

ARTICLES

LAW AND POLITICS IN THE AFTERMATH OF 9/11: UNDERSTANDING THE INTERACTION OF POLITICS, POWER, THE ROLE OF THE OLC, AND THE LAW DURING THE BUSH ADMINISTRATION, THROUGH AGENCY AND POLICY THEORY

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*So now we deal with pirates! We bargain with criminals! And don't you be so stiff-necked about it! Politics is a practical profession! If a criminal has what you want, you do business with him!*¹

I. INTRODUCTION

This article is a continuation of research on the Office of Legal Counsel (“OLC”) memos written during the Bush Administration,² which provided legal analysis on the President’s power as Commander-in-Chief³ to respond to the events of 9/11.⁴ An immeasurable amount of ink has been spilled on various questions, including (1) whether the OLC during the Bush Administration violated federal and international law by authorizing

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1. *SPARTACUS* (Universal Pictures 1960).

2. See Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They are Significant*, 76 ALB. L. REV. 217 (2013) (describing the history of the Office of the U.S. Attorney General and later the Office of Legal Counsel and how both hold quasi-judicial authority to determine the meaning of law within the Executive Branch and how their opinions are considered binding on all Executive Branch agencies, including the White House).

3. See, e.g., Arthur H. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, 43 CUMB. L. REV. 375 (2013).

4. See, e.g., Arthur H. Garrison, *The Office of Legal Counsel “Torture Memos”: A Content Analysis of What the OLC Got Right and What They Got Wrong*, 49 CRIM. L. BULL. 997 (2013).

interrogation techniques that some argue amounted to the torture of captured Al Qaeda operatives;⁵ (2) whether the OLC properly defended the Bush Administration's assertion that its policies were within the statute governing torture; (3) whether an act of war perpetrated by Al Qaeda authorized the President, as Commander-in-Chief, to use enhanced interrogation techniques;⁶ and (4) what the proper role of the OLC is within the Executive Branch.⁷

5. See, e.g., Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557 (2005); David Brennan, *Torture of Guantanamo Detainees With the Complicity of Medical Health Personnel: The Case for Accountability and Providing a Forum for Redress for These International Wrongs*, 45 U.S.F. L. REV. 1005 (2011); Steven Giballa, *Saving the Law from the Office of Legal Counsel*, 22 GEO. J. LEGAL ETHICS 845 (2009); Joseph Lavitt, *The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During the Bush Administration*, 62 ME. L. REV. 155 (2010); Bradley Lipton, *A Call for Institutional Reform of the Office of Legal Counsel*, 4 HARV. L. & POL'Y REV. 249 (2010); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010); Fran Quigley, *Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch*, 20 CORNELL J.L. & PUB. POL'Y 271 (2010); Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT'L L. REV. 9 (2005); Robert F. Turner, *What Went Wrong? Torture and the Office of Legal Counsel in the Bush Administration*, 32 CAMPBELL L. REV. 529 (2010); Johannes van Aggelen, *A Response to John C. Yoo, The Status of Soldiers and Terrorists Under the Geneva Conventions*, 4 CHINESE J. OF INT'L L. 167 (2005); Tung Yin, *Great Minds Think Alike: The "Torture Memo," Office of Legal Counsel, and Sharing the Boss's Mindset*, 45 WILLAMETTE L. REV. 473 (2009); Aaron R. Jackson, Comment, *The White House Counsel Torture Memo: The Final Product of a Flawed System*, 42 CAL. W. L. REV. 149 (2005); Marisa Lopez, Note, *Professional Responsibility: Tortured Independence in the Office of Legal Counsel*, 57 FLA. L. REV. 685 (2005); Rachel Ward Saltzman, Note, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439 (2010); Ross L. Weiner, Note, *The Office of Legal Counsel and Torture: The Law as Both a Sword and Shield*, 77 GEO. WASH. L. REV. 524 (2009).

6. See, e.g., THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 3–5 (David Cole ed.) (2009); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007); JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 175–77 (2006); Janet Cooper Alexander, *John Yoo's War Powers: The Law Review and the World*, 100 CAL. L. REV. 331, 358–60 (2012); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455 (2005); Arthur H. Garrison, *Hamdan v. Rumsfeld, Military Commissions, and Acts of Congress: A Summary*, 30 AM. J. TRIAL ADVOC. 339, 340 (2006); Arthur H. Garrison, *Hamdi, Padilla and Rasul: The War on Terrorism on the Judicial Front*, 27 AM. J. TRIAL ADVOC. 99 (2003); Arthur H. Garrison, *Hamiltonian and Madisonian Democracy, The Rule of Law and Why the Courts Have a Role in the War on Terrorism*, 8 J. OF THE INST. OF JUSTICE AND INT'L STUDIES 120, 130–31 (2008); Arthur H. Garrison, *The Judiciary in Times of National Security Crisis and Terrorism*, 30 AM. J. TRIAL ADVOC. 166 (2006); Arthur H. Garrison, *The War on Terrorism on the Judicial Front, Part II: The Courts Strike Back*, 27 AM. J. TRIAL ADVOC. 473 (2004); David J. Gottlieb, *How We Came to Torture*, 14 KAN. J.L. & PUB. POL'Y 449, 453–56 (2005); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SEC. L. & POL'Y 409 (2005); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007); Joseph Lavitt, *The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During the Bush Administration*, 62 ME. L. REV. 155 (2010); Jordan J. Paust, *Executive Plans and*

While these legal questions are important, there are other approaches to understanding the OLC memos: agency theory and policy theory. Agency theory, a branch of rational choice theory, focuses on “social structure and social relations”⁸ on both a macro and micro level. Agency theory is the study of relationships between principals and their agents, the power that is delegated to the agents, and how the principals regulate or control the power given to their agents.⁹ Although there are various perspectives on the application of agency theory in political science, sociology, and economics, key areas of study in agency theory include the relationships of power held by those in government and how these relationships relate to decisionmaking.¹⁰

Policy theory focuses on “the understanding of the interaction among the machinery of the state, political actors, and the public” and how these

Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees, 43 COLUM. J. TRANSNAT'L L. 811, 855–61 (2005); Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297 (2006); Rouillard, *supra* note 5, at 9; Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389 (2010); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); DAWN E. JOHNSEN, ALL THE PRESIDENT'S LAWYERS: HOW TO AVOID ANOTHER “TORTURE OPINION” DEBACLE, (2007), available at <http://www.acslaw.org/files/Dawn%20Johnsen%20July%202007.pdf>.

7. See e.g., LUTHER A. HUSTON, THE DEPARTMENT OF JUSTICE 60–61 (1967). Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217, 244 (2013); Arthur H. Garrison, *The Bush Administration and the Office of Legal Counsel (OLC) Torture Memos: A Content Analysis of the Response of the Academic Legal Community*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2012); Arthur H. Garrison, *The Role of the OLC in Providing Legal Advice to the Commander-in-Chief after September 11th: The Choices Made by the Bush Administration Office of Legal Counsel*, J. NAT'L ASS'N ADMIN. L. JUDICIARY, Oct. 2012, at 648; Rachel W. Saltzman, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439 (2010); Frank M. Wozencraft, *OLC: The Unfamiliar Acronym*, A.B.A. J., Jan. 1971, at 33; Tobias T. Gibson, *Office of Legal Counsel: Inner Workings and Impact*, LAW & COURTS (Am. Political Science Ass'n, Washington D.C.), Spring 2008, at 7.

8. Edgar Kiser, *Comparing Varieties of Agency Theory in Economics, Political Science, and Sociology: An Illustration from State Policy Implementation*, SOCIOLOGICAL THEORY, July 1999, at 146.

9. *Id.*

10. “Agency relations exist in a wide variety of social contexts involving the delegation of authority, including clients and various service providers (doctors, lawyers, insurance agents), citizens and politicians, political party members and party leaders, rulers and state officials, employers and employees, and stockholders and managers of corporations (in all cases, the former is the principal and the latter the agent). The key feature of all agency relations is that once principals delegate authority to agents, they often have problems controlling them, because (1) agents’ interests often differ from theirs, and (2) agents often have better information about their actions than do principals. Agency theory focuses on the ways principals try to mitigate this control problem by selecting certain types of agents and forms of monitoring their actions, and by using various amounts and types of positive and negative sanctions.” *Id.*

parties' actions produce "public action."¹¹ Policy theory, like agency theory, has various approaches, but at its base is the study of the management of decisionmaking at the institutional and sometimes individual level.¹² Policy theory includes the study of how institutions act and react to research and public interest, and how these relationships result in decisionmaking.¹³

Policy theory provides a context for analysis on how institutional, administrative and structural distinctions between different legal agencies function within the Executive Branch. These distinctions carry certain responsibilities and power dynamics that, when confused, can result in erroneous legal advice being provided to the President and the Executive Branch.

This Article, utilizing both agency theory and policy theory, provides a critical view of the actions of the OLC during the Bush Administration by reviewing its actions in the context of institutional and political power dynamics in policymaking. Further, this Article will examine why the OLC failed to maintain the distinction between legal policymaking and legal decisionmaking regarding the Bush Administration's response to the attacks of 9/11.

II. POLITICS, POWER DYNAMICS, AND INSTITUTIONS WITHIN GOVERNMENT DECISIONMAKING

*Politics is the art of postponing a decision until it is no longer relevant.*¹⁴

While government is about public service and policymaking, politics is about power and winning. Although government and politics work in tandem, they are different. Politics is the oil that makes government work. Another aspect to government operations is historical memory. Historical

11. Evangelia Petridou, *Theories of the Policy Process: Contemporary Scholarship & Future Directions*, POL. STUD. J., April 2014, at S12.

12. Kenneth J. Meier, *Policy Theory, Policy Theory Everywhere: Ravings of a Deranged Policy Scholar*, POL. STUD. J., Feb. 2009, at 5, 6 ("Some theories want to explain why policies work or do not work (microeconomic approaches, institutional rational choice), others are more concerned with why policies are adopted (advocacy coalition frameworks, policy diffusion), or why key events shape policy discourse (punctuated equilibrium theory), or perhaps how all of this fits into an ideological process of governing (social construction). Some theories focus on generating falsifiable predictions where others do well only in post event explanation.")

13. See Arthur H. Garrison, *The Influence of Research on Criminal Justice Policy Making*, 4 PROF. ISSUES IN CRIM. JUST. 9, (2009).

14. RED TAILS (Lucasfilm 2012).

memory provides a context for making and understanding policymaking and the power dynamics within government. But there is a paradox to history. The paradox of history is that history is perceived as being about the truth, which it is; but history is defined by the choosing of facts, the priority and the prioritization of those facts, and the emphasis and meaning (relevance) placed on those facts at the expense of other facts. In politics truth means recognized truth, which is the process of choosing facts. The choice of facts is a tool in the game of politics and policymaking, and the former is not about the truth, it's about power. Agency and policy theories provide an explanation of how history, truth, politics and power, operate and result in policymaking.

The discipline of political science in general, and public and legal policymaking specifically, is the study of societal decisionmaking. It involves the study of who gets what, when, how, and why.¹⁵ Put another way, politics can be understood as the study of power that “refers to symbols, violence, goods, and practices as means of attaining and maintaining control.”¹⁶ Politics is about the power to make something happen. Power is an independent variable in how policy is made, but it is not a static variable, immutable in the hands of the possessor; rather, it is a liquid and dynamic variable that flows between political decisionmakers. In policymaking there are different types of power that define different political positions. For example, the President holds institutional power (the Office of the President of the United States) and with that power he can veto a bill or grant a pardon. The power of the person holding the Office of the President is institutional. Once the President leaves office, he can no longer veto bills or grant pardons. But the President also holds political and moral power, which can be increased or decreased by events both under and beyond the control of the person holding the presidency. Political and moral powers function independently of institutional power. When the President's political and moral powers are increased, he can prevent the override of his veto or prevail over Congress in a policy dispute. However, the political and moral powers of the President can be countered by other members of the Executive Branch, individual members of Congress, or the federal judiciary. The President can be countered by moral arguments, as demonstrated by the dispute between President George W. Bush and

15. See generally HAROLD DWIGHT LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW?* (1950) (exploring the psychological structure of politics and politicians).

16. Matthew Holden, Jr., *Reflections on How Political Scientists (and Others) Might Think About Energy and Policy*, in *THE OXFORD HANDBOOK OF PUBLIC POL.* 885 (Michael Moran, Martin Rein & Robert E. Goodin eds., 2006).

Senator John McCain over the use of torture (with McCain prevailing in that dispute)¹⁷ or by legal arguments, as demonstrated by the Supreme Court in the terror cases.¹⁸

In the process of policymaking, it is easy for politics to create law. An example of how the law can be used to support or oppose policymaking is the Department of Justice's March 2004 rebellion over the National Security Agency ("NSA") Terrorist Surveillance Program ("TSP"), also known as the President's Surveillance Program.¹⁹ The rebellion occurred over the Justice Department's refusal to authorize warrantless metadata collection of domestic and international Internet and e-mail records.²⁰ The scope of the metadata collection program and the Justice Department rebellion became public in 2005, 2006, and 2013.²¹ The TSP, originally authorized in 2001 under President Bush's authority as Commander-in-Chief, briefly ended as a result of the Justice Department rebellion but was reinstated under the authority of the Foreign Intelligence Surveillance Court (FISC) in July 2004, and later codified into law in 2008.²²

17. See *infra* note 52 and accompanying text.

18. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1812 (2011).

19. See generally OFFICE OF THE INSPECTOR GENERAL, NATIONAL SECURITY AGENCY, CENTRAL SECURITY SERVICE, ST-09-0002 (2009) (reporting on the NSA surveillance program's authority which was rescinded by the President and subsequently recreated under FISC). Arthur H. Garrison, *The Role of the OLC in Providing Legal Advice to the Commander-in-Chief After September 11th: The Choices Made by the Bush Administration Office of Legal Counsel*, J. NAT'L ASS'N ADMIN. L. JUDICIARY, Oct. 2012, at 648.

20. See *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013); *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013); Siobhan Gorman, *System Error*, THE BALT. SUN, Jan. 29, 2006, http://articles.baltimoresun.com/2006-01-29/news/0601280286_1_intelligence-experts-11-intelligence-trailblazer; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=0; *United States of Secrets* (PBS television broadcast May 13, 2014); Moira Lavelle, *Readings & Links: NSA Secrets*, PBS (May 13, 2014, 8:40 PM), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/united-states-of-secrets/readings-links-nsa-secrets/>.

21. See *supra* note 20 and accompanying text.

22. See *supra* notes 19–20 and accompanying text. See also, Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (signed by President Bush on July 10, 2008); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended at 50 U.S.C. §1861) (2001) (authorizing the government to secure any tangible item such as e-mail, internet, business records, papers, documents, or any other item through a National Security Letter (NSL) by order of the FBI);

Eight days later on 19 March 2004, the President rescinded the authority to collect bulk Internet metadata and gave NSA one week to stop collection and block access to previously

Although the Justice Department initially prevailed over the White House, the program was reinstated by changing the legal theory supporting the program from an assertion of the Article II Commander-in-Chief power to authorization under the Foreign Intelligence Surveillance Act (FISA) followed by federal legislation, the FISA Amendments Act of 2008.²³ This case illustrates that policymaking is a dynamic process involving the utilization of institutional power, moral power, legal arguments, and the opportunity to define problems and solutions. To study policymaking is to study political power: the power to (1) define the nature of a social problem; (2) determine if that problem rises to the need for public policy; (3) control who makes such determinations and when; and (4) design and implement public policy to address the social problem.

Political power is both an institutional variable and a personal variable. Power flows among institutions and individuals within what has been called the power game.²⁴ The power game includes the personal relationships among individuals, departments, offices, agencies, institutions, and branches of government that control (1) who is and is not in the room when policy is made; (2) who has the political and moral authority to determine policy; (3) who has the short and/or long-term control over the framing and defining of policy problems; and (4) who best

collected bulk Internet metadata. NSA did so on 26 March 2004. To close the resulting collection gap, DoJ and NSA immediately began efforts to recreate this authority in what became the PR/TT [Pen Register/Trap & Trace] order

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The FISC signed the first PR/TT order on 14 July 2004. Although NSA lost access to the bulk metadata from 26 March 2004 until the order was signed, the order essentially gave NSA the same authority to collect bulk Internet metadata that it had under the PSP, except that it specified the datalinks from which NSA could collect, and it limited the number of people that could access the data.

OFFICE OF THE INSPECTOR GENERAL, NATIONAL SECURITY AGENCY, CENTRAL SECURITY SERVICE, ST-09-0002, 38–39 (2009). Cf. Meghan Neal, *FISA Judges Slammed the NSA for Knowingly Violating Court Rules*, MOTHERBOARD (Nov. 19, 2013, 10:23 AM), <http://motherboard.vice.com/blog/fisa-judges-slammed-the-nsa-for-knowingly-violating-court-rules-in-spying-program> (redacted opinion and order allegedly showing the NSA obtained surveillance powers by overstepping its power and ignoring protections placed by the courts); Colleen Kollar-Kotelly, *Opinion and Order*, FISA Ct., <http://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf>.

23. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (signed by President Bush on July 10, 2008).

24. See generally HEDRICK SMITH, *THE POWER GAME: HOW WASHINGTON WORKS* (1988) (in which a Washington D.C. insider details the American political power structure in the Reagan era).

controls political events to the advantage or disadvantage of competing policy advocates.²⁵

In 1988, Hedrick Smith published *The Power Game: How Washington Works*, in which he asserted that policymaking in Washington, D.C., is the result of various players maneuvering to gain, maintain, or limit the influence or power of others.²⁶ The game is both about policy substance and who has and does not have the power to make things happen or prevent things from happening.²⁷ The power game also includes the selection of whose views are considered and accepted by senior policy and elected officials and those who have access to them.²⁸ The game includes the interactions of various groups and individuals trying to make their views and policies prevail over others.²⁹ The winners of the power game are (1) those who are in the “power loop” when policy is made and (2) those who control who are within the policymaking loop and who are excluded.³⁰

In the Bush Administration, the key players involved in controlling the development of legal policy regarding the War on Terror were limited to Deputy Assistant Attorney General John Yoo, General Counsel to the Vice President David Addington, White House General Counsel Alberto Gonzales, Deputy White House Counsel Tim Flanigan, and Department of Defense General Counsel Jim Haynes.³¹ These men, known as the “War Council,” would “plot legal strategy in the War on Terror, sometimes as a prelude to dealing with lawyers from the State Department, the National Security Council, and the Joint Chiefs of Staff who would ordinarily be involved in war-related inter-agency legal decisions, and sometimes to the exclusion of the interagency process altogether.”³² Furthermore, the War

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* For example, the Reagan Administration policy to create SDI was created and announced in major speech written by a small group within the National Security Council staff and the Iran Contra political disaster was a staff created and implemented foreign policy initiative without the input of the State or Defense Department Secretaries.

31. See OFFICES OF INSPECTORS GEN. OF THE DEP'T OF DEF. ET AL., REP. NO. 2009-0013-AS, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM (2009); HOWARD BALL, BUSH, THE DETAINEES, AND THE CONSTITUTION: THE BATTLE OVER PRESIDENTIAL POWER IN THE WAR ON TERROR (2007); HAROLD H. BRUFF, BAD ADVICE: BUSH LAWYERS IN THE WAR ON TERROR (2009); BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY (2008); JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 22 (2006); JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 30-33 (2006).

32. GOLDSMITH, *supra* note 6, at 22.

Council never divorced legal analysis from policymaking or the political objectives of the Bush Administration,³³ and took advantage of the Bush Administration's desire for quick and decisive action against the threat of terror, its general mistrust of the established Executive Branch legal community, and its belief in unitary executive power in times of war and crisis. The actions of the "War Council" supported the goal of fostering and maintaining an end run around normal intra-agency and inter-agency institutional and bureaucratic processes in legal and war policymaking.³⁴ Policymaking involves those who are present when the decision is made and those who control the decisionmaking process.³⁵ That control includes determining when a decision is made and who is absent and thereby has no input in the decisionmaking process. The observation that "personnel is policy"³⁶ is astutely correct because government policymaking is the result of various factors including individual personalities and psychologies, personal relationships, power attained and maintained by institutional agencies, opposing ideological perspectives and how all of these are distributed between and among those who are involved in the process of making policy.

Regarding government policymaking, Smith observes that Presidents, Senators, Congressmen, and congressional committee staff members all vie over control of agenda setting, the "coalition game," and the "image game."³⁷ The image game includes understanding how the media works, how it focuses public attention and frames opinions in political debate, and how the press creates or can be used to create images in the public mind.³⁸ Especially important is controlling how the public views a policy or politician in a twenty-four hour cable television news-oriented world,³⁹

33. See BRUFF, *supra* note 31.

34. See Garrison, *The Office of Legal Counsel "Torture Memos": A Content Analysis of What the OLC Got right and What They Got Wrong*, *supra* note 4. See also Kiser, *supra* note 8; See *supra* notes 19, 31 and accompanying text. See *infra* note 100 and accompanying text.

35. See SMITH, *supra* note 24. See generally JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d. ed. 1995) (describing the results of a study following the rise and fall of items on an agenda and why some items are prominent while others are neglected). DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* (2d. ed. 2002) (arguing that the policy analysis often appears paradoxical, and that policy reform is a complex social process rather than simply a tool of policy makers).

36. *Morning Joe: Arianna Huffington Panel Discussion: Are Lawmakers Abandoning the Middle Class?* (MSNBC television broadcast Sept. 8, 2010), available at <http://www.huffingtonpost.com/huff-tv/arianna-discusses-her-newb708841.html>.

37. See SMITH, *supra* note 24, at 392–450.

38. *Id.*

39. *Id.*

because how something “looks” can ultimately determine whether a policy or politician succeeds or fails.⁴⁰ For example, during his visit to the site of the World Trade Center attacks, while standing on the smoking rubble of the World Trade Center, flanked by the firemen of New York, President Bush said, “I hear you. And the people who knocked this building down will hear all of us soon.”⁴¹ When a President is perceived as a strong leader, especially in times of crisis, his perceived strength translates into the power to set the agenda and create the perception that his opponents, foreign or domestic, are weak by comparison.⁴² By focusing on the need for additional security in a post-9/11 world, President Bush was also able to prevail in the debate over the creation of the Department of Homeland Security and the transference of various executive agencies to the new department, despite the objections of union and civil service protection advocates, by simultaneously framing unions as self-serving interest groups standing in the way of national security.⁴³

At the constitutional level, the power game exists as a struggle between Congress, the President, and the Judiciary. James Madison wrote that, “ambition must be made to counter ambition.”⁴⁴ In other words, power must be made to counter power. While checks and balances help preserve the balance of power among the three branches of government, the policymaking power struggle is much more complicated and cannot be explained by a constitutional civic lesson.⁴⁵ Some examples of the power game include the power struggles between the “dissident triangle,” which involves the “triangular power network formed among the Pentagon’s internal critics, their allies in Congress, and the press, which harvests news leaks from both,”⁴⁶ and the “iron triangle,” which involves the “symbiotic partnership of military services, defense contractors, and members of

40. *Id.*

41. Philip Delves Broughton, *The Rest of the World Hears You*, TELEGRAPH, Sept. 15, 2001, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1340612/The-rest-of-the-world-hears-you.html>

42. See SMITH, *supra* note 24;

43. Joseph Slater, *Homeland Security vs. Workers’ Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 U. PA. J. LAB. & EMP. L. 295, 308–10 (2004); See NOAM CHOMSKY, *IMPERIAL AMBITIONS: CONVERSATIONS WITH NOAM CHOMSKY ON THE POST-9/11 WORLD* (2005).

44. THE FEDERALIST NO. 51 (James Madison).

45. SMITH, *supra* note 24, at 163–69.

46. SMITH, *supra* note 24, at 163.

Congress from states and districts where military spending was heavy and visible.”⁴⁷

In addition to its prominence between the three branches, the power game can also manifest internally within the executive branch. In the fall of 2001 and winter of 2002, the power game that dominated the Bush Administration’s policy decisions regarding its post-9/11 global strategy involved the internal triangular struggle between the War Council at one point, the Legal Advisor of the State Department and other legal counsels within the Defense Department and the Uniformed Judge Advocates General at another point, with the President, on the third, siding with the War Council.⁴⁸ This triangular struggle was exacerbated by the struggle over general foreign and military policy after 9/11 between Secretary of State Colin Powell at one point, Vice President Dick Cheney and Secretary of Defense Donald Rumsfeld on another point, and President Bush at the third.⁴⁹ Both struggles resulted in the marginalization of Powell, the State Department Legal Advisor, and various other agencies that did not hold the same view of the law as the War Council and the Vice President’s General Counsel.⁵⁰

However, the power to make and control policy is fluid, as President Bush and the War Council discovered when they were forced to change their policy on the use of enhanced interrogation techniques after those policies were made public in 2004, resulting in Congressional and public protest against the Administration’s assertion that the exclusive and final determination of interrogation techniques used on captured enemy combatants was an exclusive power reserved for the Commander-in-Chief.⁵¹ Congress, led by Senator McCain, and the public, compelled the President to begrudgingly accept an amendment to the 2006 Defense Department Appropriation that prohibited the entire class of techniques previously approved by the President.⁵² The Detainee Treatment Act of 2005, also known as the McCain Amendment, changed the Bush Administration’s policy regarding treatment of captured enemy combatants as follows:

47. SMITH, *supra* note 24, at 173.

48. See *supra* notes 3 and 7 and accompanying text.

49. *Id.*; See *supra* note 31 and accompanying text.

50. *Id.*

51. See BALL, *supra* note 31; BRUFF, *supra* note 31; GELLMAN, *supra* note 31; GOLDSMITH, *supra* note 6, at 22; MARGULIES, *supra* note 31.

52. See Detainee Treatment Act of 2005, Pub. L. No. 109-163, 119 Stat. 3475.

No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation

....

No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment

....

CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED—In this section, the term “cruel, inhuman, or degrading treatment or punishment” means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.⁵³

The President, having lost the policy debate on the treatment of captured enemy combatants and no longer being able to claim that decisionmaking regarding interrogation was an exclusive presidential power, attempted to limit the legal impact of the amendment in his signing statement:

The executive branch shall construe [the McCain Amendment], relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.⁵⁴

The President’s signing statement proved to be futile, and the McCain Amendment ended the political and policy debate on the use of enhanced techniques by the military. Thus, the President lost the debate and power struggle over the determination of detainee interrogation techniques.

53. *Id.* §§ 1402(a), 1403(a), 1403(d).

54. Statement on Signing the Department of Defense, Emergency Supplemental Appropriates to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005), available at <http://www.gpo.gov/fdsys/pkg/WCPD-2006-01-02/pdf/WCPD-2006-01-02-Pg1918.pdf>.

Nevertheless, the President was not without political supporters, and under political pressure, Senator McCain agreed to an additional amendment, which provided immunity to those who acted under the various memos issued by the OLC asserting that the interrogation techniques were lawful. The Amendment reads as follows:

PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL—In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.⁵⁵

Just as President Bush was forced to acquiesce to the views of Senator McCain, President Bush was also forced to revise and discontinue parts of the TSP. In the Justice Department rebellion of March 2004, the Acting Attorney General, the Director of the FBI, and several senior subcabinet level officers forced the War Council and the President to back down from

55. P.L. 109-163, 119 Stat 3475, Title XIV § 1404(a). Although the Bush Administration's view of the President's power over detainees did not prevail generally, Yoo's opinion that an officer conducting interrogation under the OLC "torture memos" could not be prosecuted or held accountable in civil court did prevail. See 151 CONG. REC. S11061 (daily ed. Oct. 5, 2006) (statement of Sen. McCain, Sen. Stevens, and others on H.R. 2863). MICHAEL J. GARCIA, CONG. RESEARCH SERV., RS22312, INTERROGATION OF DETAINEES: OVERVIEW OF THE MCCAIN AMENDMENT (Jan. 24, 2006) (additional research on the legal meaning of the McCain Amendment); MICHAEL J. GARCIA, CONG. RESEARCH SERV., RL33655, INTERROGATION OF DETAINEES: OVERVIEW OF THE MCCAIN AMENDMENT (Oct. 23, 2006); Alfred W. McCoy, *Why the McCain Torture Ban Won't Work: The Bush Legacy of Legalized Torture*, TOM DISPATCH (Feb. 2, 2007), <http://www.tomdispatch.com/post/57336/>.

this key policy initiative.⁵⁶ Although the President had the institutional power to issue the final word on the TSP, the flow of actual power had shifted to the officers of the Justice Department, backed by a principled stand.⁵⁷ Furthermore, the threat of mass resignations within the top levels of the Department of Justice would have resulted in a political disaster greatly amplified by the twenty-four hour media and opinion-oriented press, both in the United States and internationally.⁵⁸ As President Bush wrote, the rebellion would have left his Administration subject to a political “firestorm” in the press.⁵⁹ The legal principle at issue in the March 2004 rebellion aside, a key factor within the power game of politics is the power of the press to determine what policies and politicians are brought into the public eye. When the press focused on the outcry from Congress and the legal community, the Bush Administration was forced to change its policies and legal assertions.⁶⁰

John W. Kingdon provides another key work on policymaking. Kingdon published the first edition of *Agendas, Alternatives, and Public Policies* in 1984 and the second edition in 1995.⁶¹ Like Smith, Kingdon asserted that policymaking is much more complicated than just the interaction among the three branches of government.⁶² According to Kingdon, policymaking involves more than the triangulation of power groups like Congressional subcommittees, the regulated industry under those committees, and the executive agency tasked with implementing regulations.⁶³ Rather, he posited that there are three policymaking streams (problems, policies, and politics) that interact in the presence of or in the

56. See *Newsweek* Staff, *Why Justice Department Lawyers Defied President Bush*, Dec. 12, 2008, NEWSWEEK, <http://www.newsweek.com/why-justice-lawyers-defied-president-bush-83515>; see *supra* note 20 and accompanying text. Politics aside, the Justice Department rebellion also enforced the rule of law in the face of political pressure. Although it is true that the OLC power to determine the meaning of the law comes from the power of the Attorney General which in turn is a power delegated from the President, the role of the Justice Department is to defend the meaning of the law even when it conflicts with policy. Comey and the Justice Department asserted that the TSP program was not lawful as constituted and vowed that if President Bush authorized the TSP without the Justice Department's sanction, the decision would stand, but they as officers of the Department would have to resign. Thus, the rule of law that the President is not a law unto himself was successfully defended. The rule of law is of little actual use if it will not be defended in practical terms when challenged.

57. See *supra* note 20 and accompanying text.

58. GEORGE W. BUSH, DECISION POINTS 172–74 (2010).

59. *Id.*

60. See *supra* note 20 and accompanying text (discussing the March 2004 Justice Department rebellion to the White House authorization of the TSP program).

61. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed.) (1995).

62. *Id.*

63. *Id.*

absence of various factors including elections, media attention, the presence and expertise of policy entrepreneurs, political timing, political power dynamics, the national mood, and the narrative of national crisis or the lack thereof.⁶⁴ Thus, agenda-setting and policymaking are dynamic processes in which problems, policies, and politics converge with policy-makers and interested parties to create windows for policy goals to move from being governmental agenda items—things that can be implemented—to decisionmaking agenda items—things that will be implemented.

This process is explained in part by the concept of crisis planning. Some policy initiatives can be proposed and implemented only when a crisis (1) focuses societal attention on prompt action and (2) provides an environment in which the necessary policy can be implemented. This dynamic is what is meant by the cliché “never let a crisis go to waste.” An example of this dynamic was the creation of the Department of Homeland Security. The wholesale reorganization of the American national security apparatus and the relocation of more than ten major agencies into one agency could only occur after a crisis of 9/11’s proportions.

While Smith and Kingdon focus on the process of politics and agenda setting, Deborah Stone approaches the question of policymaking and agenda-setting with less focus on the mechanics of politics and more on the results of politics. In her book *Policy Paradox*, Stone rejects the arguments that politics and policymaking are the result of a rational formula in which one places a set of variables in a formula to create a policy determination, and that the economic “market model [is] a convincing description of the world” and how it works.⁶⁵ Rather, Stone argues, policymaking at its heart is about the definition of words and phrases like rule of law, justice, community, equity, efficiency, and democracy.⁶⁶ These words are not without meaning, but their meanings are not fixed.⁶⁷ They are not terms of

64. Although Kingdon’s book provides significant insights into how policy is made, he does not place enough focus on the achievement of power, in of itself, as a key factor of policymaking. In this respect, Smith’s book is more helpful in understanding policymaking. Although policymaking is a substantive dynamic, to be effective in the process of policymaking, achievement of “power” is necessary outside of the dynamic of making any particular policy. Once “power” is achieved, the ability to enter and influence the dynamic of policymaking is then possible. How that power is gained is a distinct “stream” from the other streams of problems, policies, and politics.

65. See STONE, *supra* note 35, at xi.

66. See *Id.*; Arthur H. Garrison, *The Traditions and History of the Meaning of the Rule of Law*, 12 GEO. J.L. & PUB. POL’Y (forthcoming 2014) (for a discussion on the rule of law).

67. See STONE, *supra* note 35, at xi.

art, but terms that involve normative meaning.⁶⁸ As such they are not objectively rational but are subjectively believed.⁶⁹

Before there was Rational Choice, there was Irrational Choice.⁷⁰ Irrational Choice, unlike Rational Choice theory,⁷¹ involves making choices based on normative defining of politics, policy choices, and basic concepts of right and wrong regardless of the objective benefit, outcomes, and outputs.⁷² Stone highlights this approach when she explains that life and human decisionmaking are not just the result of rational thinking in which logic results in decisions and policies, but in contrast, they are the result of a process of value judgments and defining problems.⁷³ This is what Kingdon calls the narrative of problem definition: to whom does a problem belong? The narrative of problem definition can also define political losses and victories. For example, the OLC legal memos were a victory even though they were later repudiated because they were in effect for the first two years after 9/11 and the political fortitude asserted by the Administration resulted in President Bush being reelected as president. The policies were a success although they were a failure because they were only a failure in the long run; the beginning of their abandonment occurred in December 2004 and was not completed in January 2009.⁷⁴ As Stone explains, the definition of policies and problems, as well as the solutions applied, can sometimes be paradoxical because life itself is paradoxical.⁷⁵ The narrative of a problem is governed by the position and values one holds. In other words, where you sit is where you stand. A political loss can be defined as a victory in the long run and a loss can be defined as a win in order to maintain power to be used in a policy fight in the future. Stone thus explains what rational choice and microeconomics-based theorists fail to explain: not every decision made by an individual is rationally determined or logical, nor are rationally-based results always desired. In politics, a person or party or interest that fails to achieve a policy objective in a policy dispute still wins if the opposing person or interest fails as well. Politics, as both Kingdon and Smith explain, involves the power of ideas

68. *See id.*

69. *See id.*

70. Holden, Jr., *supra* note 16, at 885.

71. *Id.*

72. *Id.*

73. *See* STONE, *supra* note 35.

74. *See supra* notes 2–7, 19, 31 and accompanying text; *See infra* note 100 and accompanying text.

75. *See* STONE, *supra* note 35.

and narratives as well as conflicting goals that are merged to produce results that both addresses and fails to address asserted goals. Life does not always involve rational results and that fact is acceptable or at least acknowledged by society. Life is about knowing that ambiguity and paradoxes exist, and politics is about deciding who has to live with the negative results of ambiguity and paradoxes in the formation of political agendas.

Finally, policymaking also involves the administrative and strategic management operations within an agency. Wechsler and Backoff, for example, explain that the strategic management approach to understanding policymaking “focuses on the nature of human choice and action taking in the public sector.”⁷⁶ Wechsler and Backoff assert that because government organizations function under an authority power system rather than a market system, which focuses on efficiency, the currency of government operations is “multilateral power, influence, bargaining, voting, and exchange relationships” rather than profit and the efficient distribution of services.⁷⁷ Thus, all governmental decisionmaking agencies, regardless of purpose, are governed by internal and external factors including statutory law, constitutional law, legislative committees, senior executive leaders, judicial mandates, administrative rules and regulations, political climates, media scrutiny, internal values and principles, and general public support.⁷⁸ It is the result of the interplay of all of these conflicting factors that Stone describes as paradox decisionmaking.⁷⁹

Wechsler and Backoff propose that government agencies utilize four strategies—(1) developmental, (2) transformational, (3) protective, and (4) political—to both protect and assert themselves within the broader political policymaking environment that they must operate in.⁸⁰ *Developmental* strategic planning and policymaking involves crafting strategies to “enhance organizational status, capacity, resources, and impact and to produce a new and different organizational future.”⁸¹ In other words, the developmental strategy is designed to keep an agency relevant within the

76. Barton Wechsler & Robert W. Backoff, *Policy Making and Administration in State Agencies: Strategic Management Approaches*, 46 PUBLIC ADMINISTRATION REVIEW 321, 321 (1986).

77. *Id.*

78. See generally Arthur H. Garrison, *The Influence of Research on Criminal Justice Policy-making*, 4 PROFESSIONAL ISSUES CRIMINAL JUSTICE 9 (2009) (reviewing how these factors impact policymaking).

79. See STONE, *supra* note 35.

80. Wechsler & Backoff, *supra* note 76, at 323.

81. *Id.*

political system. *Transformational* decisionmaking focuses on how the agency changes based on either internal or external factors that force a change in the purpose or range of authority of an agency.⁸² *Protective* strategic planning is the “political” aspect of an organization’s operations and planning, for it focuses on defending itself against external forces or protecting the status quo.⁸³ The *political* policymaking strategy is more offensive in nature than the protective strategy in that the political policymaking strategy can involve “changing [political] environmental conditions . . . to accommodate a new balance of power[,] limit pressures for organizational change [or make] the organization [] an instrument of partisan politics and as a means of rewarding political supporters.”⁸⁴

III. AGENCY THEORY, POLITICS AND DECISIONMAKING OF THE BUSH ADMINISTRATION OLC

*Motive with opportunity converts what is said into what is done in achieving policy objectives.*⁸⁵

82. *Id.*

83. *Id.*

84. Wechsler & Backoff, *supra* note 76, at 325.

85. Policy implementation is a complex mixture of motives and the opportunities to implement ideas. This complex mixture is what is called a policy window. Policy implementation is not the same as policy determination. Policy implementation is about what is done, policy determination is about what can be done or what is planned to be done when the opportunity presents itself. A desired policy can be developed without the necessary policy window to implement it. It is the policy window that transforms policy determination into policy implementation. The policy window can be politically created or utilized. *See Supra* notes 24, 34 and accompanying text. An example of the transformation of policy determination into policy implementation is the policy to attack Iraq and remove Saddam Hussein from power. The policy was regime change and the policy window utilization was 9/11.

On January 26, 1998 Donald Rumsfeld along with Paul Wolfowitz and other neoconservatives wrote to President Clinton:

The only acceptable strategy is one that eliminates the possibility that Iraq will be able to use or threaten to use weapons of mass destruction. In the near term, this means a willingness to undertake military action as diplomacy is clearly failing. In the long term, it means removing Saddam Hussein and his regime from power. That now needs to become the aim of American foreign policy....We believe the U.S. has the authority under existing UN resolutions to take the necessary steps, including military steps, to protect our vital interests in the Gulf. In any case, American policy cannot continue to be crippled by a misguided insistence on unanimity in the UN Security Council.

Donald Rumsfeld et al., *Open Letter to the President*, PROJECT FOR THE NEW AMERICAN CENTURY, <https://web.archive.org/web/20130112203258/http://www.newamericancentury.org/iraqclintonletter.htm>

. But the policy window to allow for regime change in Iraq, through military action if necessary, did not exist before 9/11. The policy and justification to remove Saddam Hussein for having and threatening the use of WMDs was developed but could not be implemented. In January 2001 President Bush took the oath of office and “Rumsfeld and Wolfowitz . . . take the reigns of Defense Department policy. Vice

President Chaney has reversed course and now supports regime change in Iraq. Motive awaits opportunity and for the Bush Administration 9/11 provides it.” MSNBC, *Hubris*, YOUTUBE (February 18, 2013), <http://www.youtube.com/watch?v=B5FaMbnINwc>. “Nine-eleven changed everything. The threat of weapons of mass destruction now drives American policy [and] inside the [Bush] Administration it is the existing pre 9/11 planning about Iraq and Iraq’s oil that goes operational.” MSNBC, *Why We Did It*, YOUTUBE (March 7, 2014) <https://www.youtube.com/watch?v=Sbey4hPlrX0>.

In his state of the union address on January 28, 2003, President Bush with 9/11 fears still fresh in the American mind reported Iraq had sought nuclear weapons materials:

The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa. Our intelligence sources tell us that he has attempted to purchase high-strength aluminum tubes suitable for nuclear weapons production. Saddam Hussein has not credibly explained these activities. He clearly has much to hide. The dictator of Iraq is not disarming. To the contrary, he is deceiving.

Text of President Bush’s 2003 State of the Union Address, Wash. Post (Jan. 28, 2003), www.washingtonpost.com/wp-srv/onpolitics/transcripts/bustext_012803.html. Vice-President Chaney implied that Iraq had a direct link to the attacks of 9/11 while focusing on the narrative of Iraq pursuit of WMDs in an interview on *Meet the Press*:

MR. RUSSERT: Let me turn to Iraq. When you were last on this program, September 16, five days after the attack on our country, I asked you whether there was any evidence that Iraq was involved in the attack and you said no. Since that time, a couple articles have appeared which I want to get you to react to. The first: “The Czech interior minister said today that an Iraqi intelligence officer met with Mohammed Atta, one of the ringleaders of the Sept. 11 terrorist attacks on the United States, just five months before the synchronized hijackings and mass killings were carried out” Do you still believe there’s no evidence that Iraq was involved in September 11?

VICE PRES. CHANEY: Well, what we now have that’s developed since you and I last talked, Tim, of course, was that report that--it’s been pretty well confirmed that he did go to Prague and he did meet with a senior official of the Iraqi intelligence service in Czechoslovakia last April, several months before the attack. Now, what the purpose of that was, what transpired between them, we simply don’t know at this point, but that’s clearly an avenue that we want to pursue.

MR. RUSSERT: What we do know is they--Iraq is harboring terrorists.

VICE PRES. CHANEY: Correct Well, the evidence is pretty conclusive that the Iraqis have, indeed, harbored terrorists. That wasn’t the question you asked me last time we met. You asked about evidence in involvement in September 11. Over the years, for example, they’ve provided safe harbor for Abu Nidal, worked out of Baghdad for a long time. The situation, I think, that leads a lot of people to be concerned about Iraq has to do not just with their past activity of harboring terrorists, but also with Saddam Hussein’s behavior over the years and with his aggressive pursuit of weapons of mass destruction.

Meet the Press (NBC television broadcast Dec. 9, 2001) (emphasis added), available at http://www.leadingtowar.com/PDFsources_claims_atta/2001_12_09_NBCmtp.pdf. As far as intelligence on WMD and military operations against Iraq were concerned, it was clear to the intelligence community that the issue was decided and that 9/11 caused the American people to break their tradition of not beginning offensive wars. MSNBC, *Hubris*, *supra* note 85.

There are differences in the institutional roles of the various offices of legal counsels within the executive branch⁸⁶ and the OLC. The institutional role of the OLC is to provide the President, the White House General Counsel, the Attorney General, and the various agencies within the Executive Branch with legal opinions on what the law is and if a proposed policy is in violation of the law.⁸⁷

The OLC, as an agency within the Justice Department, has the authority to determine the meaning of the law. Its opinions are determinative and authoritative on all other Executive Branch agencies⁸⁸ except the Office of Solicitor General. The power of the OLC to interpret the law and its meaning regarding Executive Branch policymaking is significant as a policymaking structural matter because “an agency’s approach to statutory interpretation is in part a function of the policymaking form through which it acts.”⁸⁹ In other words, how the OLC viewed its function during the first two years after 9/11 governed how it produced its memos. There are various strategies by which an agency empowered to interpret statutory or constitutional law can approach its role. In general, the two main approaches are quasi-judicial and policy oriented.⁹⁰ The former approach interprets law as a court would and focuses on the meaning of the law rather than attempting to achieve a specific policy consequence of the interpretation.⁹¹ The latter approach

86. See Marry Anne Borrelli, Karen Hult and Nancy Kassop, *The White House Counsel’s Office*, 31 *PRESIDENTIAL STUD. Q.* 570 (2001); See Avidan Y. Cover, *Supervisory Responsibility for the Office of Legal Counsel*, 25 *Georgetown Journal of Legal Ethics* 269 (2012); See Eric A Posner, *Deference to the Executive in the United States after September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 *HARV. J.L. & PUB. POL’Y* 213 (2012).

87. See *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 110th Cong. 604 (2008) (statement of John P. Elwood, Deputy Assistant Attorney General, Office of the Legal Counsel, Department of Justice), available at http://www.judiciary.senate.gov/imo/media/doc/elwood_testimony_04_30_08.pdf (describing the OLC’s role in relation to the Executive Branch); Kenneth Dam, *The Special Responsibility of Lawyers in the Executive Branch*, *CHI. B. REC.* 4, (1974); James Comey, *Intelligence Under the Law*, 10 *GREEN BAG* 439 (2007) (discussing the importance for a lawyer to be able to say no); W. Bradley Wendel, *Executive Branch Lawyers in a Time of Terror: The 2008 F.W. Wickwire Memorial Lecture*, 31 *DALHOUSIE L.J.* 247 (2008) (discussing the ethical responsibilities of lawyers who advise the Executive Branch regarding the lawfulness of actions taken in the interest of national security).

88. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, *supra* note 3.

89. Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 *MICH. ST. L. REV.* 225, 226 (2009).

90. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, *supra* note 3.

91. *Id.*

focuses on the achievement of a specific policy or political objective.⁹² Neither approach is wrong *per se*. The issue is which approach is correct based on the purpose of the agency.

There are differences between (1) legal policymaking (political agenda preferences) and legal decisionmaking (quasi-judicial); (2) legal counseling (providing advice as to legality) and litigating (defending a policy in court); and (3) prosecution decisionmaking (who goes to trial) and appellate decisionmaking (whether a court decision should be appealed).⁹³ The former in each group deals with subjective policy considerations while the latter deals with quasi-judicial or objective legal determinations. In the two years after 9/11, the OLC produced opinions, specifically the August 2002 memo and CIA Interrogation memo, which abandoned the latter role of quasi-judicial or objective legal determination for the former role of achieving political objectives.⁹⁴ The OLC and specifically former Deputy Assistant U.S. Attorney General John Yoo, in an effort to be relevant (a developmental strategy) and helpful to the political objectives of the Administration (a political strategy), abandoned its quasi-judicial agency role as the objective legal advisor to the Administration.⁹⁵

Former Solicitor General Paul D. Clement wrote that the nonpartisan, nonpolitical role of the OLC, like that of the Office of the Solicitor General, is based upon the fact that it does not make decisions based on the political needs and desires of the Executive Branch *per se*.⁹⁶ Both offices make decisions based on neutral interpretation of the law. To put the organizational system of legal decisionmaking in perspective, the OLC determines what the law means and how the law governs the boundaries of executive policymaking power, the Solicitor General determines whether a statute or policy could be reasonably defended before the bar of justice, and the White House General Counsel determines if a proposed policy is in line with the political goals and objectives of the President.⁹⁷ Institutionally, the first two agencies involve legal decisionmaking; the last agency involves legal policymaking. Put another way, the first two are more concerned with

92. *Id.*

93. See Paul D. Clement, *The Intra-Executive Separation of Powers: Keynote Address at the 2009 Randolph W. Thorer Symposium*, 59 EMORY L.J. 311, 315–24 (2009).

94. See *supra* notes 5, 8, 19 and 31. See *infra* note 100.

95. See *supra* notes 5, 8, 19 and 31. See *infra* note 100.

96. See Clement *supra* note 93.

97. See Darby Morrisroe, *Co-Counsel to the President: Assessing the Bush White House Legal Policymaking Process*, American Political Science Association 2009 Toronto Meeting Paper, Annual Meeting of the American Political Science Association (2009).

the rule of law and establishing the outer boundaries of what the law allows, while the last is concerned with political policy achievement within the boundaries of the law.

The distinction between the role and purpose of the OLC compared with other legal Executive Branch agencies is not trivial. In discussing agency decisionmaking, Clement discussed five justifications for the distinction between legal decisionmaking—the role of the OLC and the Solicitor General’s Office—and political policymaking—the role of the White House and other agencies and offices inside and outside of the Department of Justice, and why the distinctions are important.⁹⁸ The five justifications are: (1) efficient division of required skills and abilities to address overall operation within the Executive Branch, (2) the promotion of good inter-agency relationships, (3) the establishment of a framework for decisionmaking, (4) establishing a proper relationship with the White House, and (5) accountability for decisions when they are made.⁹⁹ It is the last two justifications that are important for determining how the OLC produced the torture memos, from an agency perspective, and how the distinction between legal decisionmaking and legal policymaking were blurred within the Bush administration.¹⁰⁰

The White House and the White House Office of General Counsel, by definition, deal in politics, policy, and power. The goal of both offices is to achieve the policy goals and agenda of the President. The Attorney General, appointed by the President, is tasked with directing the Justice Department to fall in line with the political views of the President. To insulate the interpretation of the law from political determinations, the OLC and the Solicitor General are not invited into policymaking decisions within the White House. The proper interactions between the White House General Counsel and the OLC or the Solicitor General are limited to instances when the White House needs a determination on what the law requires, and if a proposed policy or statute can be defended before the bar of justice. This interaction should not include whether or not a policy

98. See Clement *supra* note 3.

99. *Id.* at 324.

100. The literature on how the Bush Administration organized legal policymaking is critical of both the failure of the OLC to remain policy neutral and the overshadowing of the White House Counsel, the Justice Department, and other legal policy offices by the Office of Legal Counsel to the Vice President. See, e.g., BALL, *supra* note 31; BRUFF, *supra* note 31; MARGULIES, *supra* note 31; James P. Pfiffner, *The Contemporary Presidency: Decision-making in the Bush White House*, 39 PRESIDENTIAL STUDIES QUARTERLY 363 (2009) (arguing that some of the Bush administration’s most important decisions lacked “a regular policy process and consultation”); Morrisroe, *supra* note 97.

should be implemented, supported, or opposed—as a political matter—to achieve a specific policy objective. The OLC, after 9/11, confused this distinction and division of labor.¹⁰¹ The OLC became a tool for the Bush Administration to justify policy rather than fulfill its traditional role of using policy-outcome-neutral judgment to determine what the law required.¹⁰² Put another way, it is the role of the General Counsel or other legal policymaking agencies to be in the room when policy is being formed so that legal considerations are represented and infused into the process. For this process to occur, (1) the General Counsel or other legal policymaking agencies must provide answers and strategies to achieve the policy goals of senior policymakers and (2) policy makers need to view General Counsels and their legal advice as useful in the policy making process.

The role of General Counsel and other legal policymaking agencies is to address whether a policy makes political sense and to provide a list of legal alternatives to policy desires. This is why they must act within the political realm of power politics—so they will be relevant and present in the room when policy is made. The role of the OLC is different: the role of the OLC is not to be relevant to those making policy or to make the law support a policy determination. The role of the OLC is to establish what the law (both its text and purpose) requires and to establish the boundaries that policymakers must function within. The role of the OLC is to say “here you can go and no farther; here you must stop.”

IV. CONCLUSION

When policy is being made the process is a combination of political possibility, individual personality and psychology, individual political philosophy and ideology, institutional position and purpose, political opportunity and the distribution of power among those who decide what problems are to be recognized for solutions or not and what solutions are applied to those problems. This process can produce poor policy determination or poor policy implementation when there are mismatches of people (personality or psychology) or agencies to the problem to be solved or solution to be implemented. The process of decisionmaking, which includes who makes and implements policy, dictates the results of the policy. Policymaking is an interpersonal process that requires an

101. See *supra* notes 5–8, 20, 31 and 100.

102. See Clement, *supra* note 93.

accounting of the political, administrative and bureaucratic cultures of the group or agency that is making the policy. People in these cultures react, plan and act based on the frame of reference they have and how to accomplish goals and objectives. It is within this process of power and policy that the agency legal counsel must interject specific laws that are relevant to the policy debate and in general defend the significance of the rule of law. This defense and interjection of the law is even more important when understanding the purpose and role of the OLC.

The Office of Legal Counsel within the Department of Justice is tasked with providing policy makers with legal opinions on the meaning of the law.¹⁰³ The significance of the OLC, as an agency theory matter, is to make distinctions between the law, legal policymaking, and legal decisionmaking. The role of the OLC should not be confused with the role of agency general counsels. Their roles are much more political and their goal is to help their agencies to do what they want to do in the right way. Their role is to find a way to get proposed policies to legal sufficiency. To meet this obligation, agency general counsels must be in the policy making room when policies are being formed. They have to be accepted by policy makers and viewed as useful to the policymaking process. For agency general counsels, the best time to offer legal advice is when policy options are being considered, listed, and weighed, not when final decisions are being made regarding policy determination and implementation.

This need to be in room is not the same for the OLC. The OLC is not a legal policymaking institution. The OLC is a quasi-judicial, legal decisionmaking institution whose job is much more limited, and it has a higher constitutional function. The OLC, unlike agency general counsels, exercises the constitutional requirement of the president to make certain that the laws are faithfully executed.¹⁰⁴ The role of the OLC is to protect the rule of law within the executive branch, not to aid policy makers in forming policy that is facially legal. Under the American constitutional system, the rule of law¹⁰⁵ (1) is above politics and policymaking, (2) it protects the system of government, and (3) it governs the actions of politics and executive power.¹⁰⁶ Under the American political system,

103. See *supra* note 2 and accompanying text.

104. *Id.*

105. See *supra* note 57 and accompanying text.

106. See Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, *supra* note 3. Arthur H. Garrison, *The Rule of Law and the Rise of Control of Executive Power* 18 TEXAS REV. LAW & POL. 304, 351–55 (2014).

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policymaking is a power game that results in the creation and implementation of sometimes paradoxical and ambiguous policies. The rule of law is not paradoxical or ambiguous. It is the standard that government policy must align itself to. The distinction between the purpose and nature of the rule of law and politics is not a small matter and when they are confused, the agency responsible for the protection of the former can make tragic errors. None of the operational strategies explained by Whechsler and Bacoff should be utilized by the OLC. The OLC is not a policy agency to be used as a political weapon or a shield for the White House. Its role is quasi-judicial and it stands as the agency whose purpose is to apply and defend the law within the executive branch. The failure to adhere to this role explains, in part, the torture memos.

