



2012

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Recommended Citation

Jamil N. Jaffer, *The Ethics of National Security Lawyering: A Response to Jeh Johnson*, 31 *YALE L. & POL'Y REV.* (2012).
Available at: <https://digitalcommons.law.yale.edu/ylpr/vol31/iss1/7>

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YALE LAW & POLICY REVIEW

The Ethics of National Security Lawyering: A Response to Jeh Johnson

Jamil N. Jaffer*

INTRODUCTION

In a February 2012 Dean's Lecture at Yale Law School titled *National Security Law, Lawyers, and Lawyering in the Obama Administration*, Jeh Johnson, then-General Counsel of the Department of Defense, undertook a strong defense of the Obama Administration's legal regime and policies supporting the U.S. military's counterterrorism efforts against al Qaeda and its associated forces.¹ Scholars and lawyers of reasonable minds can—and ought to—rationally debate many of the finer points of Johnson's legal analysis, including the limitations he argues are placed upon the United States government's use of force by certain precepts of international law. The goal in this short Essay, however, is not to consider the merits of Johnson's legal analysis. Instead, this Essay highlights the various roles that national security lawyers in the executive branch play and the variety of ethical responsibilities those roles entail. This Essay critically discusses Johnson's broad assertion that the government—and *a fortiori*, the government's lawyers—must guard against aggressive interpretations of its authorities, lest such interpretations discredit the government's efforts, provoke controversy, and invite challenge.² This Essay argues that John-

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1. Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 *YALE L. & POL'Y REV.* 141 (2013).
2. *Id.* at 145 ("Against an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our au-

son's failure to contextualize this position—to specify whether it applies to all situations that a government lawyer faces, or whether it is limited only to certain contexts—may lead a government lawyer to fail to meet his or her core ethical responsibilities when serving as an advocate for the government in national security matters.

Johnson's comments focus generally on defending the views of the Obama Administration's national security lawyers. Johnson highlights the apparently vigorous debate among the current Administration's lawyers and policymakers,³ while also criticizing the prior Administration and some of its lawyers.⁴ What Johnson's speech does not do, however, is engage in any robust discussion of the various roles and responsibilities—particularly the various ethical responsibilities—of national security lawyers in the executive branch. His speech also fails to differentiate among these various roles and responsibilities, and thus may lead executive branch lawyers to, at times, misconstrue their ethical obligations. This Essay aims to fill that gap in Johnson's effort and highlight the potential ill effects of making sweeping generalizations about the government's interpretation of its authorities.

I. THE VARIED ROLES OF GOVERNMENT NATIONAL SECURITY LAWYERS

One of the first principles that a new lawyer learns is that he or she has an ethical duty to be a strong and effective advocate for his or her client.⁵ This duty is not without limitations, of course. A lawyer cannot advocate for a course of

thorities that will discredit our efforts, provoke controversy, and invite challenge.”).

3. *Id.* at 144 (“I believe that over the last three years, the President has benefited from healthy and robust debate among the lawyers on his national security team [O]ur clients are sophisticated consumers of legal advice. The President, the Vice President, the National Security Adviser, the Vice President’s National Security Adviser, the Secretary of State, the Secretary of Defense, and the Secretary of Homeland Security are themselves all lawyers.”).
4. *Id.* at 144 (“By contrast, ‘group think’ among lawyers is dangerous, because it makes us lazy and complacent in our thinking and can lead to bad results. Likewise, shutting your eyes and ears to the legal dissent and concerns of others can lead to disastrous consequences. . . . The report chronicles the failure of my predecessor in the Bush Administration to listen to the objections of the Judge Advocate General (JAG) leadership about enhanced interrogation techniques, the result of which was that the legal opinion of one lieutenant colonel, without more, carried the day as the legal endorsement for stress positions, the removal of clothing, and the use of phobias to interrogate detainees at Guantánamo Bay.”).
5. MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 2 (2012) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”); *see also id.* pmbl. ¶ 9 (discussing the “lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law”); D.C. RULES OF PROF’L CONDUCT R. 1.3 (2007) (“A lawyer shall represent a client zealously and diligently within the bounds of the law.”).

action that he or she knows to be indefensible as a matter of law.⁶ Nor can a lawyer violate his or her ethical duties as an officer of the court, including the duty of candor to the tribunal⁷ or his or her responsibility as a lawyer appearing *ex parte* to fully disclose material facts, even where such facts may be adverse to his or her client's position.⁸

However, while young lawyers and law students often think of themselves primarily as advocates for clients, it is important to note that lawyers often play a much larger and more complicated role in our legal system. The American Bar Association's (ABA) Model Rules of Professional Conduct identify three meta-responsibilities for a practicing lawyer: (1) serving as a representative of clients; (2) serving as an officer of the legal system; and (3) serving as a public citizen who has a special responsibility for the quality of justice.⁹

Within these meta-responsibilities, the ABA identifies four specific roles that a lawyer plays when he or she is a representative of a client: (1) the advisor, who provides clients with an informed understanding of their legal rights and obligations, along with their practical implications; (2) the advocate, who zealously asserts the client's position in the adversarial system; (3) the negotiator, who seeks an advantageous result for his or her client, consistent with the requirements of honest dealings with others; and (4) the evaluator, who examines a client's legal affairs and reports about them to the client or others, as appropriate.¹⁰

The majority of the ABA's Model Rules, under this grouping, provide ethical guidance to lawyers on how to regulate their conduct in their role as an advocate. As noted above, these rules require zealous advocacy on behalf of clients, tempered by important limitations, including the requirements to only make arguments that are consistent with the law (or involve good faith arguments for an extension, modification, or change in the law) and to display appropriate conduct before tribunals.¹¹ However, with respect to the other roles the Model Rules impose upon lawyers, the ABA provides fairly limited ethical guidance. For example, on the ethical responsibilities of a lawyer as an advisor, the rules simply state that a lawyer ought to render candid advice and exercise independent, professional judgment in a way that considers the moral, economic, social, and political factors relevant to the client's situation.¹² In the context

6. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2012).

7. *Id.* R. 3.3.

8. *Id.* R. 3.3(d).

9. *Id.* pmb. ¶ 1.

10. *Id.* ¶ 2.

11. *See supra* notes 6-10.

12. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2012); *see also* Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 985-86 (1991) (identifying a lack of clarity in the rule for government lawyers acting in the advisor role in that

of the lawyer as a public citizen, the Model Rules simply suggest that a lawyer ought to seek improvement of the law, the quality of the legal profession, the administration of justice, and access to the legal system, as well as to further the public's understanding of and confidence in the rule of law and the justice system.¹³

Even in the context of advocacy, however, the rules applicable to a government lawyer are far from clear. For example, there is much debate in the academic literature over exactly whom a government lawyer represents.¹⁴ Is it the particular agency involved in the matter before the lawyer, the responsible officers of that agency, the branch of government employing the lawyer, the government generally, or the American people?¹⁵ While this question remains largely unsettled, what remains clear is that government lawyers, like lawyers in the private sector, are often called upon to play a variety of roles and, as a result, have varied ethical responsibilities.

“the duty to consider the public good is a duty of all public servants, not just lawyers . . . [and] in the American political system, the responsibility to decide which government policy will serve the public good ordinarily rests with elected officials, not with government lawyers” (citation omitted).

13. See MODEL RULES OF PROF'L CONDUCT pmbl ¶ 6 (2012); see also Deborah L. Rhode, *Colloquium: What Does It Mean To Practice Law "in the Interests of Justice" in the Twenty-First Century?*, 70 *FORDHAM L. REV.* 1543, 1545-48 (2002) (discussing differing conceptions of the role of a lawyer as a public citizen).
14. See, e.g., HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 581 (5th ed. 2010) (“Who is the client of the government lawyer? Possible contenders include the agency head, the chief executive officer (e.g., the governor or president), the legislature as the elected representatives of the public, and the ‘public.’”); Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and Government Lawyer*, 5 *GEO. J. LEGAL ETHICS* 291, 296 (1991) (“In this unusual world, who is the government lawyer’s client? The question has vexed decision-makers and commentators for many years. The possibilities include: (1) the public (2) the government as a whole (3) the branch of government in which the lawyer is employed (4) the particular agency or department in which the lawyer works and (5) the responsible officers who make decisions for the agency.”); Michelle M. Kwon, *The Tax Man’s Ethics: Four of the Hardest Ethical Questions for an IRS Lawyer*, 9 *CARDOZO PUB. L. POL’Y & ETHICS J.* 371, 391 (2011) (“Defining a government lawyer’s client sometimes proves difficult. Depending on the type of lawyer and the type of representation, the government lawyer’s client may be a particular government official, a member of the military, a branch of government, a particular agency, or even the government as a whole.”); Patricia E. Salkin & Allyson Phillips, *Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*, 39 *IND. L. REV.* 561, 564 (2006) (“The literature is full of robust debate . . . with arguments advanced that the client can be an individual public official, an agency or department within the government, the government as a whole, or the public at large.”).
15. See sources cited *supra* note 14.

For example, a lawyer in the United States Department of Justice's National Security Division (NSD) might serve as an advocate for the government, either as a prosecutor in the Counterterrorism or Counterespionage Sections or as a lawyer in the Office of Intelligence seeking *ex parte* orders for surveillance in front of the Foreign Intelligence Surveillance Court (FISC).¹⁶ These lawyers, in their role as advocates, seek a substantive outcome on behalf of the federal government—either a conviction and sentence in the case of the prosecutors or, in the case of lawyer in the Office of Intelligence, a surveillance order usually targeting a foreign power, an agent of a foreign power, or foreigners located overseas.

Alternatively, an NSD lawyer in the Office of Law and Policy, either working alone or with the Department's Office of Legal Counsel, may serve as an advisor to operators and lawyers in the Intelligence Community, providing guidance to those individuals and agencies on their rights and obligations under the law.¹⁷ Specifically, a national security lawyer playing such a role might provide advice on what the law does and does not permit in the context of a proposed action. That is, the lawyer may provide advice on exactly where the proverbial "foul line" sits and what actions an intelligence community agency or operator might permissibly take within those boundaries.

One variant on this role, albeit not one that is unique to government national security lawyers, is the lawyer as policy counselor. In this capacity, the lawyer must not only provide guidance to an agency or operator on where the foul line sits, but also advise his or her client on (1) how close to the foul line they ought to play, and (2) the relative risks and benefits of playing that close to, or far from, the foul line.

Another role of the national security lawyer is similar to that of the "evaluator," in ABA terms, or the oversight lawyer, in federal government-speak. In this capacity, for example, a lawyer in NSD's Office of Intelligence might conduct oversight over an agency collecting intelligence pursuant to a FISC authorization. That lawyer may be called upon to ensure that all collection is conducted within the bounds of the FISC's orders. In this role the lawyer serves as an umpire, determining whether any lines were crossed, and, if so, whether any discipline or procedures ought to be recommended to help ensure the problem does not arise again.

It is critical to note, however, that while the ethical duties of lawyers clearly change as they move between these roles, it is unusual for the lawyers and the institutions they work for to discuss these varied ethical responsibilities and determine which ought to apply in a given workday scenario. Nor do they organize themselves in ways that cleanly divide up these roles and responsibilities so

16. See *National Security Division Progress Report*, U.S. DEP'T OF JUSTICE (Apr. 2008), <http://www.justice.gov/nsd/docs/2008/nsd-progress-rpt-2008.pdf> (describing the operations of the NSD's Counterterrorism Section, Counterespionage Section, and Office of Intelligence).

17. *Id.* at 27-29 (describing the operations of NSD's Office of Law and Policy).

as to ensure that it is clear which ethical responsibilities apply in particular circumstance.¹⁸

II. THE VARIED ETHICAL RESPONSIBILITIES OF GOVERNMENT NATIONAL SECURITY LAWYERS

Ethical challenges arise most often when we ask national security lawyers to play multiple roles but provide them no rubric to distinguish between those roles and no ethical framework to apply. Take the example of the Office of Intelligence lawyer. The NSD was created in 2006, and there was a major reorganization of the then-named Office of Intelligence Policy and Review (OIPR) in 2008, which cleanly separated out the oversight section from the operations section and the litigation section.¹⁹ Prior to these reforms, it was not unusual for OIPR lawyers to be responsible one day for obtaining surveillance orders under FISA, acting as advocates for the government's position before the FISC, and the very next day to be required to act as oversight lawyers, looking deep into the operations conducted by the very agencies whose surveillance orders they had previously been in charge of obtaining. Even more challenging from an ethical perspective is the fact that the results of the lawyer's oversight work are often required—by the FISC's orders, policies, practices, or procedures—to be provided to the judicial branch.

One way to address such challenges—as the NSD front office did in 2008—is to take structural action to correct them. The 2008 reforms in NSD, which, as noted above, served to separate OIPR's previously combined functions into operations, litigation, and oversight, and sought to arrange the office itself against the functional lines described above in the ABA Model Rules. The operations and litigation functions are both principally advocacy roles, in that they involve the filing of briefs and materials with the courts in order to achieve a substantive result on behalf of the government. On the other hand, the oversight function is fundamentally an evaluative role, where the government lawyer is, like an umpire, assessing the government's compliance with the appropriate rules, and ensuring that appropriate corrective actions remedy any mistakes. Even though Office of Intelligence lawyers may, over time, rotate between the three sections, the separation of these sections into these three categories makes it simpler for an attorney to understand what role he or she is likely to be called upon to play on a given day.

18. While this Essay focuses on the particular case of government national security lawyers—where the pressures on ethical responsibilities are particularly high given the classified nature and sensitivity of the work—this challenge faces all government lawyers and may reflect broader cultural and institutional issues that ought to be addressed.

19. See Press Release, U.S. Dep't of Justice, National Security Division Launches New Office of Intelligence (Apr. 30, 2008), http://www.justice.gov/opa/pr/2008/April/08_nsd_360.html.

At the same time, the reform did not completely address the challenges of national security lawyering in the Office of Intelligence. For example, the litigation section, which is responsible for arguing for the use and protection of FISA information in federal court, is also responsible for seeking authorization from the Attorney General to use FISA information in a federal prosecution. This latter process, internal to the executive branch, requires NSD lawyers to serve not primarily as advocates, but rather as policy counselors to the Attorney General on how the use of such information in court might play out and whether he ought to approve or disapprove the request. Dividing this role from the remainder of the litigation section's advocacy responsibilities before the federal courts could further improve the separation between functions in NSD.

Why does it matter that government national security lawyers, like one of the NSD lawyers described above, understand what roles they are playing? Does it really affect how they carry out their day-to-day duties? The answer to these questions is fairly simple: because national security lawyers in the government are called upon every day to fulfill multiple functions, sometimes with very serious real-world consequences, it is critical that they understand their different functions so they can apply the appropriate ethical perspective to guide their actions. To understand the central role lawyers play in such efforts, one need only look at President Obama's homeland security and counterterrorism adviser John Brennan's description of the lengthy and detailed analysis government lawyers undertake on behalf of the Department of Defense in the context of certain offensive counterterrorism operations.²⁰ If a government lawyer is confused or uncertain about the role he or she is meant to play at a given time, the advice that he or she provides could be dramatically different, with very real implications for the targets and beneficiaries of government action.

Take, for example, the situation posited by General Mike Hayden, the former Director of Central Intelligence and Director of the National Security Agency, who once noted that he believed his role, as the head of an intelligence community's operational, collection, and analytical component, was to play as close to the foul line as possible, while always remaining in fair territory.²¹ That

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20. See John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy* (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>) (emphasizing the significant role "legal review" plays in decisions regarding the use of offensive counterterrorism measures).
21. See Gen. Michael V. Hayden, CIA Director's Address at Duquesne University Commencement (May 4, 2007), <https://www.cia.gov/news-information/speeches-testimony/2007/cia-directors-address-at-duquesne-university-commencement.html> ("At a confirmation hearing a couple of years ago, one of the senators asked if I would respect American civil liberties in carrying out my intelligence tasks. I, of course, said that I would. I also told him that I had a duty to play aggressively 'right up to' the line. Playing back from the line protected me but didn't protect America. I made it clear I would always play in fair territory, but that there would be chalk dust on my cleats.").

is, General Hayden liked to argue that he wasn't really doing his job well enough if there wasn't "chalk dust on [his] cleats."²² This, of course, might present a challenge for a lawyer working for General Hayden.

For one of General Hayden's lawyers tasked with seeking a surveillance order from the FISC there is little to no problem: he or she can (and usually ought to) be a forceful advocate for the government, making every appropriate argument to get as much surveillance as possible and for as long a period as possible.²³ In a sense, then, the lawyer as advocate is right there alongside General Hayden, getting a little chalk on his or her cleats.

For the Hayden lawyer playing the advisor role, however, the ethical responsibility to be a forceful advocate is largely sidelined, while the ethical responsibility to paint a detailed picture of where the specific legal lines sit and to explain how he and other operators might stay within those boundaries is maximized. In this role, the lawyer isn't getting any chalk on his or her cleats; rather, he or she is just pointing out where the line is and how to play the game within the lines.

And, of course, for the Hayden lawyer playing the policy counselor role, he or she is required not only to provide advice on where the legal lines sit, but also to exercise legal, political, and policy judgment to recommend options the government should consider and, ultimately, to advise on the option it ought to adopt going forward. In this role, the lawyer might or might not get some chalk on his or her cleats. The policy advisor is able to argue that the government should play right up to the line, or that the government ought to play ten yards back. Either position is wholly appropriate and consistent with the lawyer's eth-

22. *Id.*

23. In this context, of course, a government lawyer must also actively keep in mind the importance of being fully forthcoming with a court, as government lawyers typically appear before the FISC *ex parte* and *in camera*. See, e.g., 50 U.S.C. § 1805 (2012) (providing for issuance of an *ex parte* order under FISA); see also UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT RULES OF PROCEDURE R. 17(b) (2010) ("Except as the Court otherwise directs or the Rules otherwise provide, a hearing in a non-adversarial matter must be *ex parte* and conducted within the Court's secure facility."). Similarly, the Supreme Court has made clear that while a government lawyer has a duty to aggressively pursue the government's position and "strike hard blows," he or she may not go beyond the bounds of appropriate behavior by "striking foul blows," by employing improper methods or seeking a result not warranted by the evidence or the law. See, e.g., *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

ical duties because his or her role is not to argue for the government in court, and not simply to advise where the lines are, but to argue exactly how far from the line the government ought to play.

Given the substantially different advice a lawyer might give depending on the role he or she is to play, and the different ethical responsibilities accompanying each of those roles, it is important to ensure that a federal lawyer knows exactly what role he or she is playing before tackling a given scenario.

III. THE CHALLENGE OF NOT DIFFERENTIATING BETWEEN NATIONAL SECURITY LAWYER ROLES

This brings us to the fundamental problem with Jeh Johnson's speech: it does not account for the range of perspectives that government lawyers must be prepared to bring to their work. When Johnson argues, in the context of the ongoing conflict with al Qaeda and its associated forces, that the government "must guard against aggressive interpretations of [its] authorities that will discredit [its] efforts, provoke controversy, and invite challenge,"²⁴ he does not specify the scope of his message and thereby creates the potential for government national security lawyers to apply his approach beyond its intended context. Johnson does not delineate the lines between the various roles a government lawyer may play. He simply makes the statement that the government—and presumably its lawyers—should not pursue aggressive interpretations of its authorities.

Is Johnson arguing that a government lawyer ought *never* to argue for the most aggressive interpretation of its authorities, even when he or she is arguing before a federal court? If this is Johnson's position, it certainly seems inconsistent with a lawyer's general ethical duty of zealous representation. Of course, the executive branch—like any other client—is entitled to tell its lawyers to be less aggressive than the law permits. But if that is the policy position that Johnson is laying out, it seems important that he make that abundantly clear since that approach represents a significant policy decision, one that cuts against the normal instinct of a lawyer as an advocate.

Alternatively, is Johnson arguing that the government should not step right up to General Hayden's proverbial chalk line when making policy judgments about what counterterrorism actions it might take? Or is Johnson arguing that when a government national security lawyer is playing the advisor role—describing where the lines are—that he or she ought to provide more conservative advice to the government on how to play the game so that it ensures that it stays within the lines? While it appears that Johnson is likely arguing for one of these two latter points, the lack of clarity is particularly problematic because, absent further context, Johnson's statements might lead a national security lawyer in the executive branch to avoid taking the strongest possible line on behalf of the government, even in court.

24. Johnson, *supra* note 1, at 145.

Applying the ethical analysis set forth above, Johnson's statement, on its face, is a perfectly appropriate statement of policy and, as such, it is a perfectly appropriate position for a lawyer wearing the policy counselor hat to recommend when the government is considering its litigation posture or the nature and scope of counterterrorism actions it might undertake.²⁵ However, for the lawyer wearing the advocacy hat, appearing before a federal court (whether *ex parte* or in an adversarial setting), there is little excuse to present anything other than the strongest arguments in support of the government's position.²⁶

Of course, any such arguments must be within the bounds of the laws and Constitution of the United States. And, as noted previously, the executive branch is always free to direct—as a matter of policy—its lawyers not to take the most aggressive position possible.²⁷ However, absent such a policy decision, for a federal national security lawyer not to take the most forward-leading position possible before a court would essentially be to ignore his or her responsibility to be a vigorous and effective advocate for his or her client.²⁸ As another cur-

25. See Lanctot, *supra* note 12, at 1014-15 (“Government officials must weigh the interests of competing groups, the litigation risks, the likelihood of success, and the political ramifications of government action or inaction. Indeed, it is precisely this task that they were elected to perform As government officials and as lawyers representing clients, government lawyers should participate in this decision-making process.”).

26. See, e.g., D.C. RULES OF PROF'L CONDUCT R. 1.3(b) (2007) (“A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules.”); see also *id.* R. 1.3 cmt. 1 (“The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law This duty requires the lawyer to . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.”); Lanctot, *supra* note 12, at 1013 (“The intrinsically different nature of the government client cannot alone justify a departure from the traditional duty of zealous advocacy. Indeed, the opposite may well be true. First, the government is entitled to have its views heard in federal court just like any other litigant Not only are government agencies entitled to have their positions presented in federal court, but if government lawyers interpose their own views of what positions are worthy of defense, those agencies have nowhere else to go.”).

27. See Lanctot, *supra* note 12, at 1015 (“[T]he decision as to which governmental action will benefit ‘the people’ or ‘the public interest’ is vested in elected officials or those to whom they have delegated their decision-making authority. Once that policy decision has been made, the government lawyer may ethically defend it, even if the lawyer believes that the public interest will not be served by that decision. The government lawyer, after all, is not employed by the federal government to represent personal interests, and it is virtually impossible for anyone to determine where a neutral view of the ‘public interest’ ends and one's own personal opinions begin.”).

28. See *id.* at 1013-14 (“The government lawyers may, and clearly should, advise the agencies of their conclusions on the merits, as should private lawyers. Ultimately, however, government lawyers must abide by their agency clients' decisions con-

rent Administration political appointee, Matthew Olsen, the former General Counsel to the National Security Agency and current head of the National Counterterrorism Center, once said in a Law Day speech at the National Security Agency:

[W]e have to be advocates. Once a decision is made to pursue an action or policy, our role as national security lawyers shifts from providing advice to being advocates. Our duty then is to argue for the government's position—forcefully within the bounds of our ethical obligations. Our job, in other words, is to persuade and win.²⁹

Unlike Olsen, who clearly argues that the role of a government lawyer, acting as an advocate, is to forcefully push the government's position, Johnson's lack of precision could very well lead a government lawyer to avoid pursuing the government's strongest arguments in court.

Johnson should clarify whether his statement applies to all interpretations of the law applicable to the conflict with al Qaeda, including those interpretations put forth by government national security lawyers advocating on behalf of the government in court, or whether it is limited to the policy counseling context, where lawyers can and ought to express their views on the appropriate posture for the government's actions. Absent such clarification, government lawyers may interpret Johnson's statement more broadly than he intended, which might lead to a weakening of the government's national security posture in the federal courts. If a lawyer fails to make the strongest argument for his or her client's position in court, the client is less likely to succeed; the same is true when a government national security lawyer appears before a federal court. The problem in the latter case, of course, is that if the government lawyer fails to obtain a surveillance order or lock up a terrorist, there can be potentially catastrophic consequences. Johnson and those who share his view owe our national security lawyers further guidance on whether and how aggressively they ought to represent the government in federal court on national security matters.

cerning the objectives of representation. More important, suggesting that government lawyers are to scrutinize government policies or litigation strategies to determine whether they are 'fair' or 'just' may well be inconsistent with the political system in which those lawyers participate. At best, it imposes a policy judgment about the independence of government lawyers in the guise of an ethical prescription. Federal government lawyers are not elected, and they do not represent any constituency. For better or worse, the American political system places the burden of determining the 'fairness' or 'justice' of public policy upon elected officials in the first instance and, ultimately, upon the courts.").

29. Matthew G. Olsen, Gen. Counsel, Nat'l Sec. Agency, Remarks at National Security Agency Law Day (Oct. 14, 2010) (on file with author).

