government lawyers operate somewhere in between the government interest and the public interest, this Note will examine both the duties to the government—through the lens of the single client model—and the duties to the public—through the lens of the public interest model.

The single client model is the perspective that the government lawyer owes a duty to her direct supervisor or agency in a way similar to that which a private lawyer owes a duty to the individual that has hired her.[30] One of the most clearly defined examples of this approach is the following:

> In 1988 a special committee of the District of Columbia Bar issued a report on government lawyers and their duties under the Model Rules that concluded that "the agency, not the public interest, should be considered the government lawyer's client. . . . [G]overnment officials "must believe that the lawyer will represent the legitimate interests the governmental client seeks to advance, and not be influenced by some unique and personal vision of the 'public interest.'"[31]

26. *See* William Josephson & Russell G. Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict*, 29 HOWARD L.J. 539, 550–51 (1986); *see also* Spitzer, *supra* note 14, at 61 (posing an imaginary situation where a government attorney is faced with the questions: "Who is the client—the Department of Financial Institutions or the entire state government? Who is the 'duly authorized constituent' for that client . . . ?"); CATHLEEN C. CAVELL & ARABELA THOMAS, ETHICAL ISSUES FOR GOVERNMENT LAWYERS § 18.2 (2018) ("Unlike private practice lawyers, the first question for many government lawyers is, 'Who is my client?'").

27. *See* MODEL RULE R.1.7 (A conflict of interest exists "if the representation of one client will be directly adverse to another client.")

28. *See* Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294 (1987).

29. *Government Counsel and Their Obligations*, *supra* note 5, at 1409 (quoting Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991)).

30. *Id*. at 1413.

31. Howland, *supra* note 24 (quoting Geoffrey Hazard, *Symposium: Legal Ethics for Government Lawyers: Straight Talk For Tough Times: Conflicts Of Interest In Representation Of Public Agencies In Civil Matters*, 9 WIDENER J. PUB. L. 211, 211–12 (2000)).

This approach is not without criticism. One reason this perspective is flawed is that it fails to recognize the distinctive space in which government lawyers operate.[32] In contrast to private lawyers, government attorney matters are rarely open to judicial review and their decisions are backed by the power of the state.[33]

The second perspective posits that the government lawyer is bound by a broader public interest.[34] This understanding derives from the idea that the United States is managed by a "government of the people, by the people, [and] for the people."[35] If a government lawyer serves the government, then she by extension serves the people. This view puts the public's interest ahead of what the direct government employer may desire.[36] This is problematic because it is difficult to discern and define what the public interest actually is.[37] If government lawyers are expected to serve the public interest, then this leaves room for individual interpretation and ambiguity. Without any agreed upon definition as to what the public interest is and the best way to fulfill this interest,[38] the government lawyer is constantly left deciding how to best balance between agency or government desires and serving the public.

Another problem with the public interest approach is that its broadness undermines the U.S. system of checks and balances in which it "is not the responsibility of an agency attorney to represent the interests of Congress or the Court."[39] This is because the legislative and judiciary branches have their own safeguards in place to protect against misadministration of the law and it is therefore not the responsibility of the executive branch lawyer to attempt to take all other branch interests and precedents into consideration when working under the executive.[40]

Although the two approaches described above represent two majority views,[41] another suggestion is to move away from attempts to define who the client is and instead define who the client is *not*.[42] Because this Note is not intended to determine which approach is best, for the sake of argument this Note will accept the two predominantly understood approaches defined above as the best ways of

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32. *Government Counsel and Their Obligations*, *supra* note 5, at 1413.

33. *Id.* at 1410.

34. *Id.* at 1412.

35. Abraham Lincoln, President of the United States, The Gettysburg Address (Nov. 19, 1863) (transcript available at https://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm [https://perma.cc/8RMJ-LB7P]).

36. *Government Counsel and Their Obligations*, *supra* note 5, at 1413.

37. *Id.*

38. *See* Maureen A. Sanders, *Government Attorneys and Ethical Rules: Good Souls in Limbo*, 7 B.Y.U. J. PUB. L. 39, 51 (1992).

39. Miller, *supra* note 28, at 1296.

40. *Id.* at 1296–97.

41. *See* Howland, *supra* note 24. Other models include the "neutral model" where the government lawyer is a disinterested and impartial observer and the "advocate model" where the government lawyer is an advocate advancing the goals of the his or her client. *Government Counsel and Their Obligations*, *supra* note 5, at 1414–15 (2008).

42. CAVELL & THOMAS, *supra* note 26, § 18.2.

understanding the government lawyer's client. The reality is that neither approach fully captures the government lawyer's role and, therefore, most government lawyers operate somewhere in between the interests of the government agency and the public interest.

## III. U.S. IMMIGRATION LAW

The United States is a nation built on immigration. Whereas European countries made the shift from emigration to immigration, the United States built immigration into the very inception of the country.[43] Immigration has bestowed "extraordinary benefits" to the United States both in a domestic sense and in a foreign policy realm.[44] As described above, government lawyers are faced with unique ethical challenges when zealously representing the client. Additionally, defining who the client is raises a range of issues in and of itself. It comes as no surprise then that the exceedingly complex nature of the immigration system poses an even greater burden on government lawyers who seek to navigate the law, maintain a moral code, and provide sound legal advice.

In order to understand how lawyers in the Trump administration interpret immigration law in an ethically ambiguous manner, it is important to lay out a basic history of U.S. immigration law with a focus on the refugee laws that apply to the Northern Triangle Agreements discussed in this Part. This Note will take a more focused approach to understanding refugee laws by examining the most recent policies which govern our understanding of humanitarian immigration today by starting with the United States as a signatory to international conventions that have come to define our modern domestic immigration laws.

The modern U.S. humanitarian immigration laws evolved from two important documents, the 1951 Convention Relating to the Status of Refugees and its later amendment, the 1967 Protocol Relating to the Status of Refugees, both created by United Nations High Commissioner for Refugees (UNHCR).[45] At present, 148 states are a party to the Convention, the Protocol, or both.[46] The United States joined this international refugee body of law by signing onto the 1967

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43. Batalova & Terrazas, *supra* note 1, at 21.

44. Jeb Bush, Thomas F. McLarty III & Edward Alden, *U.S. Immigration Policy*, Independent Task Force Report No. 63, COUNCIL ON FOREIGN RELATIONS, at 5.

45. The 1951 Convention Relating to the Status of Refugees (Convention) and its subsequent amendment, the 1967 Protocol Relating to the Status of Refugees (Protocol)—instruments that are fairly short and drafted broadly, with many important clauses open for interpretation—govern [the international refugee] regime. Sometimes differing domestic laws relating to the status of refugees in the 148 states party to the Convention or Protocol have proliferated, including in the United States, where the legislature, agencies, and courts have translated language in the Convention into domestic law. *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, 131 HARV. L. REV. 1399, 1399 (2018).

46. UNITED NATIONS HIGH COMM'R FOR REFUGEES, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, http://www.unhcr.org/en-us/3b73b0d63.pdf [https://perma.cc/9359-BSLG] (last updated Apr. 2015).

Protocol in 1968 and taking on the 1951 Convention's obligations.[47] The Convention and subsequent Protocol define a refugee as:

> [A] person who is unable or unwilling to return to his or her home country, and cannot obtain protection in that country, due to past persecution or a well-founded fear of being persecuted in the future "on account of race, religion, nationality, membership in a particular social group, or political opinion."[48]

In 1980, Congress passed the Refugee Act and amended its already existing Immigration and Nationality Act (INA).[49] This Amendment adjusted U.S. domestic law to be similar in language to that of the 1967 Protocol.[50] The language is importantly similar in regard to defining refugees. The new language broadened the bases for persons who qualify for persecution and the withholding of deportation.[51] Refugee law in the United States today and the process by which humanitarian immigrants seek refuge in the United States is largely dependent on these pieces of legislation.[52] Whereas refugees are waiting to have their claim processed abroad and brought to the United States, an asylum seeker is an individual who meets the definition of refugee outlined above but is already in the United States seeking admission through a port of entry.[53]

Although encompassed by the same laws, refugees and asylum seeker claims are evaluated differently. While the United States has a quota on the number of refugees admitted annually, there is no cap on the amount of people who can seek asylum in the United States.[54] Over 20,000 individuals were granted asylum in 2016, and almost 24,000 individuals were granted asylum on yearly average in the decade before.[55] U.S. law provides protections for individuals seeking asylum while their claim is being processed, so asylum seekers have a right to remain in the United States while they await the court's decision.[56]

With the recent influx of tens of thousands of unaccompanied minors entering the United States from Central America,[57] the United States has been forced to find solutions to processing large numbers of individuals at the border. Without

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47. *American Courts*, *supra* note 45, at 1401.

48. *Asylum in the United States*, AM. IMMIGR. COUNCIL (May 14, 2018), https://www.americanimmigrationcouncil.org/research/asylum-united-states [https://perma.cc/9ANV-RABX] (quoting Convention Relating to the Status of Refugees § 1(A)(2), July 28, 1951, 189 U.N.T.S. 137, at 137).

49. Refugee Act of 1980, Pub. L. 96-212 (1980).

50. *Asylum in the United States*, *supra* note 48.

51. *Id.*; Refugee Act of 1980, Pub. L. 96-212 (1980).

52. *See American Courts*, *supra* note 45, at 1402 ("Today, refugee law — including the Refugee Act, with its adoption of the Convention's language — is regularly implemented in the United States.")

53. *Refugees and Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum [https://perma.cc/RGF7-UV2H] (last visited Nov. 17, 2019).

54. Orrenius & Zavodny, *supra* note 1, at 186.

55. *Asylum in the United States*, *supra* note 48.

56. *Id.* As previously noted, refugees are awaiting processing of their claims outside of the United States. *See Refugees and Asylum*, *supra* note 53.

57. Orrenius & Zavodny, *supra* note 1, at 186.

any meaningful updates to immigration laws within the past decade, newly implemented governmental immigration policies are "often inconsistent with past policies and undermine their goals."[58]

What remains is an incohesive, incoherent set of laws and regulations. Making sense of the current laws and developing new policies that are faithful to the purpose of the 1951 Convention and 1967 Protocol is no easy task. Yet, developing new policies is exactly what many lawyers operating within the government are tasked with accomplishing. This begs the question as to whether these lawyers may intentionally, under certain circumstances, or perhaps unknowingly under others, cross ethical boundaries to reach desirable results for their "client," the President.

## IV. U.S. AGREEMENTS WITH GUATEMALA, EL SALVADOR, AND HONDURAS

The three recent U.S. Agreements with Guatemala, El Salvador, and Honduras demonstrate one such example of government lawyers operating within a space of ethical ambiguity. Besides their lack of clarity, these agreements attempt to rewrite immigration law in a way that undermines the very purpose of the 1967 Protocol and INA.[59] This Part will explain both the context in which these agreements arose and how the language of these agreements creates important ethical concerns.

As noted above, the U.S. immigration system has been "significantly tested" by the increased arrivals of asylum seekers from Central America arriving at the U.S. border in 2018 and 2019.[60] Central Americans, specifically from the Northern Triangle countries of El Salvador, Guatemala, and Honduras, continue to flee poverty, high homicide rates, gang activity, extortion, and corrupt public institutions.[61] The Migration Policy Institute reports alarmingly high numbers of unaccompanied minors and families apprehended at the U.S.-Mexico Border:

> In FY 2018, CBP [Customs and Border Protection] apprehended more than 38,000 unaccompanied children and nearly 104,000 people traveling as families from El Salvador, Guatemala, and Honduras at the U.S.-Mexico border. In FY 2018, 58 percent of unaccompanied minors and 49 percent of those

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58. *Id.* at 180.

59. *See Asylum in the United States*, *supra* note 48 ("As a signatory to the 1967 Protocol, and through U.S. immigration law, the United States has legal obligations to provide protection to those who qualify as refugees.")

60. Allison O'Connor, Jeanne Batalova & Jessica Bolter, *Central American Immigrants in the United States*, MIGRATION P'LCY INST. (Aug. 15, 2019), https://www.migrationpolicy.org/article/central-american-immigrants-united-states [https://perma.cc/L4QZ-BMSG].

61. *Id.*; *see also* Ashoka Mukpo, *Asylum-Seekers Are Being Abandoned in Guatemala in a New Policy Officials Call a "Total Disaster"*, ACLU (Jan. 28, 2020), https://www.aclu.org/news/human-rights/asylum-seekers-are-being-abandoned-in-guatemala-in-a-new-policy-officials-call-a-total-disaster/ [https://perma.cc/ZG6L-4M54] ("The three countries — collectively known as the Northern Triangle — are struggling with record levels of violence and instability.").

> migrating as a family from the Northern Triangle were Guatemalan. As of June 2019, CBP had apprehended more than 363,000 migrants in families from the three countries during the first nine months of the fiscal year, more than tripling total FY 2018 apprehensions. With significant shares of families and unaccompanied children requesting asylum, many have been released into the United States pending long-off hearings in U.S. immigration court.[62]

With such large numbers of migrants arriving at the U.S. border in such a short period of time, the U.S. government was forced to become involved in addressing the situation. In September 2019, the Trump administration presented one solution: agreements between the U.S. government and the countries of El Salvador, Guatemala, and Honduras.[63] These agreements state that an asylum seeker who travels through one of these Central American countries to reach the U.S. border could be sent back to the country through which the individual traveled.[64] The former Department of Homeland Security Secretary, Kevin McAleenan, spearheaded and ultimately signed these agreements.[65]

For purposes of discussion, this Note will refer to the contents of the Guatemala agreement because all three agreements have similar content. The agreement begins with fairly standard language. The preliminary language reaffirms Guatemala being a party to the 1951 Convention and 1967 Protocol and the U.S. being a party to the 1967 Protocol;[66] emphasizes the obligations of both parties to protect refugees as outlined in the Convention and Protocol;[67] emphasizes the principle of non-refoulement;[68] recognizes the laws and policies of each nation; and relays a desire to uphold asylum and share responsibility.[69] Following the introductory language, Article 1 defines certain language in the agreement including "request for protection," "protection applicant," "system to determine protection," and "unaccompanied minor."[70] Article 2 excludes the application of the agreement to nationals of, or those "habitually residing" in, Guatemala.[71] This

62. O'Connor, Batalova & Bolter, *supra* note 60.

63. *See* Daniella Silva, *U.S. Signs Asylum Deal with Honduras that Could Force Migrants to Seek Relief There*, NBC NEWS (Sept. 25, 2019), https://www.nbcnews.com/news/us-news/u-s-signs-asylum-deal-honduras-could-force-migrants-seek-n1058766 [https://perma.cc/B89L-RRVM].

64. *Id.*

65. *See Acting Secretary McAleenan Signs Agreement with Honduras*, U.S. DEP'T OF HOMELAND SECURITY (Sept. 25, 2019), https://www.dhs.gov/news/2019/09/25/acting-secretary-mcaleenan-signs-agreement-honduras [https://perma.cc/33C7-JZGA].

66. Agreement with Guatemala, *supra* note 7.

67. *Id.*

68. *See Note on Non-Refoulement*, U.N. HIGH COMMISSIONER FOR REFUGEES (Aug. 23, 1977), https://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html [https://perma.cc/B5VE-AKA8] ("The most essential component of refugee status and of asylum is protection against return to a country where a person has reason to fear persecution. This protection has found expression in the principle of non-refoulement . . . .").

69. Agreement with Guatemala, *supra* note 7.

70. *Id.* art. I §§ 1-4.

71. *Id.* art. II.

essentially means that if a Guatemalan national or resident arrives at the U.S. border seeking asylum, that individual could not be sent back to Guatemala (but in theory could be sent to El Salvador or Honduras under those agreements if the individual passed through one of those countries first).

The agreement begins to stray away from standard language and into the heart of the agreement as it progresses. Article 3 states that an asylum seeker sent from the United States to Guatemala cannot be sent to another country until Guatemala has fairly adjudicated the case.[72] Article 3 also specifies that anyone transferred from the United States to Guatemala is the responsibility of the United States until the transfer process is complete.[73] Article 4 deems the United States responsible for determining the asylum seeker's claim when the asylum seeker is an unaccompanied minor or when the individual has arrived to the U.S. with a valid visa, or is not in need of a visa.[74] Article 4 goes on to state that proper procedures will be in place for the transfer of asylum seekers consistent with obligations under national laws.[75] Article 4, as well as Article 7, reference that Guatemala will have a process in place, but do not specify the type of process or determination system.[76] Reportedly, the Trump administration "certified that Guatemala's legal framework meets [the] standard" of the agreements.[77] Article 5 allows either party to examine any claim where it determines it is in its public interest to do so, and Article 6 describes information sharing between the countries.[78]

Implementation is discussed under Article 7 and appears to rely on a plan for implementation, but does not specify what the parameters of the plan will be.[79] In Articles 7(1) and 7(2), the agreement specifies that the parties will develop standard procedures to govern implementation of this agreement and to resolve differences with respect to interpretation and implementation.[80] Article 7(3) simply states that the United States will work to strengthen Guatemala's institutional capacities.[81] Article 7(4) implements a review period following three months of operation, and Article 7(5) states that the parties will complete an implementation plan that will contain gradual steps and address transfer procedures.[82] Article 8 attempts to tie up any loose ends by stating that implementation of the agreements will enter into force once the parties have completed necessary domestic legal

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72. *Id*. art. III § 1.
73. *Id*. art. III § 2.
74. *Id*. art. IV § 1.
75. *Id*. art. IV § 2.
76. *Id*. art. IV § 2, art. VII §§ 1-2.
77. Nicole Narea, *The Trump Administration Will Start Sending Migrants Back to Guatemala Under a New Rule*, VOX (Nov. 19, 2019), https://www.vox.com/policy-and-politics/2019/11/19/20970868/asylum-rule-agreement-guatemala-el-salvador-honduras-safe-third-deport-dhs-doj [https://perma.cc/92LP-PGZ2] [hereinafter Narea, *The Trump Administration*].
78. Agreement with Guatemala, *supra* note 7, arts. V-VI.
79. *Id*. art. VII.
80. *Id*. art. VII §§ 1-2.
81. *Id*. art. VII § 3.
82. *Id*. art. VII §§ 4-5.

procedures.[83] Additionally, Article 8 adds that either party may terminate the agreements with three months' notice or suspend for three months, and the parties will agree on modifications or additions in the future.[84] On November 18, 2019, the Trump administration issued a rule instating the operation of the agreement with Guatemala, with the expectation that El Salvador and Honduras would not be far behind.[85]

Despite being brief and perhaps simple on the surface, the agreements carry a great deal of weight and are accompanied by substantial repercussions. The first issue is that these agreements circumvent the 1967 Protocol and 1980 Refugee Act adopted by the United States. At the heart of these agreements is that the Trump administration will have the ability to send away asylum seekers who reach U.S. soil. Inherent in the asylum process is the idea that an asylum seeker has the protection of the country where the individual has sought asylum until the claim is processed.[86] Now, asylum seekers, having left dangerous conditions and survived a difficult journey, could be sent away without a determination of their claim. Nevertheless, the administration claims that these agreements are similar if not the same as already acceptable "safe third-party agreements."[87]

The UNHCR has language on safe country agreements that demonstrates that such agreements are an exception to the obligations of a state party because the parameters of such an agreement are so tight. In 1991, the UNHCR issued a note introducing the idea that a country with high volumes of asylum demands could make arrangements with another country to share the responsibilities.[88] The UNHCR described safe countries as "countries which are determined either as being non-refugee-producing countries or as being countries in which refugees can enjoy asylum without any danger."[89] The UNHCR goes on to emphasize that each party to the 1951 Convention and 1967 Protocol "has a responsibility to examine refugee claims made to it" but that "burden-sharing" arrangements can be made as long as there is "protection of refugees and solutions to their problems."[90]

83. *Id.* art. VIII § 1.

84. *Id.* art. VIII § 3.

85. Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019) (to be codified at 8 C.F.R. pts. 208, 1003, 1208, 1240); Narea, *The Trump Administration*, *supra* note 77.

86. *Asylum in the United States*, *supra* note 48.

87. Nicole Narea, *Trump's Agreements in Central America are Dismantling the Asylum System as We Know It*, VOX (Sept. 26, 2019), https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained [https://perma.cc/856C-CCWN] [hereinafter Narea, *Trump's Agreements*].

88. *Background Note on the Safe Country Concept and Refugee Status*, U.N. HIGH COMMISSIONER FOR REFUGEES (July 26, 1991), https://www.unhcr.org/excom/scip/3ae68ccec/background-note-safe-country-concept-refugee-status.html [https://perma.cc/XE4D-FTMN].

89. *Id.*

90. *Id.*

In direct contrast to the UNHCR note, the agreements with the Northern Triangle countries are agreements with refugee-producing countries.[91] With such narrow specifications, it comes as no surprise that until now, the only safe third-party agreement that existed with the United States is with Canada.[92] Safe third-party agreements are not a new concept, but are considered a rare exception to the obligations of an asylum-receiving country.[93] The United States' agreement with the Northern Triangle countries have not met this obligation.

By crafting agreements with countries that do not meet the UNHCR definition of a safe third country, the United States puts asylum seekers at risk because it allows them to be deported to other unsafe countries, exposing them to further danger and violence. Adults, families, and children alike are, quite literally, fleeing the Northern Triangle and seeking asylum in the United States as a result of violence, poverty, and fear of death.[94] As of June 2019, the U.S. Department of State categorized Honduras as a Level 3 travel warning (on a four-level scale).[95] Level 3 advises travelers to reconsider a trip to the country, and the State Department cites that "[v]iolent crime, such as homicide and armed robbery, is common. Violent gang activity, such as extortion, violent street crime, rape, and narcotics and human trafficking, is widespread. Local police and emergency services lack sufficient resources to respond effectively to serious crime."[96] Although Guatemala and El Salvador have Level 2 warnings, the State Department cites similar concerns as those listed for Honduras.[97]

Furthermore, although El Salvador's Law and Order Index score has much improved from its historic low in 2016, it still remains ranked amongst the lowest quarter of the 142 countries surveyed by Gallup with a score of 67/100.[98] Neither Guatemala nor Honduras break the top fifty percent of countries surveyed and do not fare much better with scores of seventy-one and seventy-two, respectively.[99] It is problematic to assume that these countries can protect asylum seekers when

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91. In 2017 and 2018, the United States was the largest recipient of new asylum applications. Of these applications, El Salvadorians were the most common nationality of applicants, followed by Guatemalans. Hondurans were the fourth most common. Collectively, applications from Central America and Mexico made up over fifty percent of applications. GLOBAL TRENDS: FORCED DISPLACEMENT IN 2018, U.N. HIGH COMMISSIONER FOR REFUGEES 42 (2018).

92. Narea, *Trump's Agreements*, *supra* note 87.

93. *See Background Note on the Safe Country Concept and Refugee Status*, supra note 88.

94. *See* O'Connor, Batalova & Bolter, *supra* note 60.

95. *Honduras*, BUREAU OF CONSULAR AFF., U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Honduras.html [https://perma.cc/W79F-4EL9] (last visited Mar. 22, 2020).

96. *Id.*

97. *See Guatemala*, BUREAU OF CONSULAR AFF., https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Guatemala.html [https://perma.cc/MU5V-ETSB] (last visited Mar. 22, 2020); *El Salvador*, BUREAU OF CONSULAR AFF., https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/ElSalvador.html [https://perma.cc/TX7C-DBXE] (last visited Mar. 22, 2020).

98. 2018 GLOBAL LAW AND ORDER REPORT, GALLUP 4, 7 (2018).

99. *Id.* at 7.

these countries cannot even protect their own citizens. It is thus difficult to understand how McAleenan and the Trump administration could find the standards provided by these countries safe and in line with the mission and purpose of the UNHCR's safe country concept.

The third issue with the U.S.-Northern Triangle agreements stems from a reliance on unclear standards and a lack of clear information regarding protocol. Many of the problems described above boil down to the lack of clarity and uniformity necessary for the agreements to be implemented and ultimately succeed without jeopardizing the safety of the asylum seekers. The agreements say a lot without saying much at all. The language of the agreements simply indicates that both countries need standards and protocols in place, that these protocols and standards are necessary for successful implementation, and that these standards are subject to change.[100] The ambiguities that are built into the document leave a great deal of room for open-ended interpretation. The agreements, in saying so little, seem to avoid direct conflict with the 1967 Protocol and 1980 Refugee Act described above. Without more, Secretary McAleenan created a document that gives the President and his administration free reign to implement a protocol that could send asylum seekers back to unsafe countries under the guise that such agreements are legal and in line with U.S. standards.

## V. THE TORTURE MEMOS

Government attorneys are no strangers to scandals involving politically motivated prosecutions, politicized decisions, and faulty legal advice.[101] One such scandal arose when government counselors provided legal advice to justify the use of coercive interrogation methods, which came to be known as the Torture Memos.[102] The Torture Memos provide a clear example of government lawyers' zealous attempts to achieve the government client's goals leading to costly results for the public.[103] However, the Torture Memos demonstrate that the gray area in which government lawyers operate is difficult to define and leads to few if any meaningful repercussions.

Following the terrorist attacks on the World Trade Center on September 11, 2001, the United States launched a war against terrorism.[104] As part of the war against terror, a group of four lawyers produced a series of legal memoranda which have since been determined to have been written with the intent of

100. *See* Agreement with Guatemala, *supra* note 7, art. VII § 1. ("The Parties shall develop standard operating procedures to assist with implementation of this Agreement. . . . The operating procedures shall incorporate mechanisms to resolve disputes that respect the interpretation and implementation of the terms of this Agreement.").

101. *Government Counsel and Their Obligations*, *supra* note 5, at 1421.

102. *Id.* at 1423.

103. *See id.* (describing how the production of the "flawed legal opinions" were a result of a number of factors coming together, including the selection of lawyers that would agree with the executive's agenda).

104. *See id.* at 1409–10.

circumventing the laws against torture.[105] These four lawyers called themselves the "War Council" and their resulting memos became known as the "Torture Memos."[106] Among the several memos written by federal agencies, two became most notorious.[107] The first memo was written on January 9, 2002, by then-Deputy Assistant Attorney General of the Department of Justice Office of Legal Counsel (OLC) John Yoo.[108] Yoo argued that neither the Geneva Conventions nor the federal laws against torture protected the Al Qaeda and Taliban detainees.[109] Although a similar memo was written soon after on January 22, 2002, by then-Assistant Attorney General Jay Bybee, which incorporated much of the same language and analysis from the first memo,[110] the second infamous memo of interest, also by Bybee, was written on August 1, 2002.[111] Bybee addressed this memo to then-White House Counsel Alberto Gonzalez, concluding that interrogations were only considered torture if they produced pain and suffering that caused organ failure or death.[112]

The Torture Memos came under fire for several reasons. First, they attempted to circumvent the Geneva Conventions.[113] The Geneva Conventions and their Protocols govern the obligations of states during armed conflicts and provide responsibilities of non-combatants, injured soldiers, and prisoners of war.[114] Whereas the State Department viewed international law as binding on the United States, the War Council did not.[115] Due to this lack of respect for international law, the Torture Memos shifted U.S. policymaking from an obligation to adhere to the durable and binding international law of the Geneva Conventions to a flexible and transformable policy determination.[116]

Second, the Memos' interpretation of the Geneva Conventions performed legal gymnastics that led to loosened interpretations and sometimes blatantly "outlandish" arguments.[117] For example, the Yoo memo argued that the Taliban was not protected under the Conventions.[118] Yoo's arguments were premised on the dubious logic that, because Afghanistan was considered a failed state, the United States could deny captured Taliban and Al-Qaeda operatives their rights as

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105. Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389, 389, 393, 397 (2010).

106. *Id*. at 389, 391, 397.

107. *See* Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193, 199 (2010).

108. *Id*.

109. *Id*.

110. *Id*.

111. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002).

112. *Id*.; *see also* Ohlin, *supra* note 107 ("This memo concluded that interrogation techniques could not be considered torture if they only produced pain and suffering insufficient to cause organ failure or death.")

113. Scharf, *supra* note 105, at 397.

114. *Id*.

115. *Id*. at 392; *see also* Ohlin, *supra* note 107, at 202.

116. Scharf, *supra* note 105, at 397.

117. *See* Ohlin, *supra* note 107, at 201.

118. *Id*.

prisoners of war under the Geneva Conventions.[119] Additionally, Yoo applied a "minority view" of Article 3 of the Convention dealing with "armed conflict not of an international character" and found that the Geneva Conventions do not cover conflicts between a state and a non-state actor like Al-Qaeda.[120]

Third, the Torture Memos only assessed and offered a singular perspective. Rather than provide a balanced counsel to the President, the lawyers presented a pre-determined agenda and crafted the language of the Memos to achieve that agenda. Some claim that these Memos were an attempt to lay a groundwork that American personnel could point to if subject to prosecution for any human rights violations related to torture.[121] A big question is if and when the line was crossed from zealous advocacy to evasion of the law.[122] In training, lawyers are taught to devise "creative reasoning skills to work and devise a way to work around the law."[123] This type of representation may make sense in a private practice, but when a government lawyer uses such a technique, the result is—as it was here—an ethically ambiguous situation in which lawyers lose sight of good faith legal interpretation[124] and instead focus on achieving the desired results for the government under which they work.

After the leaking of the Memos, the Bush administration came under intense fire and scrutiny. Despite the public backlash, there were few meaningful repercussions for the authoring attorneys. Although the Obama administration released classified documents to increase transparency, the Obama administration chose not to press charges against any individuals.[125] After a nearly five-year investigation, the Justice Department's Office of Professional Responsibility (OPR) released a 261-page report giving its recommendations based on the analysis of the memoranda.[126] The report concluded that Yoo "violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice" and that Bybee "acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice."[127] OPR recommended that the lawyers be subject to their state bar

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119. *Id.*

120. *Id.* at 200.

121. W. Bradley Wendel, *Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (a Response to Professor Hatfield)*, 104 NW. U. L. REV. COLLOQUY 58, 59 (Aug. 2, 2009).

122. *See id.* at 61.

123. *Id.* at 62.

124. *See id.*

125. Josh Gerstein & Mike Allen, *Obama: Memo Release Weighty Decision*, POLITICO (Apr. 17, 2009), https://www.politico.com/story/2009/04/obama-memo-release-weighty-decision-021329 [https://perma.cc/U67D-H8YF].

126. Miguel A. Estrada on behalf of Professor John C. Yoo, Response to the U.S. Dep't of Justice Office of Prof'l Responsibility Final Report Dated July 29, 2009 at 1 (Oct. 9, 2009).

127. U.S. DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 11 (2009).

associations for discipline.[128] However, OPR's decision was overruled by then-Associate Deputy Attorney General David Margolis, who also criticized Yoo and Bybee for poor judgment but found that this poor judgment did not rise to the level of inciting ethical discipline.[129] Yoo responded to the OPR report by emphasizing the lawfulness of his memoranda and suggesting that his biggest flaw was that he "did not provide a sufficient level of detail and nuance in the memoranda that provided background reasoning for the specific (and *correct*) advice given to the client."[130] In the end, Yoo escaped victorious[131] and largely unscathed.

## CONCLUSION

Many of the same lessons learned and conclusions reached from the Torture Memos are found today with the asylum agreements. The Torture Memos demonstrate the ethical dilemmas posed by zealously representing the government as a client. Having "lost sight of their moral compass," Yoo and Bybee allowed their obligations to the President, as their client, to blind their ability to adhere to the law's moral and ethical codes.[132] In a similar manner to the Torture Memos, the lawyers drafting the U.S.-Northern Triangle Agreements took narrow and uncommon interpretations of international law, performed legal gymnastics, and provided a one-sided and intentionally unclear view of the law.

Given the wide range of legal and policy issues created by the agreements with the Northern Triangle countries, the question arises as to whether Secretary McAleenan acted unethically. Under the *Model Rules*, the short answer is that it depends. The long answer is probably yes, but the Torture Memos demonstrated that repercussions against him or any other attorneys who worked with him on this are highly unlikely. Secretary McAleenan and the attorneys who worked alongside him to draft the agreements were serving their client, the President.

Zealous representation in the government is a tricky balancing act that weighs the client's desires against the repercussions of such decisions. Secretary McAleenan was acting within the scope of his employment in a non-legal role within the government. However, as Rule 5.7 states, this does not absolve an attorney from being bound to observe the *Model Rules*.[133] Therefore, the biggest indication that Secretary McAleenan acted unethically is under Rule 8.4 by misrepresenting the law. Secretary McAleenan massaged the law in a way that enabled him to achieve his desired result. He dismissed the protections of international and domestic law for refugees and created new and intentionally unclear standards moving forward. Knowing that government lawyers, specifically

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128. David D. Cole, *The Sacrificial Yoo: Accounting for Torture in the OPR Report*, 4 J. NAT'L SECURITY L. & POL'Y 455, 456 (2010) (citing U.S. DEP'T OF JUSTICE, *supra* note 127, at 11 n.10).

129. *Id.*

130. Estrada, *supra* note 126, at 1.

131. *See* Cole, *supra* note 128, at 456.

132. Wendel, *supra* note 121, at 59.

133. MODEL RULES R. 5.7.

Secretary McAleenan, may have acted in violation of legal ethics by drafting and signing the agreements put into place with Guatemala, El Salvador, and Honduras, it is unlikely that repercussions will ensue. The Torture Memos have demonstrated that even when government lawyers take actions that appear unethical, the gray area in which government lawyers exist serves as a shield against serious consequences.

The U.S. immigration system is unquestionably in need of attention. With tens of thousands of asylum seekers reaching the U.S. southern border, the current system is failing to adequately address the needs of such people. However, when looking for much needed solutions to immigration problems, government lawyers are not only tasked with fulfilling the needs of their client, but also with being careful given their unique and influential position. By finding creative ways to circumvent international and domestic refugee laws, the lawyers behind the U.S. Agreements with the Northern Triangle countries entered into ethically ambiguous territory. If meaningful change is to occur, it will require an adjusted understanding of legal ethics for government lawyers and a clearer understanding of how to serve the government client. Taken together, this Note demonstrates that government lawyers operate in a gray space where legal ethics are continually called into question to fulfill the needs of a client that is—and will always be—much stronger and more powerful than the lawyer.