Bad Vice, Bad Advice: A Call to End Government Lawyers' Abdication of their Ethical Duty as Counselors

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INTRODUCTION

"Riddled with error," "this is insane who wrote this," and "a slovenly mistake;" no, these are not the reactions of a law professor to a poor first-year law student's exam.[1] They are instead reactions of Senior Republican colleagues at the Justice Department to the now infamous "Torture Memos" written by John Yoo, a Deputy Assistant Attorney General and approved by Jay Bybee, head of the Office of Legal Counsel ("OLC") of the Department of Justice ("DOJ"). The now infamous memoranda were a cherrypicked, one-sided, legal approval of the use of "enhanced interrogation techniques," a euphemistic phrase to describe torture such as waterboarding, prolonged sleep deprivation, and mental torment in the War on Terror.[2] The memos written in 2002 condoned the use of the CIA's heinous torture tactics on detainees at Abu Ghraib in Iraq that led to unresponsiveness, near drownings, self-harm, and even death.[3]

In 2004, after news of human rights violations at the Abu Gharib prison broke, one of the Torture Memos was subsequently leaked.[4] While both memos were swiftly withdrawn by the OLC as legally defective,[5] the fallout was still astronomical.[6] An internal investigation within the DOJ's Office of Professional

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1. 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, 9, 124, 160 (2009) [hereinafter OPR REPORT].

2. *See* Eric Lichtblau & Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. TIMES (Feb. 19, 2010), https://www.nytimes.com/2010/02/20/us/politics/20justice.html [https://perma.cc/ZDG6-HNLU]; OPR REPORT, *supra* note 1, at 160.

3. *See* Stephen Collinson & Evan Perez, *Senate report: CIA misled public on torture,* CNN (Dec. 9, 2014), https://www.cnn.com/2014/12/09/politics/cia-torture-report [https://perma.cc/DJK4-9KWK]; Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAGAZINE (Sept. 9, 2007), https://www.nytimes.com/2007/09/09/magazine/09rosen.html [https://perma.cc/XFZ3-KP3V]; Andrew Cohen, *The Torture Memos, 10 Years Later,* ATLANTIC (Feb. 6, 2012), https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439 [https://perma.cc/JW2E-NKMC].

4. Rosen, *supra* note 3.

5. *Id.*

6. *See* Collinson & Perez, *supra* note 3 (quoting Senator Dianne Feinstein who has referred to the CIA's actions as a "stain on our values and on our history").

Responsibility ("OPR") began, but its report, which detailed just how shaky the legal ground these memos were written on, was not released until 2009.[7] The 2009 OPR Report concluded after extensive investigation that both authors, Yoo and Bybee, had acted in violation of the *Model Rules*, in particular Rules 1.1 and 2.1, by failing to act as competent lawyers or provide candid advice respectively.[8] In condemning Yoo and Bybee, the OPR found that the memos failed to provide an accurate portrayal of the law surrounding the legality of torture.[9] However, David Margolis, Associate Deputy Attorney General of the Justice Department, stepped in to vindicate and expunge the records of both lawyers attributing the memos' errors to merely "poor judgment."[10] Therefore, Yoo and Bybee went home scot free—Yoo is now a Professor at Berkeley Law and Bybee is a judge on the Ninth Circuit.[11]

Not only did the memos' permissive and flawed definition of "torture" last beyond their withdrawal,[12] but so did the precedent set by the pardoning of Yoo and Bybee. First, the Torture Memos indicated that even in clear cases of serious ethical transgressions, discipline of government lawyers remains unlikely. Second, in absolving Yoo and Bybee for their actions, a dangerously low bar has been set for the duty of candor owed by government lawyers as advisors to their client, the United States. The Torture Memos cast a black cloud on the ability of all lawyers in the United States Government to act morally and ethically.[13]

However, the memos have also set a dangerous precedent in another less obvious respect. Remember, the memos were only discovered because they were

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7. OPR REPORT, *supra* note 1, at 1.

8. OPR REPORT, *supra* note 1, at 260.

9. OPR REPORT, *supra* note 1, at 159–60.

10. DAVID MARGOLIS ASSOCIATE DEPUTY ATTORNEY GENERAL, 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 CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS, 68–69 (Jan. 5. 2010), https://fas.org/irp/agency/doj/opr-margolis.pdf [https://perma.cc/P2M6-RAGR] [hereinafter Margolis Report].

11. Alka Pradhan, *It's time to hold lawless Trump officials accountable, and finally right the wrongs from the Bush-era torture program,* BUSINESS INSIDER (Dec. 16, 2020), https://www.businessinsider.com/biden-administration-punish-trump-officials-bush-torture-obama-lawbreaking-accountable-2020-12 [https://perma.cc/FJ6K-NFMG].

12. *See, e.g.*, *Former Deputy CIA Director Says 'Torture Report Misses the Point,* NPR (Dec. 9, 2014) (detailing Former Deputy CIA Directors defense of the memo's legal definition of torture in 2014), https://www.npr.org/2014/12/09/369667274/former-deputy-cia-director-says-torture-report-misses-the-point [https://perma.cc/Q3PY-FD2A]; Collinson & Perez, *supra* note 3 (explaining that top CIA officials and former President Bush all clung to the Justice Department's definition of legality).

13. *See* Jack Balkin, *Justice Department Will Not Punish Yoo and Bybee Because Most Lawyers Are Scum Anyway*, BALKINIZATION (Feb. 19, 2010), https://balkin.blogspot.com/2010/02/justice-department-will-not-punish-yoo.html [https://perma.cc/UR3A-TUDT]; Alexa Van Brunt, *The 'torture' memos prove America's lawyer don't know how to be ethical*, WASH. POST (Dec. 12, 2014), https://www.washingtonpost.com/posteverything/wp/2014/12/12/the-torture-memos-prove-americas-lawyers-dont-know-how-to-be-ethical [https://perma.cc/297U-4YRK].

leaked.[14] Their hamartia was that Yoo and Bybee's harebrained ideas were written down and discovered.[15] Today, in seeking to avoid further backlash or be bound by unfavorable law, government counsel have taken to avoiding formally issuing legal opinions altogether.[16] For example, the State Department has now obstinately refused to answer for years whether the United States and lawyers in the State Department are potentially liable for war crimes after aiding and abetting the Saudi-led coalition in Yemen.[17] Unlike Yoo and Bybee, who failed as advisors by not providing candid advice, lawyers now in the State Department are simply not providing *any* advice at all.[18] This, too, is a failure of these government lawyers to act in accordance with their ethical responsibilities.

Where there are now tales of government lawyers acting as merely "yes men" or "rubber stamps" to every objective of the administration in power,[19] it is worth asking, what role, if any, does the oft-ignored Model Rule 2.1 play in guiding government lawyers to act as counselors to their client? First, the Note will explain Model Rule 2.1 and its contours. Next, the Note will examine briefly why Yoo and Bybee's misdeeds should have led to discipline under the Rule. Then, the Note will focus on analyzing the current refusal of the State Department to provide legal advice as a similar failure under Model Rule 2.1. Finally, the Note will advocate for an addition to Comment 1 of Model Rule 2.1 that would clarify that the duty to provide candid advice requires presenting both sides of a legal issue, and that a lawyer who fails to provide advice because it is unpalatable is liable for discipline.

I. RULE 2.1: THE DUTY OF A LAWYER AS AN ADVISOR

Model Rule 2.1, titled "Advisor," states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[20] The comments to the brief Rule provide some additional clarity that the role of the lawyer as a counselor is to not "be deterred from

14. Oona L. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 6, 56 (2020).

15. *See* Rosen, *supra* note 3.

16. *See* Hathaway, *supra* note 14, at 10 n. 13, 64, 65–66.

17. *See* Michael LaForgia & Edward Wong, *War Crime Risk Grows for U.S. Over Saudi Strikes in Yemen*, N.Y. TIMES (Sept. 14, 2020), https://www.nytimes.com/2020/09/14/us/politics/us-war-crimes-yemen-saudi-arabia.html [https://perma.cc/489N-T2HJ].

18. *See id.*

19. David Luban, *My Testimony to the Senate Judiciary Committee*, BALKINIZATION (May 17, 2009), https://balkin.blogspot.com/2009/05/my-testimony-to-senate-judiciary.html [https://perma.cc/GL68-NFUS]; Ian Millhiser, *Trump's legal strategy is a great way to wind up in prison*, THINKPROGRESS (Mar. 22, 2018), https://archive.thinkprogress.org/trump-surrounds-himself-with-yes-man-lawyers-a-great-way-to-wind-up-in-prison-ccb0147d2fa4 [https://perma.cc/4VDB-EHM2].

20. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2018) [hereinafter MODEL RULES].

giving candid advice by the prospect that the advice will be unpalatable to the client."[21] Furthermore, while lawyers are not "expected to give advice until asked . . . when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice."[22] While the case law interpreting Model Rule 2.1 is scant;[23] there is a general understanding that when advising a client, all lawyers have a duty to provide a view of the law as it is, not as they wish it to be.[24] Additionally, while the permissive second sentence of the Rule *allows* for considering additional factors, the first sentence of the Rule uses "shall" making it a lawyer's obligation to provide candid advice.[25] Government counsel have a heightened expectation of candor due to their obligation to see that justice is done.[26]

To date, no lawyer has ever been disciplined for violating Rule 2.1.[27] This is not to suggest that the Rule is not important, but that the Rule rarely gets the attention of the disciplinary committees given the protections of the attorney-client privilege.[28] It is rare enough that disciplinary committees are privy to a sufficient amount of the lawyer's advice to be thoroughly analyzed, so it is even rarer that the advice is disclosed and then found to be deficiently competent.[29] Furthermore, there are many situations where the client implicitly wants the lawyer to be less than candid: such as situations where a client wants a legal opinion to absolve them of their desired wrongdoing.[30] But that is not the job of a lawyer, and the Rule and its comments do not exempt lawyers from sharing uncomfortable truths about the law. Unlike lawyers in court who may make claims as long as they are non-frivolous, lawyers as advisors should provide advice that is candid and in their "best judgment."[31] Such a distinction is important because, while in a courtroom, a lawyer's faulty logic or interpretation of the law can be challenged, within the private attorney-client relationship advice often remains unreviewable.[32] In such scenarios, lawyers who violate Rule 2.1 by merely telling their client what they want to hear, have failed to achieve the basic task of their job—

21. MODEL RULES R. 2.1 cmt. 1.

22. MODEL RULES R. 2.1 cmt. 5.

23. *See* David Luban, *David Margolis is Wrong,* SLATE (Feb. 22, 2020), https://slate.com/news-and-politics/2010/02/john-yoo-and-jay-bybee-shouldn-t-be-home-free.html [https://perma.cc/NR8D-538Y].

24. *See id.*

25. MODEL RULES R. 2.1.

26. *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935).

27. David Luban, *Selling Indulgences*, SLATE (Feb. 14, 2005), https://slate.com/news-and-politics/2005/02/selling-indulgences.html [https://perma.cc/JG49-GSSR].

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

making their client aware of the law; doing otherwise turns a lawyer from an advisor to a "rubber stamp" and provides no actual value to a client.[33]

II. YOO MEMO IN LIGHT OF RULE 2.1

A. EVALUATION OF THE TORTURE MEMOS UNDER THE *MODEL RULES*

After Yoo and Bybee's leaked memos became public and were subject to swift scrutiny, the Justice Department's internal ethics compliance, OPR, undertook an investigation into the creation of the memos.[34] As a baseline, the OPR investigation determined that because of choice of law rules, both Yoo and Bybee's conduct were governed by the *D.C. Rules of Professional Responsibility*.[35] D.C. Rule 2.1 ("Advisor") was, at the time, the same as the American Bar Association's ("ABA") Rule with the same additional commentary.[36] Next, the OPR in no short shrift condemns the actions of Yoo and Bybee and then recommends them to be subject to discipline by their state bar disciplinary authorities.[37] In its findings, the OPR report identifies a litany of issues in the memos that led to the eventual recommendation for discipline.[38] First, the memos left out the sole case on the topic of water torture, *United States v. Lee*, likely because it identified actions similar to waterboarding as torture.[39] Next, the definition Yoo provided as the legal definition of "torture" was drawn from a Medicare statute, which defined "severe pain" as "equivalent in intensity to the pain accompanying organ failure, impairment of bodily function, or even death."[40] In doing so, Yoo aimed to provide a higher standard for what level of pain would be allowable during and following "enhanced interrogation techniques" than what would be allowed under a more simple dictionary definition.[41] Yoo then further attempted to justify egregious

33. *See id.*; Luban, *supra* note 19.

34. Lichtblau & Shane, *supra* note 2.

35. Under Ethical Standards for Attorneys for the Government, department attorneys are governed by the conduct of the court where the case is pending and where there is no case pending the attorney should "generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rules of another jurisdiction." 28 C.F.R. § 77.4(c)(1). Bybee, as a member of the D.C bar, was governed by the D.C. Rules of Professional Conduct. However for Yoo, the OPR found that while Yoo was barred in Pennsylvania, under Pennsylvania Disciplinary Rules of Professional Conduct, "if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to this conduct." PENN. DISCIPLINARY RULES OF PROF'L CONDUCT, R. 8.5. The OPR found that because there was no single jurisdiction where the legal advice rendered will have effect, the D.C. bar rules apply because that is where Yoo authored the advice. OPR REPORT, *supra* note 1, at 20.

36. OPR REPORT, *supra* note 1, at 21.

37. OPR REPORT, *supra* note 1, at 260.

38. OPR REPORT, *supra* note 1, at 159–226, 252–57.

39. 744 F.2d 1124 (5th Cir. 1984); *see also* Luban, *supra* note 19.

40. OPR REPORT, *supra* note 1, at 176.

41. *See* Luban, *supra* note 19, at n. 7; *see also Torture*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining torture as "[t]he infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure" and explaining that torture is also termed "extraordinary interrogation technique").

levels of torture as long as the torture was done out of necessity or self-defense; however, Yoo did not defend the torture as self-defense of the torturer, but rather as self-defense of the nation.[42] At the time of the memo's writing, even the lawyer who worked below Yoo found this argument "wholly implausible."[43] Finally, the memo failed to include the Steel Seizure Cases, *Youngstown Sheet & Tube Co. v. Sawyer*, a seminal case taught to all first-year law students to highlight the powers of the Executive during times of war.[44] All of these "legal manipulations" aggregated in the memos to create a perverted misunderstanding of the law that was used to justify heinous and illegal torture by the United States.[45]

The OPR viewed all of these errors in their totality to find that there was a bad faith effort to contort the law to reach a desired result.[46] Due to the dearth of case law interpreting the duty to provided candid independent advice, the OPR outlined standards for when an opinion clearly violates candor:

> 1. Exaggerating or misstating the significance of the authority that supported the desired result; 2. Ignoring adverse authority or failing to discuss it accurately and fairly; 3. Using convoluted and counterintuitive arguments to support the desired result, while ignoring more straightforward and reasonable arguments contrary to the desired result; 4. Adopting inconsistent reasoning or arguments to favor the desired result; 5. Advancing frivolous or erroneous arguments to support the desired result.[47]

Applying these factors, the OPR found that Yoo and Bybee had failed in their ability to provide objective, candid legal advice. However, also included in the report was a memo by Margolis, acting Associate Deputy Attorney General in the DOJ, whose job was to resolve challenges to negative OPR findings. He ultimately rejected referring Bybee and Yoo for discipline.[48] Margolis found that, despite there being "some significant flaws" in the memos, the "flaws" did not warrant a finding of professional misconduct.[49] Margolis justified the government lawyers' mistakes as a product of the times, pointing heavily to post-9/11 anxiety and arguing that the "War on Terror" simply clouded Yoo and Bybee's judgment and there was no intentional ill-will.[50] Margolis' report overruled the ruling of

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42. OPR REPORT, *supra* note 1, at 220–24.

43. OPR REPORT, *supra* note 1, at 50 n. 53.

44. 343 U.S. 579 (1952). *Youngstown* stands for the proposition that even in war times, the President's powers are at their lowest when the President acts to directly contravene congressional authority. *Id.* at 638. The OPR Report highlights that the Bybee memo failed to discuss *Youngstown*, "the leading Supreme Court case on distribution of powers between the executive and legislative branches;" the Report also says that even if arguments could be made about whether or not it applies, a "thorough, objective, and candid discussions would have acknowledged its relevance to the debate." OPR REPORT, *supra* note 1, at 204.

45. *See* Luban, *supra* note 27.

46. OPR REPORT, *supra* note 1, at 254, 257, 260.

47. *See* Luban, *supra* note 23.

48. MARGOLIS REPORT, *supra* note 10, at 67–68.

49. *Id.* at 67.

50. *Id.* at 65–67.

OPR, which adamantly stated that "situations of great stress, danger, and fear do not relieve Department attorneys of their duty to provide thorough, objective, and candid legal advice, even if that advice is not what the clients want to hear."[51]

B. THE LEGACY OF THE TORTURE MEMOS TODAY

The impact of the Torture Memos continues to reverberate long past their issuance. After the memos, the Office of Legal Counsel ("OLC") issued a "best practice" memo that now requires the office to give "advice based on its best understanding of what the law requires—not simply an advocate's defense of the contemplated action."[52] The memo states that legal advice should be an "accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration's . . . pursuit of desired practices or policy objectives."[53] Such efforts echo Rule 2.1, again mandating lawyers to issue advice reflecting the law and not just what someone wants to hear.[54] Critics of this "best view" of the law standard argue that it is too restrictive for national security lawyers in times of crisis.[55]

To this day, the OLC opinions are now referred to by many as "secret law."[56] Memos and legal opinions remain undisclosed to the public despite bipartisan calls for greater transparency[57] and despite numerous FOIA requests by the Project on Government Oversight and Citizens for Responsibility and Ethics in Washington.[58] While critics of the "regime of secret law" acknowledge that FOIA requests have their limits in regards to national security, they explain that the OLC could release redacted memos without risking confidential information;

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51. OPR REPORT, *supra* note 1, at 254.

52. Hathaway, *supra* note 14, at 71 n. 257 (citing Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns. To Att'ys of the Off. of Legal Couns. 1 (July 16, 2020), http://www.justice.gov/olc/pdf/old-legal-advice-opinions.pdf [https://permacc/Z9LT-78UQ]).

53. *Id.*

54. MODEL RULES R. 2.1 cmt. 1; *see also* Luban, *supra* note 27.

55. *See* Robert F. Bauer, *The National Security Lawyer, in Crisis: When the "Best View" of the Law May Not Be the Best View*, 31 GEO. J. LEGAL ETHICS 175 (2018).

56. *See* Daniel Van Schooten & Nick Schwellenbach, *Justice Department's Secret Law" Still Prevalent, Documents Show,* PROJECT ON GOV. OVERSIGHT (Mar. 22, 2017), https://www.pogo.org/investigation/2017/03/justice-departments-secret-law-still-prevalent-documents-show [https://perma.cc/22HB-7QN8]; David Cole, *The Torture Memos: The Case Against the Lawyers*, N.Y. REV. (Oct. 8, 2009), https://www.nybooks.com/articles/2009/10/08/the-torture-memos-the-case-against-the-lawyers/?lp_txn_id=1011010 [https://perma.cc/7DZW-4YDJ].

57. *See, e.g.*, H.R. 653, 114th Cong. (2d Sess. 2016) (detailing the bipartisan legislation that passed the House but did not make it through the Senate which would have presented the OLC from withholding opinions that are "controlling interpretations of law, final reports or memoranda" used to make a final policy decision), https://www.congress.gov/congressional-report/110th-congress/senate-report/528/1 [https://perma.cc/7HMH-E94M].

58. *See* Van Schooten & Schwellenbach, *supra* note 56 (describing the redacted versions of memos received after FOIA requests which withheld the title of the memos and even the date on which they were issued).

they argue that releasing as much of the legal content as possible while withholding sensitive facts would help avoid this current creation of "secret law."[59]

III. RULE 2.1 APPLIED TO THE STATE DEPARTMENT'S REFUSAL TO ADDRESS LEGALITY OF AID TO YEMEN

A. BACKGROUND ON CONFLICT IN YEMEN

Since 2015, the United States has provided support in the form of refueling and bomb sales to a Saudi-led coalition fighting in Yemen to keep power with the Hadi rather than Houthis, who are aligned with their rival, Iran.[60] Such efforts have led to more than 20,000 airstrikes, including potentially indiscriminate bombings, such as a bombing of a school bus on August 9, 2018.[61] Because there was no evident military target in the area at the time, this bombing was likely a war crime.[62] Congress and the media have reacted to these bombings and thousands of deaths by raising the now important question—is the United States legally responsible for its involvement in these killings?[63]

Yet since 2016, the State Department has flat-out refused to answer the question of whether U.S. officials are potentially liable for war crimes under international law for aiding and abetting the Saudi-led coalitions in Yemen by providing arms exports.[64] Thus, five years later, with more than 127,000 dead including at least 17,500 civilians, the U.S government has refused to acknowledge one way or another its potential role as a co-belligerent in the war under international law.[65] Numerous legal scholars and ex-government officials have all tackled the weighty issue of potential culpability, which is, admittedly, fraught with issues of differing standards of *actus reus* and *mens rea* across international jurisdictions.[66] However, government lawyers have still remained silent—even with these legal

59. *See* Cole, *supra* note 56.

60. HUMAN RIGHTS WATCH, WORLD REPORT 2020, *Yemen* (2020), https://www.hrw.org/world-report/2020/country-chapters/yemen#:~:text=According%20to%20the%20Yemen%20Data,are%20at%20risk%20of%20famine [https://perma.cc/M9QQ-JLWC] [hereinafter HUMAN RIGHTS WORLD REPORT].

61. Mohamad Bazzi, *American Officials Could be Prosecuted for War Crimes in Yemen*, NATION (Oct. 10, 2018), https://www.thenation.com/article/archive/american-officials-could-be-prosecuted-for-war-crimes-in-yemen [https://perma.cc/FFQ8-T3A8]; HUMAN RIGHTS WORLD REPORT, *supra* note 60.

62. *See* Bazzi, *supra* note 61.

63. *See, e.g.*, LaForgia & Wong, *supra* note 17.

64. LaForgia & Wong, *supra* note 17; *see also* Warren Strobel & Jonathan Landay, *Exclusive: As Saudis bombed Yemen, U.S. worried about legal blowback*, REUTERS (Oct. 10, 2016), https://www.reuters.com/article/us-usa-saudi-yemen/exclusive-as-saudis-bombed-yemen-u-s-worried-about-legal-blowback-idUSKCN12A0BQ [https://perma.cc/5VUM-HCXC].

65. LaForgia & Wong, *supra* note 17; *see also* HUMAN RIGHTS WORLD REPORT, *supra* note 60.

66. For a discussion of these legal issues see Oona A. Hathaway, Alexandra Francis, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa T. Yamamoto, *Aiding and Abetting in International Criminal Law*, 104 CORNELL L. REV. 1593 (2019).

experts doing a majority of the work for them[67]—and refuse to issue any form of legal opinion as to whether there is liability for the U.S. officials. Eventually in August 2020, the State Department Inspector General issued a report evaluating the role of the United States in arms sales and found that "the department *did not fully assess* risks and implement mitigation measures to reduce civilian casualties and *legal concerns* associated with the transfer" of weapons to the Saudi-led coalition.[68] However, the details of the findings were put in "a classified part of the public report . . . and then so heavily redacted that lawmakers with security clearances could not see them."[69] Even whilst acknowledging the lack of assessment of legal risks, no subsequent review has yet been undertaken.[70] The State Department's acting legal adviser continues to refuse to say whether he believes U.S. officials are liable for war crimes in Yemen.[71]

It is worth noting that in 2016, a lawyer in the State Department *apparently* conducted a legal analysis into whether, by providing arms exports to the Saudis and their partners, U.S. officials are currently aiding and abetting war crimes.[72] While the memo *reportedly* concluded that yes, there is the potential for American officials, including the Secretary of State, to be charged with war crimes,[73] no memo ever reached the Secretary of State's office.[74] Instead, the 2016 memo exists only as the stuff of folklore, well known in the media and by government officials but never produced. Even requests from Congressman Ted Lieu to locate it have not led to its production by the State Department.[75] Because no opinion on potential culpability was ever enshrined as a legal opinion, there has been no obligation to investigate any allegations of war crimes.[76] Therefore, by refusing to issue advice on whether the U.S. should have continued to aid

67. *See* Ryan Goodman, *The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen*, JUST SECURITY (Sept. 1, 2016), https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen [https://perma.cc/SUY2-QLPM].

68. Office of Inspector General, ISP-I-20-19, *Review of the Department of State's Role in Arms Transfers to the Kingdom of Saudi Arabia and the United Arab Emirates* 1, 11 (2020) (emphasis added), https://www.stateoig.gov/system/files/isp-i-20-19.pdf [https://perma.cc/FLD4-GYRP].

69. LaForgia & Wong, *supra* note 17.

70. *Id.*

71. Andrea Prasow, *U.S. War Crimes in Yemen: Stop Looking the Other Way*, HUMAN RIGHTS WATCH (Sept. 21, 2020), https://www.hrw.org/news/2020/09/21/us-war-crimes-yemen-stop-looking-other-way [https://perma.cc/CK4F-B8ZJ].

72. LaForgia & Wong, *supra* note 17.

73. *Id.* ("[S]ix current and former government officials with knowledge of the memo" report that it concludes that American officials could be charged with crimes).

74. *Id.*

75. *See* Letter From Mary Elizabeth Taylor, Assistant Sec'y, Bureau of Leg Affairs, to Ted Lieu, U.S. Representative (Nov. 21, 2018), https://lieu.house.gov/sites/lieu.house.gov/files/2018-11-21%20RESPONSE%20REP%20Ted%20Lieu%20letter%20to%20SEC%20Pompeo%20on%20Yemen.pdf [https://perma.cc/T3TL-UWGU]; Oona Hathaway, *The Missing State Department memo on US Officials' Possible Aiding and Abetting Saudi War Crimes*, JUST SECURITY (July 24, 2019), https://www.justsecurity.org/65041/the-missing-state-department-memo-on-us-officials-possible-aiding-and-abetting-saudi-war-crimes [https://perma.cc/TR5G-KSAK].

76. Strobel & Landay, *supra* note 64.

Yemen, the State Department allowed the government to remain complicit in these crimes, adding more blood on their hands.

B. RULE 2.1 APPLIED TO ACTIONS OF THE STATE DEPARTMENT

Why did the government so obstinately refuse to issue this legal opinion? First, it is probably because the general consensus by most scholars on the issue is that U.S. officials are very likely liable for these war crimes.[77] But, the lasting impact of the Torture Memos and the lesson learned to refrain from enshrining legal opinions also cannot be understated.[78] For example, if the State Department lawyers had issued an opinion and had tried to justify the U.S.'s involvement by twisting the current law to fit their objectives, and the reports were subsequently leaked, the result would be eerily reminiscent of the Torture Memos—a swift condemnation for the lawyers who wrote the memo and a greater distrust in government lawyers. Alternatively, if the State Department had properly expressed the legal culpability of the United States involvement in war crimes, as they did in the now-shrouded 2016 memo, they would have to acknowledge their wrongdoing, which would have required ending aid to the Saudi coalition or at least a further investigation.[79] To avoid this rock-and-a-hard place dilemma, the State Department has instead chosen to do nothing.[80] But, the lawyers should not be able to skirt their legal obligations in this way. The fact that government national security lawyers have failed to "enshrine[] blunt legal opinions" is both leading to continued involvement by U.S. officials in war crimes as well as causing these government lawyers to violate their ethical duty under Rule 2.1 to provide advice and render candid opinions.[81]

This is the very sort of abdication of a lawyer's duty as a counselor to a client that the ABA sought to avoid in its creation of Model Rule 2.1.[82] Rule 2.1 requires a lawyer in his or her representation of a client (here, the United States) to render candid advice.[83] While Comment 5 to Rule 2.1 does not require a lawyer to give advice until asked in most occasions, where there is a client "propos [ing] a course of action that is likely to result in substantial adverse legal consequences to the client," lawyers may, under Rule 1.4, have a duty to advise the client if the "client's course of action is related to the representation."[84] Thus, even if the State Department lawyers might argue that that they were not asked to

77. Hathaway, *supra* note 75.

78. *See* Hathaway, *supra* note 14, at 71.

79. *See* Strobel & Landay, *supra* note 64 ("U.S. government lawyers ultimately did not reach a conclusion on whether U.S. support for the campaign would make the U.S. a 'co-belligerent' . . . [t]hat finding would have obligated Washington to investigate allegations of war crimes in Yemen and would have raised a legal risk that U.S. military personnel could be subject to prosecution, at least in theory.").

80. *Id.*

81. *See* LaForgia & Wong, *supra* note 17; MODEL RULES R. 2.1.

82. MODEL RULES R. 2.1.

83. *Id.*

84. MODEL RULES R. 2.1 cmt. 5.

evaluate the legality of the aid (which is an incredibly tenuous argument given the almost certain existence of the 2016 memo), the government's continued involvement in the bombings overseen by the State Department likely makes the chosen course of action related to the lawyers in the State Department's representation.[85] Furthermore, the final clause of Comment 5 *permits* a lawyer to initiate advice when doing so appears to be in the client's interest.[86] Undoubtedly, avoiding further participation in war crimes and avoiding potential liability for those crimes in international tribunals would be in the government's interest.

Therefore, the State Department lawyers should have, under Model Rule 2.1, rendered candid advice addressing both sides of the issue in accordance with Comment 1; this might have involved "unpleasant facts and alternatives" and even might have required giving "unpalatable" advice to the government regarding their potential legal liability.[87] But the State Department lawyers instead sat on their hands and refused to conclude on the potential legal liability.[88] Even though many officials from the Office of the Legal Adviser ("OLA") now say that officials at the time "expressed concern over U.S. complicity," no timing or form of those warnings has been determined.[89] The OLA's mission is to "furnish[] advice on all legal issues, domestic and international arising in the course of the Department's work," which includes assisting in "formulating and implementing the foreign policies of the United States, and promoting the development of international law."[90] The OLA's job was and is to issue advice about the State Department's work, such as its involvement in Yemen, and this work is governed by Rule 2.1.[91] By not providing an honest, candid assessment of the potential legal culpability and full exploration of both sides of this issue, the lawyers violated this Rule.

Yet unlike the Torture Memos, because of the furtive nature of the OLA's review of this legal issue, its refusal to provide any advice, and the ongoing cover-up of the 2016 memo, the State Department's failure in regard to Rule 2.1 remains largely unreviewable.[92] No memo exists to be leaked and dissected by the *New York Times* and legal ethics professors across the country akin to the Torture Memo's fallout.[93] The State Department has seemingly found a loophole to remain above the ethical Rules of Professional Responsibility, do nothing, say

85. *See id.*; *see also* Hathaway, *supra* note 75.

86. MODEL RULES R. 2.1 cmt. 5.

87. MODEL RULES R. 2.1 cmt. 1.

88. *See* Hathaway, *supra* note 75.

89. Strobel & Landay, *supra* note 64.

90. Office of the Legal Adviser, STATE.GOV, https://www.state.gov/bureaus-offices/secretary-of-state/office-of-the-legal-adviser/ [https://perma.cc/23SX-YHK6] (last visited Jan. 10, 2021).

91. *See id.*; *see also* MODEL RULES R. 2.1.

92. *See* Hathaway, *supra* note 75.

93. *See* Lichtblau & Shane, *supra* note 2 (New York Times); Luban, *supra* note 27 (Professor of Ethics at Georgetown Law).

nothing, and definitely write nothing when faced with a complicated or problematic legal issue. Yet closing this loophole is an immeasurably difficult task due to the confidentiality of an attorney-client relationship, the confidentiality afforded under the *Model Rules*, and the protections given to government lawyers in dealing with matters of national security.[94] A revision of Rule 2.1's Comments would be a step in the right direction.

IV. RECOMMENDATION FOR NEW COMMENT TO RULE 2.1

It is worth reiterating here how little attention Rule 2.1 receives during the enforcement of the Rules of Professional Responsibility.[95] Because of this, one might think that it should similarly not warrant much attention and yet, this short Note showcases two examples of breaches of the Rule that have resulted in the U.S. Government committing war crimes: first, in the torture of citizens at Abu Gharib and second, the ongoing aiding and abetting of bombing innocent civilians in Yemen. Therefore, it is time to give Rule 2.1 the attention it deserves with a necessary and long overdue modification to its first Comment.

This Note proposes the addendum of three additional sentences at the end of Rule 2.1, Comment 1 stating:

> A lawyer should to the fullest extent possible alert their client to controlling legal adverse authority. While a lawyer is permitted to argue to the fullest extent that the current law does not apply or should be modified, they should not present only a one-sided view of an issue. A lawyer who fails to provide their client candid advice, no matter how unpalatable, has abdicated their role as an advisor and shall be liable for discipline.

Such a proposal would be in line with both Rules 3.1 and 3.3, which according to the ABA, allow lawyers in front of tribunals to argue all nonfrivolous claims, including for reversal of the law, and prevents disclosing material facts or failing to disclose authority respectively.[96] While a client is not a tribunal, a lawyer should present their clients with a full understanding of the law and owes them a similar duty of truth when advising them.[97] Any appropriately robust, two-sided evaluation of the law in a memo to a client would later be protected under the attorney-client privilege in a court of law as it would be a communication made between counsel and client in confidence for the purpose of legal assistance.[98]

This amendment to the Rule would also emphasize the distinction between a lawyer's role of acting preemptively as a counselor as opposed to reactively in

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94. *See* Hathaway, *supra* note 14, at 80 n. 289 (national security); Luban, *supra* note 27 (attorney-client privilege).

95. *See* Luban, *supra* note 27.

96. MODEL RULES R. 3.1; MODEL RULES R. 3.3.

97. *See* Luban, *supra* note 27.

98. *See* Fisher v. United States, 425 U.S. 391, 403 (1976).

front of a tribunal.[99] While in front of a tribunal, a lawyer should argue all non-frivolous arguments to defend their client from convictions of wrongdoing, and when advising a client there should be an emphasis on accurately representing the law.[100] This distinction is particularly important in the instance of the Torture Memos where Bybee and Yoo were writing proactively and thus, had they presented all counterarguments in accordance with the proposed changes to the Rule, as well as the applicable precedent on the legality of torture, the torture could have been prevented. In the case of the aid to the Saudi-coalition in Yemen, while a large number of bombings have already taken place, the question of whether to continue to provide aid (and therefore the further commission of war crimes) is still outstanding.[101] Had a vigorously researched legal memorandum evaluating the state of the international law been written, a more informed decision could have been made. By refusing to provide any legal opinion, the State Department lawyers failed to act as a counselor and thus, failed to fulfill their ethical duties as lawyers.

Additionally, the change to Rule 2.1 would be consistent with the shift away from "zealous advocacy" throughout the Rules.[102] In 1983, Model Rule 1.3 was modified to remove the word "zeal" from the ABA's version of the Rule and instead merely encouraged zeal in the nonbinding comments of the Rule.[103] Such a shift reflects an acknowledgement that lawyers owe duties not only to their clients, but also to the law.[104] Bolstering Rule 2.1 with this addition to its comments would similarly reflect that lawyers cannot present one-sided versions of what their client wants the law to be because it soils the nuances of the law. Nor can lawyers merely act in their client's interest claiming zealous advocacy but failing to act as a counselor and an advisor.

While sanctions remain rare for violations of Rule 2.1 due to the confidentiality of attorney-client relations, sanctions are rare for most of the Rules.[105] Yet the

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99. Burt Neuborne, *How Lawyers 'Lose Their Souls'*, N.Y. REV. (Nov. 19, 2009), https://www.nybooks.com/articles/2009/11/19/how-lawyers-lose-their-souls [https://perma.cc/R5J6-XRJA].

100. *Id.*

101. LaForgia & Wong, *supra* note 17.

102. Paul C. Saunders, *Whatever Happened to 'Zealous Advocacy'?*, N.Y. L. J. (Mar. 11, 2011), https://www.law.com/newyorklawjournal/almID/1202485578500/Whatever-Happened-To-'Zealous-Advocacy'%3F [https://perma.cc/4C3D-GBDJ].

103. *Id.*

104. Brian Forbes, *Zeal: The New Four-Letter Word*, LAW.COM (Feb. 22, 2008), https://www.law.com/therecorder/almID/900005503973/Zeal-The-New-FourLetter-Word [https://perma.cc/4ZHT-FSE7] (describing the duty lawyers owe to clients as well as the numerous duties lawyers owe to the court, opposing counsel, and the judicial system; also noting that a professional lawyer must respect all parties involved including the law itself in the administration of justice).

105. *See* AM. BAR ASS'N, *Lawyer Regulation for a New Century*, ABA.ORG (Sept. 18, 2018), https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report [https://perma.cc/8PWJ-4G8T] (explaining that some jurisdictions dismiss up to ninety percent of complaints and stating that many complains which allege only single instances of incompetence or neglect although violations of the *Model Rules* are not found to be grounds for disciplinary action).

Rules remain an important fail-stop for governing lawyers' conduct.[106] Encouraging all lawyers in the profession to provide candid advice to their clients will lead to a better understanding of the current state of the law.[107] Furthermore, not allowing lawyers to escape their responsibility of analyzing the law and presenting it to their clients candidly will hopefully discourage lawyers from twisting the law to fit their client's desired objectives. In the case of government lawyers, this is particularly important given the rise of "secret law" that, under the cloud of secrecy, long goes unchecked.[108] If government lawyers had long been required to present the current state of public law alongside their argued-for interpretations, there would likely be less divergence between the two.[109] While the lack of transparency would still exist between the government and the public regarding matters of national security, there would be stricter adherence to the law and its foundations.

CONCLUSION

Will the proposed change to Model Rule 2.1 end the regime of "secret law" within the upper echelons of government lawyers? Probably not. But might it encourage lawyers to better understand and comply with the contours of Rule 2.1? Hopefully yes. When lawyers are taught and reminded of the *Model Rules*, Rule 2.1 governing their role as an advisor and counselor should not be glossed over. A lawyer is not only an advocate for or a confidant to their clients, but is also an advisor—someone that must make their client aware of both sides of a legal issue. Where appropriate, a lawyer should give advice on the moral and ethical concerns related to their desired course of action and actively do more than rubber stamp their clients' desired wrongdoing. Currently, government lawyers are too often being "yes men;" by writing legal opinions that will justify the wrongdoing *ex post facto*, lawyers are neither advising nor helping their clients. The lawyers of the OLA and the OLC have the same ethical duties as all other lawyers to advise their client, the government. By writing severely misguided memos to justify torture and refusing to address the likely legal culpability for war crimes so that the government could continue its wrongdoing, government lawyers have set a dangerous precedent that suggests lawyers can turn a blind eye to their client's illegality. Amending the Comments of Rule 2.1 would help steer the government lawyers away from this problematic tactic, and would likely lead to more informed, well-considered decisions by the government. Finally, demanding of all lawyers a more stringent adherence to exploring all sides of a legal issue will lead to better lawyers who give better advice.

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106. *See* Luban, *supra* note 27; MODEL RULES pmbl.

107. *See* Daniel Van Schooten, *Office of Legal Counsel Publishes New "Secret Law" Opinions*, PROJECT ON GOV. OVERSIGHT (Sep. 26, 2018), https://www.pogo.org/analysis/2018/09/office-of-legal-counsel-publishes-new-secret-law-opinions [https://perma.cc/58P3-VMD8].

108. *See id.*

109. *See id.*