

The Office of Legal Counsel’s Client is the President: Why the *Model Rules* Demand a Secretive Agency Identify its Boss

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This Note argues that the Model Rules of Professional Conduct require the Office of Legal Counsel to identify President Biden as its client. Had the agency done so when Biden first took office, it could have immediately implemented Biden’s policy preference: keeping former prisoners home during the coronavirus pandemic.

INTRODUCTION

When I first talked to Gwen Levi in April 2021, she was scared.¹ A 75-year-old woman released from prison amid the coronavirus pandemic after serving 16 years for a nonviolent drug offense, Levi could be reincarcerated for the most minor violation of her release conditions.² Even if she complied with them, a memo issued in the Trump administration’s final days (“Trump memo”) recommended returning people like her to prison after the health emergency ended.³ Advocates for prisoners urged the memo’s author, the Justice Department’s Office of Legal Counsel (OLC), to rescind it.⁴ The Biden administration, however, would not act.⁵

In June, Levi’s worst fear was realized. While in a computer class, she missed a call from a corrections official—a violation of her release terms—and was sent to D.C. Jail to await a transfer to Federal Bureau of Prisons’ (BOP) custody.⁶

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1. Justin Wm. Moyer & Neena Satija, *Inmates Sent Home Amid Pandemic May Have to Return Under Trump-era Policy*, WASH. POST (Apr. 21, 2021), https://www.washingtonpost.com/local/public-safety/federal-prisoners-pandemic/2021/04/21/5d4cc3c8-96fa-11eb-8e42-3906c09073f9_story.html [https://perma.cc/7UUR-VGR3].

2. *Id.*

3. Home Confinement of Fed. Prisoners After the Covid-19 Emergency, 2021 WL 222748 (O.L.C. Jan. 15, 2021) [hereinafter Trump memo].

4. Moyer & Satija, *supra* note 1.

5. *Id.*

6. Justin Wm. Moyer & Neena Satija, *A Grandmother Didn’t Answer Her Phone During a Class. She was Sent Back to Prison*, WASH. POST (June 26, 2021), https://www.washingtonpost.com/local/public-safety/inmates-pandemic-biden-trump-policy/2021/06/25/e89aa28e-d376-11eb-baed-4abcf380a17_story.html [https://perma.cc/474X-YRVD].

Though the coronavirus still raged, Levi was headed back to a prison system where 293 inmates and seven staff members have died of Covid.⁷ “There’s no question she was in class,” her lawyer told me. “Because she could have been robbing a bank, they’re going to treat her as if she was robbing a bank.”⁸

After Levi’s story went viral, her sentence was reduced to time served, and she was sent home.⁹ However, thousands of others released early from prison because of the coronavirus faced reincarceration until the OLC reversed itself in late 2021,¹⁰ endorsing a statutory interpretation rejected by the OLC serving Trump.¹¹ Those who had struggled to understand why Biden wouldn’t undo Trump’s policy were vindicated by an argument that looked less like legal reasoning than the exercise of raw power.

To understand how the OLC could perform this public about-face, I will examine this influential Justice Department agency—one that can’t decide whether it serves the current president, the executive branch writ large, the American people, or some combination of the above. Though the OLC “exercises the Attorney General’s authority . . . to advise the President and executive agencies,”¹² its role is not just advisory. The office says its decisions, which appear inconsistently in the public record,¹³ are “controlling on questions of law within the Executive Branch.”¹⁴ Yet, the OLC’s decisions may be overruled by the president even though, in this game of jurisprudential chicken, presidents are reluctant to overrule the OLC.¹⁵

The OLC’s confusion over the scope of its authority further obscures the clear purpose of an important office whose operations are already shrouded in secrecy.

7. BUREAU OF PRISONS, <https://www.bop.gov/coronavirus> [<https://perma.cc/A468-CP8W>] (last visited Apr. 17, 2022).

8. Moyer & Satija, *supra* note 6.

9. Justin Wm. Moyer, *Grandmother Jailed After Not Answering her Phone During Class is Ordered Released from Prison Sentence*, WASH. POST (July 6, 2021), https://www.washingtonpost.com/local/inmates-pandemic-policy-gwen-levi/2021/07/06/ede8be98-de7e-11eb-a501-0e69b5d012e5_story.html [<https://perma.cc/F3S3-G69G>].

10. David Nakamura, *Bureau of Prisons Can Keep Inmates in Home Confinement After Coronavirus Emergency Ends*, WASH. POST (Dec. 21, 2021), https://www.washingtonpost.com/national-security/prisoners-covid-home-confinement/2021/12/21/1536316e-629c-11ec-8ce3-9454d0b46d42_story.html [<https://perma.cc/C264-P7H2>].

11. Discretion to Continue the Home-Confinement Placements of Fed. Prisoners After the Covid-19 Emergency, 2021 WL 6145876 (O.L.C. Dec. 21, 2021) [hereinafter Biden memo].

12. Re: Best Practices for OLC Opinions, 2005 WL 6219354, at 1 (O.L.C. May 16, 2005).

13. Columbia University’s Knight First Amendment Institute created an online tracking tool for OLC decisions in 2022 because the agency “publishes only a subset in an online reading room, based on discretionary criteria it applies behind closed doors . . . without any kind of public.” Press Release, Knight First Amendment Institute, Institute Releases New Tool to Track OLC Opinions (Jan. 14, 2022), <https://knightcolumbia.org/blog/institute-releases-new-tool-to-track-olc-opinions> [<https://perma.cc/D2HD-KL3X>].

14. Re: Best Practices for OLC Opinions, *supra* note 12, at 1.

15. See, e.g., Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <https://www.nytimes.com/2011/06/18/world/africa/18powers.html> [<https://perma.cc/563V-HG9M>] (“Presidents have the legal authority to override the legal conclusions of the Office of Legal Counsel and to act in a manner that is contrary to its advice, but it is extraordinarily rare for that to happen.”).

In this Note, I will argue that 1) the OLC's client is the current president and 2) the *Model Rules of Professional Conduct* demand that the OLC acknowledge that its client is the current president. Applying this logic to the present case: President Biden, as head of the executive branch, is the OLC's client in the Trump memo controversy. As the OLC's client, President Biden always had the power, without resorting to novel statutory interpretation, to rescind the Trump memo. Thus, the only authority that kept thousands in fear—fear of being torn from the lives they built outside of prison in the past two years—was President Biden himself. The Note concludes by contemplating the consequences of revealing the president as the OLC's client for the executive branch and agency law.

I. WHAT THE OLC IS

The Justice Department's Office of Legal Counsel is a reservoir of executive authority delegated over generations. The Judiciary Act of 1789 created the attorney general's office¹⁶ to "give his advice and opinion upon questions of law when required by the President."¹⁷ The Department of Justice was created in 1870 "so that the AG would have support."¹⁸ Among the support positions created was the Solicitor General, who offered "legal opinions on matters referred by the Attorney General."¹⁹ In the late 1920s, this function was inherited by an assistant solicitor general,²⁰ then transferred to the Congressionally created Executive Adjudications Division in 1950.²¹ Finally, in 1953, that office was renamed the Office of Legal Counsel by an attorney general's administrative order.²² Today, the office has about two dozen lawyers²³ and is led by an assistant attorney general nominated by the president and confirmed by the Senate.²⁴ The office is near the top of the Justice Department's organizational chart, answering directly to the attorney general and the deputy attorney general.²⁵

According to the Department of Justice, the OLC does a lot:

16. Billy W. Monroe, *The President's Law Firm: The Office of Legal Counsel from Roosevelt to Trump* 13 (2021).

17. Judiciary Act, § 35. <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/1/STATUTE-1-Pg73.pdf> [<https://perma.cc/L3KW-QM9J>].

18. MONROE, *supra* note 16, at 13.

19. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1460 (2010).

20. Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 710 (2005).

21. Morrison, *supra* note 19, at 1460.

22. MONROE, *supra* note 16, at 20.

23. Kel McClanahan, *How One Secretive Justice Department Office Can Sway the Whole Government*, WASH. POST (Sept. 26, 2019), <https://www.washingtonpost.com/outlook/2019/09/26/how-one-secretive-justice-department-office-can-sway-whole-government> [<https://perma.cc/RBJ7-7SSU>].

24. Morrison, *supra* note 19, at 1460.

25. DEP'T OF JUSTICE, Organizational Chart, <https://www.justice.gov/agencies/chart> [<https://perma.cc/8RF8-RYBH>] (last visited Jan. 7, 2022).

[T]he Assistant Attorney General in charge of the Office of Legal Counsel provides legal advice to the President and all executive branch agencies. The Office drafts legal opinions of the Attorney General and provides its own written opinions and other advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and other components of the Department of Justice. Such requests typically deal with legal issues of particular complexity and importance or those about which two or more agencies are in disagreement. The Office is also responsible for reviewing and commenting on the constitutionality of pending legislation All executive orders and substantive proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President's formal approval In addition to serving as, in effect, outside counsel for the other agencies of the Executive Branch, the Office of Legal Counsel plays a special role within the Department itself. It reviews all proposed orders of the Attorney General and regulations requiring the Attorney General's approval. It also performs a variety of special assignments referred by the Attorney General or the Deputy Attorney General.²⁶

With the expansive, ambiguous portfolio described above—drafting opinions, offering advice, settling agency disagreements, commenting on legislation, and reviewing presidential proclamations while remaining available for “special assignments”—the OLC is Article II’s all-purpose legal fixer. The agency is the Ray Donovan of the executive branch.²⁷

Commentators and critics have tried to capture the agency’s chameleon qualities. The OLC “straddles the line between politics and law.”²⁸ It need not suffer “the justiciability constraints applicable to courts, but neither [does] the self-directed work of an academic”²⁹ as the office has “an incentive to provide legal advice in a way that encourages its clients to return.”³⁰ The OLC isn’t “a court that must hear both sides of the argument,” but “issues opinions without the checks and balances provided by adversary argument.”³¹ Though it dwells among

26. DEP’T OF JUSTICE, Office of Legal Counsel, <https://www.justice.gov/olc> [<https://perma.cc/9DNG-XY3G>] (last visited Oct. 11, 2021).

27. SHOWTIME, <https://www.sho.com/ray-donovan/cast/ray-donovan> [<https://perma.cc/SK6L-LXZ9>] (last visited Jan. 7, 2022) (“Ray Donovan is a man of many faces. He’s a cool, sophisticated Hollywood player but also a ruthless south Boston thug His job as a problem fixer for the Hollywood elite has helped lift him out of the working class to within reach of the wealthy and powerful.”).

28. MONROE, *supra* note 16, at xi.

29. Morrison, *supra* note 19, at 1460.

30. *Id.* at 1461.

31. Bruce Ackerman, *Abolish the White House Counsel: And the Office of Legal Counsel, Too, While We’re at It*, SLATE (Apr. 22, 2009), <https://slate.com/news-and-politics/2009/04/abolish-the-white-house-counsel-and-the-office-of-legal-counsel.html> [<https://perma.cc/Z2C9-BF9Q>].

other executive agencies, it is not *of* them. Like Lord Byron's Childe Harold³² or *The Matrix's* Neo,³³ the OLC is much more than it appears to be.

The OLC also *does* much more than it appears to do. Much of its work product never surfaces.³⁴ It is among "the most understudied agencies in the national government."³⁵ The decisions it does publish—on a website that demands much scrolling from a devoted reader—address legal questions that will change the course of history as well as those that will disappear into history's dustbin.³⁶ Here, we learn that the Food and Drug Administration can issue an emergency vaccine authorization.³⁷ We also learn that South Dakota's 4-H Youth Development Program can maintain separate boys' and girls' rodeo divisions without violating Title IX.³⁸

Crucially, the OLC can change its mind—and can be ignored by the president. Some of the agency's pronouncements are followed by high-profile reconsiderations, reversals, and presidential dismissals.³⁹ In 1973, the OLC serving President Nixon amid the Watergate scandal conveniently decided that a sitting president couldn't be indicted; in 2000, the OLC serving President Clinton after his impeachment reconsidered, but conveniently agreed.⁴⁰ In 2002, the OLC serving President Bush argued in "torture memos" that severe pain must be "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death,"⁴¹ clearing the way for aggressive interrogation techniques.⁴² In 2009, Obama's OLC announced that these memos "do not reflect the current views of this Office."⁴³ Yet Obama, two years later, ignored his OLC when he decided to continue armed intervention in Libya without

32. LORD BYRON, *CHILDE HAROLD'S PILGRIMAGE* 208 (The Floating Press 2009) (1818) ("I stood/Among them, but not of them; in a shroud/Of thoughts which were not their thoughts").

33. *THE MATRIX* (Warner Bros., 1999).

34. Pillard, *supra* note 20, at 712 ("Most OLC advice is never made public.").

35. MONROE, *supra* note 16, at 5.

36. DEP'T OF JUSTICE, <https://www.justice.gov/olc/opinions> [<https://perma.cc/D55Y-TPU5>] (last visited Jan. 7, 2022).

37. Whether Section 564 of the Food, Drug, & Cosm. Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization, 2021 WL 3418599 (O.L.C. July 6, 2021).

38. Sex Segregation in Youth Rodeo Events Under Title IX Reguls., 2021 WL 222745 (O.L.C. Jan. 13, 2021).

39. As the decisions discussed briefly in this paragraph have received extensive treatment elsewhere, I will not burden the reader with my own analysis.

40. A Sitting President's Amenability to Indictment & Crim. Prosecution, 24 U.S. Op. Off. Legal Counsel 222 (2000).

41. Dahlia Lithwick, *The Worst Ideas of the Decade: The Torture Memos*, WASH. POST (Dec. 21, 2009), <https://www.washingtonpost.com/wp-srv/special/opinions/outlook/worst-ideas/torture-memos.html> [<https://perma.cc/HRM6-5E3B>] (citing "torture memos").

42. Steven Giballa, *Saving the Law from the Office of Legal Counsel*, 22 GEO. J. LEGAL ETHICS 845, 848 (2009).

43. Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of Sept. 11, 2001, 2009 WL 1267352, at *1 (O.L.C. Jan. 15, 2009).

congressional approval.⁴⁴ And, in 2021, President Biden’s OLC reversed a Trump OLC decision that shielded Trump’s tax returns from release to a House committee.⁴⁵

Over decades, OLC attorneys have mulled, proclaimed, mulled some more, and retracted some of their own proclamations, defining the executive branch’s proper role in our democracy. They have also done something more quotidian: tried to please their boss.

At least since the 1950s, when the OLC took its current form, the office has largely furthered the goals of the man at the top of the executive branch. In 245 opinions issued between 1977 and the first year of the Obama administration, the OLC supported the president’s position 79 percent of the time and supported some portion of that position 8 percent of the time.⁴⁶ It opposed the White House just 13 percent of the time.⁴⁷ At least publicly, the office mostly enacts Oval Office policy preferences.⁴⁸

There is no mystery here: The President is the OLC’s boss. The OLC should say so to protect democracy and those living under it—not least those trying to avoid unnecessary prison stays during a pandemic.

II. WHAT THE TRUMP PRISON MEMO WAS

For those who wish to avoid coronavirus infection, prisons are “among the nation’s most dangerous places”⁴⁹—“cramped, often unsanitary settings . . . ideal for communicating disease.”⁵⁰ Between April 2020 and April 2021, an average of 1,400 inmate coronavirus infections and seven deaths were reported in correctional facilities daily.⁵¹ In the federal prison system, about 53,000 prisoners and 13,000 staff members have been infected.⁵² Of these, 293 prisoners and seven

44. Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011) <https://www.nytimes.com/2011/06/18/world/africa/18powers.html?smid=share> [<https://perma.cc/453C-VK7V>]. (“Presidents have the legal authority to override the legal conclusions of the Office of Legal Counsel . . . but it is extraordinarily rare for that to happen. Under normal circumstances, the office’s of the law is legally binding on the executive branch.”).

45. Devlin Bartlett, *Congress Should Get Trump’s Tax Returns, Biden Justice Department Says*, WASH. POST (July 30, 2021), https://www.washingtonpost.com/national-security/trump-tax-returns-congress/2021/07/30/c476873e-f15c-11eb-81d2-ffae0f931b8f_story.html?tid=ss_tw [<https://perma.cc/3DFB-8E8B>].

46. Avidan Y. Cover, *Supervisory Responsibility for the Office of Legal Counsel*, 25 GEO. J. LEGAL ETHICS 269, 276 (2012) (citing Morrison, *supra* note 19).

47. *Id.*

48. MONROE, *supra* note 16, at 3 (“[I]t is very difficult to discover the true number of OLC memoranda for any time period, because the memorandum can be either classified or withheld from the public.”).

49. Eddie Burkhalter, Izzy Colón, Brendon Derr, Lazaro Gamio, Rebecca Griesbach, Ann Hinga Klein, Danya Issawi, K.B. Mensah, Derek M. Norman, Savannah Redl, Chloe Reynolds, Emily Schwing, Libby Seline, Rachel Sherman, Maura Turcotte & Timothy Williams, *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. TIMES (Apr. 10, 2021), <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html> [<https://perma.cc/BD8C-GL5E>].

50. *Id.*

51. *Id.*

52. BUREAU OF PRISONS, *supra* note 7.

staff members have died.⁵³

On March 26, 2020, Attorney General William P. Barr “directed federal prisons to send vulnerable, low-risk inmates to home confinement or release them outright.”⁵⁴ Barr clearly laid out the advantages of home confinement in a time of plague. “Many inmates will be safer in [Federal Bureau of Prisons] facilities where the population is controlled and there is ready access to doctors and medical care,” he wrote in a memo to the BOP’s director.⁵⁵ “But for some eligible inmates, home confinement might be more effective in protecting their health.”⁵⁶ According to its own statistics, the BOP has placed almost 41,000 inmates on home confinement since Barr’s order, with more than 6,000 still serving time.⁵⁷

Though Barr acted the day before the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) became law, that statute clarified his authority.⁵⁸ The relevant portion of the law—§ 12003(b)(2)—signed by Trump on March 27, 2020,⁵⁹ reads:

During the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director determines appropriate.⁶⁰

Advocates for incarcerated people thought the language “expanded the federal government’s ability to move people from federal prison to serve their sentences at home.”⁶¹ The CARES Act expressly extended the language of 18 U.S.C. 3624(c)(2),

53. *Id.*

54. Justin Wm. Moyer & Neena Satija, *Frail Inmates Could Be Sent Home to Prevent the Spread of Covid-19. Instead, Some are Dying in Federal Prisons.*, WASH. POST (Aug. 3, 2020), https://www.washingtonpost.com/local/public-safety/frail-inmates-could-be-sent-home-to-prevent-the-spread-of-covid-19-instead-some-are-dying-in-federal-prisons/2020/08/02/992fd484-b636-11ea-9b0f-c797548c1154_story.html [https://perma.cc/TSG4-SS5B].

55. William P. Barr, “Memorandum for Director of Bureau Prisons [sic]” (Mar. 26, 2020), https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf [https://perma.cc/L42R-SW8H] (last visited Jan. 8, 2022).

56. *Id.*

57. BUREAU OF PRISONS, Frequently Asked Questions regarding potential inmate home confinement in response to the COVID-19 pandemic, https://www.bop.gov/coronavirus/faq.jsp#hc_rdap [https://perma.cc/B8A9-UD89] (last visited Apr. 17, 2022).

58. CARES Act, Pub. L. No. 116-136, § 12003(b)(2) (2020).

59. President Claudia Grisales, Kelsey Snell, Susan Davis & Barbara Spunt, *Trump Signs \$2 Trillion Coronavirus Rescue Package Into Law*, NAT’L PUB. RADIO (Mar. 27, 2020), <https://www.npr.org/2020/03/27/822062909/house-aims-to-send-2-trillion-rescue-package-to-president-to-stem-coronavirus-cr> [https://perma.cc/6ZFG-L7CZ].

60. CARES Act, Pub. L. No. 116-136, § 12003(b)(2) (2020).

61. AM. C.L. UNION, Coalition Letter to President Biden on CARES Act Clemency (July 19, 2021), <https://www.aclu.org/letter/coalition-letter-president-biden-cares-act-clemency> [https://perma.cc/T3PW-WVCX].

which permits the BOP Director to send prisoners to home confinement “for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months”⁶² through the pandemic’s “covered emergency period.”⁶³ In another memorandum on April 3, Barr pushed the BOP to make use of this power in service of the agency’s “profound obligation to protect the health and safety of all inmates” amid “significant levels of infection at several of our facilities.”⁶⁴ The mandate was clear: *Get prisoners home now*. Barr continued: “Given the speed with which this disease has spread through the general public, it is clear that time is of the essence. Please implement this Memorandum as quickly as possible and keep me apprised of your progress.”⁶⁵

Though some prisoners and their families said BOP officials were slow to implement Barr’s order—the agency routinely opposes motions for compassionate release or reduced sentences in courtrooms across the country⁶⁶—some incarcerated people able to get home rebuilt their lives.⁶⁷ Wendy Hechtman, who served just three years of a 15-year sentence for drug manufacturing before she was sent to home confinement in late 2020, told me a few months later that she lived in sober housing while working remotely for a company that finds employment for people with criminal histories.⁶⁸ On the outside, she was able to get a prosthetic eye BOP doctors had approved but not provided, and her conversations with her children were no longer limited to 25 minutes three times per week.⁶⁹ “Now I can talk to them every day,” she said. “More importantly, they don’t have to worry that I’m in prison anymore.”⁷⁰

People like Hechtman did not see the Office of Legal Counsel suiting up on the sidelines. On Jan. 15, 2021, five days before Trump left office, his OLC issued a memo called “Home Confinement of Federal Prisoners After the COVID-19 Emergency.”⁷¹ The CARES Act, according to its interpretation, authorized home confinement “only during the Act’s covered emergency period and when the Attorney General finds that the emergency conditions are materially affecting BOP’s functioning.”⁷² Should the declared pandemic emergency end or the Attorney General revoke his materiality finding, the BOP “would be required to

62. 18 U.S.C. § 3624(c)(2) (2018).

63. CARES Act, Pub. L. No. 116-136, § 12003(b)(2) (2020).

64. William P. Barr, “Memorandum for Director of Bureau of Prisons” (Apr. 23, 2020), <https://www.justice.gov/file/1266661/download> [<https://perma.cc/2VFV-C4ZN>] (last visited Mar. 5, 2022).

65. *Id.*

66. Joseph Neff & Keri Blakinger, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied*, THE MARSHALL PROJECT (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied> [<https://perma.cc/HN2Q-KNQK>].

67. Moyer & Satija, *supra* note 1.

68. *Id.*

69. Telephone interview with Wendy Hechtman (2021).

70. *Id.*

71. Trump memo, *supra* note 3.

72. *Id.* at 1.

recall the prisoners to correctional facilities unless they are otherwise eligible for home confinement.”⁷³ Moreover, the OLC said, other provisions of § 3621—language that allows early release “for satisfactory behavior”⁷⁴ or that permit the BOP to “designate the place of the prisoner’s imprisonment”⁷⁵—offered released prisoners no safe harbor; those provisions “do not supplement the CARES Act authority to authorize home confinement.”⁷⁶ Those released early for reasons not recognized as legitimate before the pandemic, in other words, would be reincarcerated when the pandemic ended.

The OLC did not mount a policy argument but a textual one. The opinion cited Justice Thomas’s recent admonition: “Our analysis begins and ends with the text.”⁷⁷ Early home confinement must end “once the CARES Act authority evaporates”⁷⁸ with the state of emergency, the OLC found, quoting an 18-year-old dissenting opinion from Justice Scalia: “When a power is conferred for a limited time, the *automatic* consequence of the expiration of that time is the expiration of the power.”⁷⁹ This time limit was “consistent with the structure of the CARES Act” as the Act provides “a variety of forms of temporary emergency relief.”⁸⁰ No elephants hid in mouseholes⁸¹ here: “If Congress had fundamentally altered the structure of home confinement beyond the emergency circumstance . . . then it would have said so.”⁸² Here, the BOP’s emergency power to “place” a prisoner at home “requires ongoing action, and therefore continuing legal authority”⁸³—authority that would end with the pandemic.

Using similar textualist tools, the OLC found the BOP’s non-emergency power to “place the prisoner in a facility” under § 3621(b) did not mean the agency could place the prisoner in a home; as per dictionary definitions, a “‘facility’” is “‘something’ like ‘a hospital,’” while a home is “‘habitually occupied by a family.”⁸⁴ Moreover, precedent and the BOP’s own policies showed the agency’s discretion to select facilities “does not extend to home confinement.”⁸⁵ Finally, the

73. *Id.*

74. 18 U.S.C. § 3621(a) (2018).

75. 18 U.S.C. § 3621(b) (2018).

76. Trump memo, *supra* note 3, at 1.

77. *Id.* at 3 (citing *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020)).

78. *Id.*

79. *Id.* (emphasis in original) (citing *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 174-175 (2003) (Scalia, J., dissenting). Scalia unsuccessfully argued that 600 retiring coal workers should not receive statutory benefits from coal companies because the federal agency tasked with assigning the benefits did so after a deadline passed. *Id.*

80. *Id.* at 4.

81. *See, e.g.*, *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

82. Trump memo, *supra* note 3, at 4.

83. *Id.* at 5.

84. *Id.* at 6 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 812-813 (1961)).

85. *Id.*

OLC reasoned, statutory changes in the past 20 years that might be read to grant the BOP greater discretion did not because they distinguished home confinement from other forms of custody such as community correctional facilities.⁸⁶ The opinion cited another Scalia warning: a legal text should not “needlessly be given an interpretation that causes it to . . . have no consequence.”⁸⁷ In the Trump memo, the OLC could not sanction “surplusage.”⁸⁸

The Trump memo put those living in home confinement on tenterhooks. Along with their families and employers, they faced the prospect that, should the public health improve, they would disappear back into the BOP.⁸⁹ Fortunately and unfortunately, there was no immediate threat—the pandemic emergency, indefinitely extended by the White House on Feb. 24, 2021, has not ended since.⁹⁰ With thousands dead of the coronavirus each day in early 2022 amid the spread of the Omicron variant, the emergency has no clear terminus.⁹¹ Still, for many with years of their sentences left to serve—people precluded from home confinement in normal times—life was on pause. As Hechtman said: “It’s like waiting to be sentenced all over again.”⁹²

The BOP seemed stumped by the OLC ruling. Called to Capitol Hill in April, BOP Director Michael Carvajal—appointed by Trump, then serving under President Biden⁹³—said: “We need to be given guidance on what to do with these individuals so we can follow the law.”⁹⁴ In a letter to Attorney General Merrick Garland, Senators Richard J. Durbin (D-Ill.) and Cory A. Booker (D-N.J.) insisted

86. *Id.* at 8.

87. *Id.* at 14 (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012)).

88. Trump memo, *supra* note 3, at 8.

89. Thirty employers of those released early through the CARES Act wrote Biden in August, asking that he let their employees remain free amid a labor shortage: “We do not think it makes any sense—from a public safety or economic standpoint—to return people to prison who are doing everything right,” the letter said. Letter from CARES Act Employers to President Biden (Aug. 25, 2021), <https://famm.org/wp-content/uploads/letter-from-employers-of-CARES-Act-August-25-2021.pdf> [<https://perma.cc/Q5T8-MBQU>].

90. WHITE HOUSE, A Letter on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic (Feb. 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/24/a-letter-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic> [<https://perma.cc/7FF2-H64A>].

91. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> [<https://perma.cc/BCT7-TPMB>] (last visited Mar. 5, 2022).

92. Charlie Savage & Zolan Kanno-Youngs, *Biden Legal Team Decides Inmates Must Return to Prison After Covid Emergency*, N.Y. TIMES (July 19, 2021), <https://www.nytimes.com/2021/07/19/us/politics/biden-prisoners-covid.html> [<https://perma.cc/45CG-D86G>].

93. BOP Director Carvajal resigned in early 2022 amid criticism of coronavirus outbreaks in prisons and revelations that more than 100 BOP employees “have been arrested, convicted or sentenced for crimes committed since 2019, including a warden charged with sexually abusing a prison inmate.” Olafimihan Oshin, *Embattled Federal Bureau of Prisons Director Resigning*, THE HILL (Jan. 5, 2022), <https://thehill.com/homenews/administration/588490-embattled-federal-bureau-of-prisons-director-resigning> [<https://perma.cc/CY6F-XLY7>].

94. Moyer & Satija. *supra* note 1.

that CARES “does not require or permit BOP to recall these prisoners.”⁹⁵ Though the letter was signed by 27 Democrats and one Republican⁹⁶—and non-signatory Sen. Chuck Grassley (R-Iowa) criticized the Trump memo as mere “policy”⁹⁷—the epistle offered more than political grandstanding. It offered a legal theory.

Sens. Durbin and Booker focused on language in § 3624(c)(2) that demands the BOP ensure incarcerated people have “a reasonable opportunity to adjust to and prepare for the reentry.”⁹⁸ Rejecting the OLC’s position by looking to the statute’s purpose, the senators found prisoners should “finish the remainder of their sentence in home confinement to allow ‘a reasonable opportunity to adjust.’”⁹⁹ Because “[r]ecalling prisoners, absent a violation of the terms of release, is contrary to that goal,” those released early should remain free.¹⁰⁰ The letter found the BOP’s new authority reached beyond the law’s expiration date. “It is that authority (the authority to make a placement decision), not the consequences of those decisions, that is limited to the emergency period of the pandemic,” the letter said, concluding: “the OLC opinion incorrectly interprets the CARES Act, and we ask you to rescind it.”¹⁰¹

Faced with this request, President Biden OLC’s would not act for months—and it would formulate a legal theory directly contrary to Trump’s OLC before it did.

III. WHAT THE BIDEN PRISON MEMO IS

Despite bipartisan criticism of the Trump memo, the White House responded cautiously. In April 2021, a White House spokesman said only that President Biden “is committed to reducing incarceration and helping people to reenter society.”¹⁰² The Justice Department declined comment.¹⁰³ In July—six months into Biden’s presidency and two weeks after Gwen Levi’s re-incarceration ended with compassionate release¹⁰⁴—the White House said it would stand by the Trump OLC’s memo.¹⁰⁵ “[Biden’s] administration is focused on reforming our justice

95. COMM. ON THE JUDICIARY, Durbin, Booker Call on AG Garland To Rescind Trump-era Opinion That Would Force Individuals on Home Confinement to Return to Prison Following Pandemic (Apr. 23, 2021), <https://www.judiciary.senate.gov/press/dem/releases/durbin-booker-call-on-ag-garland-to-rescind-trump-era-opinion-that-would-force-individuals-on-home-confinement-to-return-to-prison-following-pandemic> [https://perma.cc/2VMR-LJGA].

96. Moyer & Satija, *supra* note 1.

97. Savage & Zolan Kanno-Youngs, *supra* note 92.

98. COMM. ON THE JUDICIARY, *supra* note 95 (quoting U.S.C. § 3624(c)(2) (2018)).

99. *Id.*

100. *Id.*

101. *Id.*

102. Moyer & Satija, *supra* note 1.

103. *Id.*

104. Gwen Levi, *I Was Sent Back to Jail for Going to a Computer Class. It's Time to Act on Home Confinement.*, WASH. POST (July 15, 2021), <https://www.washingtonpost.com/opinions/2021/07/15/gwen-levi-home-confinement-prison-biden> [https://perma.cc/TA9P-VN5A].

105. Savage & Zolan Kanno-Youngs, *supra* note 92.

system in order to strengthen families, boost our economy and give people a chance at a better future,” a spokesman said—a comment that did not address the controversy at hand.¹⁰⁶ Then, in October—after the administration asked some on home confinement to submit commutation applications¹⁰⁷—Attorney General Garland said the memo was getting yet another look.¹⁰⁸ “I agree it would be a terrible policy to return these people to prison after they’ve shown that they’re able to live in home confinement without violations,” Garland said.¹⁰⁹

The results of the review (“Biden memo”) appeared four days before Christmas.¹¹⁰ “We do not lightly depart from our precedents,” President Biden’s OLC declared before departing from a precedent less than one year old with a new reading of the CARES Act.¹¹¹ Now, the Biden memo declared, “the better reading of section 12003(b)(2) . . . does not require that prisoners in extended home confinement be returned *en masse* to correctional facilities when the emergency period ends.”¹¹² After reviewing the Trump OLC’s reasoning—all that stuff about the “temporary” nature of CARES Act relief,¹¹³ the expiration of the emergency power, and the verb “place” as “connoting an ongoing action that required ongoing legal authority”¹¹⁴—President Biden’s OLC rejected it.

Why the reversal? Well, it turned out, the BOP had disagreed with Trump’s memo all along, believing “that section 12003(b)(2) is ‘most reasonably interpreted’ to give the Bureau discretion over which inmates to return to facilities.”¹¹⁵ The agency’s reading of the CARES Act focused not on “place,” but a different verb—the authority that expired was “to *lengthen* terms of home confinement, not the authority to let prisoners *remain* in home confinement.”¹¹⁶ Put another way: If the pandemic ended, the Bureau would lose its CARES power to send people home but hold on to its inherent power to let them stay there. This was good policy, the Biden memo argued, “balancing the Bureau’s numerous penological goals and needs, as well as the needs of the prisoner.”¹¹⁷

106. *Id.*

107. Sam Stein, *Biden Starts Clemency Process for Inmates Released Due to Covid Conditions*, POLITICO (Sept. 13, 2021), <https://www.politico.com/news/2021/09/13/biden-clemency-covid-inmates-511658> [<https://perma.cc/M2WM-L2V7>].

108. Jack Queen, *DOJ Will Revise Trump-Era Home Release Limit, Garland Says*, LAW360 (Oct. 27, 2021), <https://www.law360.com/articles/1434773> [<https://perma.cc/G6JA-YJZZ>].

109. *Id.*

110. Biden memo, *supra* note 11, at 2.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 4.

115. *Id.* (citing Kenneth Hyle, BOP General Counsel, Memorandum for Christopher H. Schroeder, Assistant Attorney General, Office of Legal Counsel, *Re: Views Regarding OLC Opinion, “Home Confinement of Federal Prisoners After the COVID-19 Emergency,”* dated January 15, 2021, at 2 (Dec. 10, 2021).

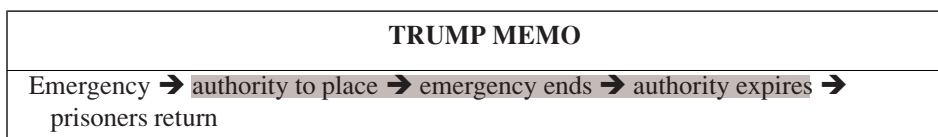
116. Biden memo, *supra* note 11, at 4 (emphasis in original).

117. *Id.* at 5.

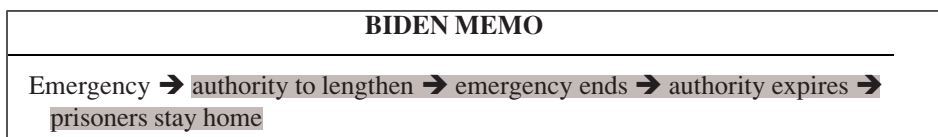
Where the Trump memo was silent on the BOP's interpretation of the CARES Act,¹¹⁸ the Biden memo embraced the agency's reading, finding "lengthen" signifies "a discrete act: once something is permissibly lengthened, no further or ongoing action is typically required."¹¹⁹ President Biden's OLC resorted to linguistic gymnastics to make this point:

Appropriately focusing on the verb "lengthen" diminishes the importance of the sense in which the verb "place" is used, because even if "place" is meant to imply a continuing process, the authority for the entirety of that extended placement was created when its duration was lawfully "lengthened."¹²⁰

This convoluted grammar is better represented in a diagram. Under the Trump memo, the CARES Act's effects—free prisoners—expire with the BOP's temporary authority to place them at home. Further action is required to keep them at home, and the BOP no longer has the power to take this action.



Under the Biden memo, the CARES Act's effects—again, free prisoners—persist because their terms of home confinement have already been lengthened. No further action is needed; the BOP's emergency authority continues to protect those transitioning back to their communities.



Finally, the Biden memo cited precedent the Trump memo ignored to find that the BOP has "additional authority to continue extended home-confinement placements."¹²¹ The conclusion was bolstered by a new reading of the CARES Act that recalled Sens. Durbin and Booker's arguments about the "consequences" of placing prisoners in home confinement:¹²² "The fact that the expanded placement

118. Addressed to the BOP's general counsel, the Trump memo treated the agency's views as suggestions to be dismissed. *See, e.g.*, Trump memo, *supra* note 3, at 5 ("you have suggested that BOP may have discretion . . . [b]ut we do not agree."). By contrast, the Biden memo was addressed to the attorney general.

119. Biden memo, *supra* note 11, at 5.

120. Biden memo, *supra* note 11, at 6.

121. *Id.* (citing *United States v. Wilson*, 503 U.S. 329 (1992); *United States v. Ko*, 739 F.3d 558 (10th Cir. 2014)).

122. COMM. ON THE JUDICIARY, *supra* note 95 (quoting U.S.C. § 3624(c)(2) (2018)).

authority is temporary . . . does not entail that the consequences of such placements need also be temporary.”¹²³ Where Trump’s OLC ignored the purpose of the CARES Act, President Biden’s OLC looked beyond the statute to focus on “the broader purpose of home confinement . . . to ‘afford the prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community.’”¹²⁴ Had Congress intended to fundamentally alter home confinement, the Trump memo argued, Congress would have been “more explicit”;¹²⁵ had Congress intended “an unprecedented and penologically unjustified mass recall of prisoners,” the Biden memo argued, “it would have said so.”¹²⁶ The Biden memo concluded: “Even if the statute is considered ambiguous, BOP’s view represents a reasonable reading that should be accorded deference.”¹²⁷

This major reversal is hard to explain without reference to politics. Though President Biden’s OLC offered a *mea culpa* of sorts—“our prior opinion failed to address important and persuasive counterarguments”¹²⁸—it did not agonize over what its flip-flop said about partisanship’s place in legal arguments. Indeed, media coverage of the Biden memo delved little into its reasoning. People who were probably destined to go back to prison, perhaps as a result of a Christmas miracle, were not going back after all—and that was enough for a story filed as travelers rushed to take antigen tests before gathering with their families.¹²⁹ Advocates, at least, got the result they wanted: “This is excellent news for thousands of people and their families to get before the holidays,” one said.¹³⁰

Those reading the Trump and Biden memos side by side might find it difficult to understand how the same agency drawing on the same body of law could come to such wildly divergent outcomes:

123. Biden memo, *supra* note 11, at 8.

124. *Id.* at 9 (citing 18 U.S.C. §3621(c)(1) (2018)).

125. *Id.* at 10.

126. *Id.*

127. *Id.* at 2.

128. *Id.* at 10.

129. *See, e.g.*, Nakamura, *supra* note 10; Katie Benner, Zolan Kanno-Youngs & Charlie Savage, *Some Inmates Can Stay Confined at Home After Covid Emergency, Justice Dept. Says*, N.Y. TIMES (Dec. 21, 2021), <https://www.nytimes.com/2021/12/21/us/politics/prison-covid-home-confinement.html> [<https://perma.cc/42R3-KVE3>].

130. F.A.M.M., F.A.M.M. Issues Statement Following OLC Memo Stating People on CARES Act Home Confinement Won’t Have to Return to Prison En Masse (Dec. 21, 2021), <https://famm.org/famm-issues-statement-following-olc-memo-stating-people-on-cares-act-home-confinement-wont-have-to-return-to-prison-en-masse> [<https://perma.cc/N8FF-HKE6>].

Trump Memo (Jan. 15, 2021)	Biden Memo (Dec. 21, 2021)
12003(b)(2) expiration means people must be returned to prison en masse	→ 12003(b)(2) “does not require” people in home confinement “be returned en masse”
“CARES Act authority evaporates” with pandemic emergency	→ Authority that expires is “the authority of BOP to <i>lengthen</i> terms of home confinement, not the authority to let prisoners <i>remain</i> ” there
BOP’s 3621(b) power to “place” prisoners does not include ability to “place” them at home	→ BOP’s 3624(c)(2) power to “place . . . continues to exist after section 12003(b)(2) ceases to be operative”
BOP discretion to select facilities “does not extend to home confinement”	→ 12003(b)(2) “most reasonably interpreted” to give BOP discretion over “which inmates to return to facilities,” including home confinement
Congress would have been “more explicit” if it wanted to home confinement’s “structure”	→ Had Congress intended a “mass recall . . . it would have said so.”
No policy argument	→ “balanc[es] . . . numerous penological goals and needs [with] the needs of the prisoner.”

With the Biden memo, the executive branch’s most prominent legal entity stood up and, with a straight face, decided the opposite of what it had decided less than a year before. The OLC’s argument defied logic—in January or in December, the agency had to have been wrong.

The argument, however, did not—and cannot—defy politics.

IV. WHY THE OLC SHOULD SAY THE PRESIDENT IS ITS CLIENT

Had President Biden or his BOP wished to return people to prison at the pandemic’s conclusion, that was their prerogative. But because the Trump memo was adverse to so many former prisoners, the *Model Rules of Professional Conduct* should have prevented Biden’s OLC—an organization of lawyers—from deferring to Trump’s OLC, as it did throughout 2021. As per Rule 1.13(f), President Biden’s OLC should have made clear that it speaks for the president and he is its client.

As befits a profession whose practitioners are sometimes criticized for their lack of a moral compass, the American Bar Association's *Model Rules* are written by volunteers and "do not have the force of law."¹³¹ Still, the ABA—"the leading national organization of lawyers"—is not nothing, and its rules have been adopted by many states, federal courts, and federal agencies through statutes.¹³² Though not etched on sacred stones, the *Model Rules* are what we have to guide us.

The *Model Rules* make clear in the first sentence of their Preamble: A lawyer is "a representative of *clients*."¹³³ But not every lawyer hangs out a shingle in a one-horse town and reads the obituaries to find business. What about organizational attorneys? Who is their client? Rule 1.13—"organization as client"—speaks to the advocate who "represents the organization acting through its duly authorized constituents."¹³⁴ Rule 1.13(f) further clarifies organizational attorneys' unique responsibilities. When dealing with an organization's constituents, a lawyer "shall explain the identity of the client" when "the organization's interests are adverse to those of the constituents."¹³⁵ Comment 9 to Rule 1.13 specifies that the "duty defined in this Rule applies to governmental organizations."¹³⁶ And though "[d]efining precisely" a government agency's client is "beyond the scope of these Rules," the "relevant branch of government may be the client."¹³⁷

If the *Model Rules* are, as they purport to be, "rules of reason,"¹³⁸ Comment 9's discussion of government attorneys' obligations, exiled to the equivalent of a footnote, demands clear elucidation. In sum: Lawyers represent people. Some of these people are organized into governments. When lawyers represent people organized into a government adverse to its constituents—that is, adverse to its citizens—lawyers must identify the people they represent.¹³⁹

The OLC has never done this. On one hand, the agency "helps the President fulfill his or her constitutional duties to preserve, protect, and defend the Constitution, and to 'take Care that the Laws be faithfully executed.'"¹⁴⁰ On the

131. Geoffrey C. Hazard, Jr., Susan P. Koniak, Roger C. Cramton & George M. Cohen, *The Law and Ethics of Lawyering* 28 (2017).

132. *Id.*

133. MODEL RULES OF PROF'L CONDUCT (2020) pmbl. (emphasis added) [hereinafter MODEL RULES].

134. MODEL RULES R. 1.13(a).

135. MODEL RULES R. 1.13(f).

136. MODEL RULES R. 1.13 cmt. 9.

137. MODEL RULES R. 1.13 cmt. 9.

138. Model Rules scope.

139. Michael A. Cardozo, *The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer*, 22 PROF. LAW. 4, 6 (2014) ("As a practical matter, the government lawyer's job is almost invariably to advance the objectives and defend the interests of whoever is in charge of making final decisions on the particular issue in question.")

140. David J. Barron, Acting Assistant Attorney General, Memorandum for Attorneys of the Office Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/TM3C-EBDY>] (quoting U.S. CONST. art. I, § 2, cl. 3) [hereinafter Best practices memo].

other hand, the agency purports to be above the political fray, offering “candid, independent, and principled advice—even when that advice may be inconsistent with the aims of policymakers.”¹⁴¹ Those who must live with the consequences of OLC diktats are forced into doublethink as the agency announces its neutrality while serving a politician.¹⁴²

To hold the OLC accountable, those to whom the agency stands adverse must stand on first principles: The executive power is “vested in a President of the United States of America.”¹⁴³ This president is not an office or a branch but, for the past 233 years, a man.¹⁴⁴ Men have political preferences, and a man who is president has the authority—the responsibility—to structure “the administrative state to advance his political priorities.”¹⁴⁵ Viewed as a political actor, the OLC does not surprise when supporting torture before denouncing it¹⁴⁶ or denying legislators the right to inspect one president’s tax returns before sanctioning their release months after his successor takes office.¹⁴⁷ Those who take a policy position—for example, on whether the Wire Act applies to non-sports gaming¹⁴⁸ or whether West Virginia State College can receive federal funds¹⁴⁹—are justifiably frustrated when the OLC changes course to go against them. Their frustration may be moral or ideological, but it must also be political. It is not a constitution the OLC is expounding¹⁵⁰—it is retail politics as bare-knuckled as those of Tammany Hall or the Koch Brothers.

This is not a popular view of the OLC or its obligations even though the agency’s rhetoric—that its analyses “should always be principled, forthright . . . and not designed merely to advance the policy preferences of the President”¹⁵¹—is misleading. The OLC lacks guardrails, but what can guide it? If case law

141. *Id.*

142. Law is “significant precisely because it is not immunised from the realm of politics and thus has definite effects and consequences for the multitude of arguments, battles and struggles which produce the human condition.” Peter Fitzpatrick and Alan Hunt, *Critical Legal Studies: Introduction*, 14 J.L. & Soc’y 1, 1 (1987).

143. U.S. CONST. art. II, § 1, cl. 1.

144. See, e.g., Farida Jalalzai, *Why the US Still Hasn't Had a Woman President*, THE CONVERSATION (Mar. 9, 2020), <https://theconversation.com/why-the-us-still-hasnt-had-a-woman-president-131125> [<https://perma.cc/C85J-47YD>].

145. Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 808 (2017). Renan adds: “legal analysis is crucial to the president’s policy agenda, and so presidents have much at stake in how they structure their legal decisional apparatus.” *Id.*

146. Status of Certain OLC Opinions, *supra* note 43, at 3 (“The federal prohibition on torture . . . is constitutional . . . The statement to the contrary from the August 1, 2002, memorandum . . . has been withdrawn”).

147. Bartlett, *supra* note 45.

148. Gambling Reconsidering Whether the Wire Act Applies to Non-Sports, 2018 WL 7080165 (O.L.C. Nov. 2, 2018).

149. Reconsideration of Prior Opinion Concerning Land-Grant Colleges, 17 U.S. Op. O.L.C. 184 (1993).

150. “[W]e must never forget that it is a *constitution* we are expounding.” *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (emphasis in original). See also Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1033 (1981) (finding there “is not the same freedom in construing the Constitution as in constructing a moral code”).

151. Best practices memo, *supra* note 140.

applying the *Model Rules* to the OLC exists, I cannot find it.¹⁵² Past practice is inconsistent or obscured from public view. Commentators willing to recognize the OLC as a political actor sometimes recommend transparency¹⁵³ or reporting obligations to Congress.¹⁵⁴ Others recommend OLC attorneys who put politics over neutrality should be punished,¹⁵⁵ perhaps under *Model Rules* provisions that demand lawyers “render candid advice” removed from political concerns.¹⁵⁶

There is another way: The OLC need only identify its client as Rule 1.13(f) demands.

Though this may seem a pointless exercise—why proclaim President Biden OLC works for President Biden when it is, as everyone should know, President Biden’s OLC?—such a proclamation would offer great relief. For those who thought they would be reincarcerated before the Biden memo overturned the Trump memo, the distinction between OLC-as-neutral-interpreter and OLC-as-political-actor was not academic. The distinction was the difference between freedom and detention. As detailed above, Garland appeared uncertain what to do about home confinement for months; the Biden memo, issued after a season of confusion among former prisoners, their advocates, their families, and the BOP itself, awkwardly pays homage to the Trump memo even as it erases it.¹⁵⁷ Why didn’t the OLC just override the memo on President Biden’s first day in office—five days after the Trump memo was released? This would have made fraught conversations about OLC stare decisis unnecessary since, in reality, the president need pay no mind to OLC stare decisis.¹⁵⁸

152. Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1410 (2008) (government attorneys’ “interpretations are rarely subject to judicial review because potential plaintiffs lack standing or because courts apply the political question doctrine.”).

153. See, e.g., Tung Yin, *Great Minds Think Alike: The “Torture Memo,” Office of Legal Counsel, and Sharing the Boss’s Mindset*, 45 WILLAMETTE L. REV. 473, 475 (2009) (concluding “the assertion of ethical or professional conduct standards is unlikely to restrain OLC lawyers the way that critics hope; instead, greater transparency, while not a panacea, is more likely to achieve that result”); MONROE, *supra* note 16, at 127 (“the best reform is simply more transparency by requiring many more OLC opinions to be released”); Morrison, *supra* note 19, at 1525 (“one factor is critical: public disclosure”).

154. Note, *supra* note 152, at 1430 (“disclosure to the public at large may be unwise, but disclosure to Congress, with certain safeguards, may be the best way to ensure that the law is improved.”).

155. Steven Giballa, *Saving the Law from the Office of Legal Counsel*, 22 GEO. J. LEGAL ETHICS 845, 861 (2009) (the Justice Department’s Office of Professional Responsibility should “establish the precedent that OLC lawyers cannot provide legal advice in which the result has been predetermined by the client’s preferences.”).

156. Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557, 568–69 (2005) (Model Rule 2.1 “requires lawyers in their advisory capacity to ‘render candid advice,’ and it is even aspirational in its proposition, suggesting that lawyers can look to ‘moral, economic, social and political factors’ in rendering such advice.”).

157. See, e.g., Biden memo, *supra* note 11, at 2 (“we have given the views expressed in our prior opinion careful and respectful consideration”).

158. See Morrison, *supra* note 19, at 1525 (proposing multi-factor test for overruling previous OLC decisions because “mere ‘differences in approach’ from one head of OLC to the next are insufficient to support a departure”—but “[d]ifferences in approach from one President to the next, in contrast, can sometimes justify such a departure.”).

If President Biden always intended to let former prisoners stay home, the OLC's delay only caused people pain. As Levi wrote after her release: "Those of us in home confinement are stunned and scared . . . President Biden, please act now to keep these people home."¹⁵⁹ Does the pretend need for a bad-faith debate about statutory interpretation justify this suffering?

CONCLUSION

This Note argues that the *Model Rules* demand the explicit identification of the president as the OLC's client. Implementing Rule 1.13(f) so boldly could have serious repercussions. Between 2017 and 2021, amid multiple investigations and two impeachments, the nation heatedly debated whether Attorneys General Jeff Sessions and Barr were independent or under President Trump's control.¹⁶⁰ After Sessions was fired for failing to stop special prosecutor Robert Mueller's probe of Russian election interference¹⁶¹ and Barr subsequently derailed the Mueller report,¹⁶² it is clear: These public servants were under Trump's control. What if these AGs, invoking Rule 1.13(f), had made no gestures toward independence, but simply identified Trump as their client and openly followed his orders? Or what if, throughout the universe of agency law, legal actors discounted constituent interests and did what organization heads told them to do? The result would be jurisprudential fascism where "[a]bsolute dictatorial power is exercised by the Leader and Chancellor either personally or through his subordinate authorities."¹⁶³

This is not democratic. Indeed, it is terrifying. Yet, express reliance on Rule 1.13(f) would, at least, strip the veil of legitimacy from many exertions of brute power in American life. We could no longer deny that, as critical legal studies pioneer Mark Tushnet once explained, "law is politics."¹⁶⁴ Legal niceties—from

159. Levi, *supra* note 104.

160. See, e.g., Tessa Berenson, *Attorney General Bill Barr Says He Won't Be 'Bullied.' But Questions Remain About His Independence From Trump*, TIME (Feb. 12, 2020), <https://time.com/5782899/roger-stone-sentencing-attorney-general> [<https://perma.cc/YA69-B4ST>].

161. Peter Baker, Katie Benner & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html> [<https://perma.cc/WXS2-WEX6>].

162. Devlin Barrett & Matt Zapotosky, *Mueller Complained That Barr's Letter Did Not Capture Context of Trump Probe*, WASH. POST (Apr. 30, 2019), https://www.washingtonpost.com/world/national-security/mueller-complained-that-barrs-letter-did-not-capture-context-of-trump-probe/2019/04/30/d3c8fdb6-6b7b-11e9-a66d-a82d3f3d96d5_story.html [<https://perma.cc/5R5L-SG8D>].

163. ERNST FRAENKEL & JENS MEIERHENRICH, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* 6 (1941), <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198716204.001.0001/acprof-9780198716204> [<https://perma.cc/S2LH-39WN>] ("a comprehensive analysis of the rise and nature of National-Socialism" that "is the only such analysis written from within Hitler's Germany.").

164. Mark V. Tushnet, *Critical Legal Theory*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 80, 80 (Martin P. Golding & William A. Edmundson eds., 2005) ("law is politics" means "disputes within law were resolved in the same way that disputes with in politics were resolved, by some fairly messy combination of coercion and reasoned argument, rather than by reason alone").

Upjohn warnings¹⁶⁵ to the supposed independence of agencies like the FBI,¹⁶⁶ EPA,¹⁶⁷ and the OLC¹⁶⁸—advancing the notion that corporate and agency lawyers work for someone other than their bosses would fall away. If nothing else, attorneys would be forced to admit that they favor their employers.

Maybe the idea of a “1.13(f) declaration” offers a distinction without a difference. The Biden memo overruled the Trump memo without reference to the *Model Rules* just as Trump escaped prosecution without acknowledging the Justice Department did his bidding. But identifying the current president as the OLC’s client under Rule 1.13(f) would elevate another quality the *Model Rules* claim to value: candor.¹⁶⁹ Those affected by OLC decisions—BOP prisoners, combatants subject to torture, nations facing invasions—would understand on whose whims their fates depend. Naming one’s adversary may not bring power but at least brings clarity. As punk icon Henry Rollins put it after the 2016 election: “It’s a rough room, America, but at least we now know where we’re at.”¹⁷⁰

165. Robert M. Radick & Rusty Feldman, *A Warning About 'Upjohn' Warnings: A Word of Caution for Individual Employees*, N.Y. L.J. (June 25, 2021) (employees *not* warned that employers control attorney-client privilege have “no meaningful remedy”).

166. Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html> [<https://perma.cc/LJT6-MCLY>].

167. Dino Grandoni, *EPA Dismisses Dozens of Key Science Advisers Picked Under Trump*, WASH. POST (Mar. 31, 2021), <https://www.washingtonpost.com/climate-environment/2021/03/31/epa-advisory-panels> [<https://perma.cc/Y2JL-3UXQ>].

168. Best practices memo, *supra* note 140.

169. *See, e.g.*, MODEL RULES R. 3.3 (“Candor toward the tribunal”).

170. Henry Rollins, *Trump's Win Has Shredded the Veil of Civility, and Maybe It's About Time*, LA WEEKLY (Nov. 9, 2016), <https://www.laweekly.com/henry-rollins-trumps-win-has-shredded-the-veil-of-civility-and-maybe-its-about-time> [<https://perma.cc/37UZ-WS2E>].