

Boston College International and Comparative Law Review

Volume 32

Issue 2 *The Pen, the Sword, and the Waterboard:
Ethical Lawyering in the "Global War on Terroism"*

Article 8

5-1-2009

The Role of the Client: The President's Role in Government Lawyering

Gabriella Blum

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Gabriella Blum, *The Role of the Client: The President's Role in Government Lawyering*, 32 B.C. Int'l & Comp. L. Rev. 275 (2009), <http://lawdigitalcommons.bc.edu/iclr/vol32/iss2/8>

This Symposium Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

THE ROLE OF THE CLIENT: THE PRESIDENT'S ROLE IN GOVERNMENT LAWYERING

GABRIELLA BLUM*

Abstract: Discussions of whether Bush and Clinton administration lawyers have acted ethically have missed a fundamental point about the attorney-client relationship. It is the client—in this case, the government—who is ultimately responsible for making policy decisions, not the attorney. Too often, the question of what is “legal” has been substituted for what should actually be done, especially in the United States, where “legal” and “desirable” have become so intertwined. Governments should consult with attorneys, but should also be prepared to implement whatever policies they believe are “right,” and if necessary to explain any departures from what is “legal” to the public, to whom they are ultimately accountable.

The public debate over the ethical and professional conduct of the Bush administration lawyers has been a hallmark of the critique of the Bush presidency in its entirety. John Yoo, Alberto Gonzales, James Bybee, David Addington and others have consistently drawn fire on all fronts; after a while, it seemed their actions stood as a metonymy for the administration in general. By their critics they were held responsible for everything the administration was doing and, worse still, were perceived as aiders and abettors rather than gatekeepers, who should thus be indicted for complicity in the administration's perpetration of war crimes.

The mere fact that the debate over the lawyers' conduct has corresponded to such a large degree with the debate over the Bush administration's policies in the war on terrorism is proof of the point I wish to make here: much of the assessment of the lawyers' handling of their tasks assumes a direct and inevitable relationship between the legal advice provided and the administration's subsequent actions. This assumption has not been sufficiently examined. In other words, the voluminous discussions of the role of government lawyers have

* Assistant Professor of Law, Harvard Law School. I wish to thank Jack Goldsmith, Philip Heymann, and the Hon. William Young of the District Court of Massachusetts for their animated engagement with me on this topic. The opinions expressed in this article are mine alone. I also would like to thank Matthew Ivey for his wonderful editing job.

largely neglected an inquiry into the role of the *client*, and, by extension, the role of law in policymaking.

To seize the point, it would be useful to turn to Attorney General Michael Mukasey's Commencement speech at Boston College Law School last year.¹ Like others who have attempted to account for the state of public legal practice under the Bush administration, the Attorney General claimed that any discussion of the conduct of the administration lawyers must begin with their predecessors under President Clinton. The National Commission on Terrorist Attacks Upon the United States (9/11 Commission) placed direct blame on the lawyers of the Clinton administration for preventing the Executive from taking effective action to meet the threat of terrorism against the United States. According to the report, the Clinton lawyers were too risk-averse, refrained from "going right up to the edge of the law," and actively hindered the Executive from exercising even those powers that should have been deemed legal under a more security-minded reading of the law.² In this, the government lawyers shared the responsibility for the government's failure to preempt the attacks of September 11, 2001. Attorney General Mukasey then explained that it was this criticism that invited, indeed drove, the subsequent Bush administration lawyers to interpret the law in the most expansive way possible (and, to many minds, impossible).

If we accept this narrative, we have before us two groups: those pre-9/11 lawyers who advised the government that it could not do what it believed was necessary to fight terrorism, and those post-9/11 lawyers who advised the government that it could do whatever it thought was necessary to fight terrorism. One group limited the President more than was legally required; the other allowed him more than was legally plausible.

This discrepancy immediately begs a series of questions: where do we draw the correct line between complicity and obstruction? What considerations should lawyers take into account when offering legal advice to the executive? And, if such advice must be tipped one way or another, what type of bias should our system prefer—the overly-permissive or overly-restrictive?

¹ See generally Michael B. Mukasey, *The Role of Lawyers in the Global War on Terrorism*, 32 B.C. INT'L & COMP. L. REV. 179 (2009).

² See generally FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>

Past and present debates over the role of government lawyers tend to focus on the type of legal advice with which public-service lawyers should furnish their clients. Some, like Jack Balkin, have made the cheerless sophist argument that, “lawyers are rhetorical whores; their job is to confuse, obfuscate, and make unjust and illegal things seem perfectly just and legal, or, if they cannot quite manage that feat, to muddy up our convictions sufficiently that we conclude that it’s a close case.”³ Almost thirty years earlier, Geoffrey Hazard opined that, “If you have a client, you have to represent him and not ‘justice’ in some abstract sense.”⁴ Others, such as David Luban and Deborah Rhode, have professed an altogether different view of what lawyering, and particularly government lawyering, should be about, arguing that public service lawyers should care, “more about the means used than the bare fact that they are legal,”⁵ and, “accept personal responsibility for the moral consequences of their professional actions.”⁶

To my mind, these debates neglect an all-important component, which is the role of the government as a client. More specifically, I wish to argue that the question of what type of advice lawyers should give the government concerns only one part of a two-way conversation between the lawyer and the client; and that without inquiring into the responsibility of the client receiving the legal advice, our normative and prescriptive view of government lawyering is seriously lacking.

To flesh out my argument, I return to a paragraph in Attorney General Mukasey’s speech:

A lawyer’s principal duty is to advise his client as to the best reading of the law—to define the space in which the client may legally act. If you do your job well, there will be times when you will advise clients that the law prohibits them from taking their desired course of action, or even prohibits them from doing things that are, in your view, the right thing to do. And there will be times when you will have to advise clients that the law permits them to take actions that you may find imprudent, or even wrong.⁷

³ Jack M. Balkin, *Our Legal and Political Culture*, BALKINIZATION, Dec. 31, 2005, <http://balkin.blogspot.com/2005/12/our-legal-and-political-culture.html>.

⁴ GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 125 (1978).

⁵ DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY*, at xxii (1988).

⁶ DEBORAH RHODE, *IN THE INTERESTS OF JUSTICE* 66–67 (2000).

⁷ Mukasey, *supra* note 1, at 180.

Attorney General Mukasey suggests that the lawyer's task is limited to a pronouncement of what the law *is*, consciously excluding any extra-legal considerations. For now, I wish to sidestep the debate about whether this statement is correct or not, and focus, instead, on what Attorney General Mukasey does *not* say—about what the client should do with the legal advice he receives. His silence on this point, I believe, derives from an implicit assumption, which pervades the government as much as it does public discourse, that legal advice is forever an overriding consideration, the last if not the first argument to be weighed in any policy discussion.

In the United States, as Thomas Paine has said, “Law is King.”⁸ From its earliest foundation, this country has taken pride in being a nation ruled not by men but by laws.⁹ Alexis de Tocqueville commended the role of law in the United States as mitigating against majority tyranny.¹⁰ The notion of a rule of law, to which the leaders as much as any common citizen are subject, underlies our fundamental political association. The Constitution is our new Bible, our laws are our common pact. The American ideal of a city upon a hill has become dependent on following the wise restraints that keep us free. In everyday discourse we commend people for being law abiding citizens, and believe that everyone should “play by the rules.” For Americans, both past and present, the law is a metonymy for the line that separates right from wrong, inviting wrongdoers to justify their immoral behavior by arguing they have done nothing illegal, and making it difficult to justify illegal behavior as nonetheless morally just.

In this uber-legalistic culture, if a lawyer advises her client that a policy is illegal, the client hears “it is evil.” No one wants to be an evildoer. If she advises her client that the policy is legal, the client hears “it is good,” because it is compatible with the system of values on which we have chosen to found the law. If it is “good,” it follows that doing it is also worthwhile. Hence, we arrive at a confluence of legality and legitimacy, of what is permissible and what is desirable, a confluence which is often questionable both pragmatically and ethically.

Administrations are not immune to this conflation; in some ways they are more susceptible to it. In the context of the war on terrorism,

⁸ THOMAS PAINE, COMMON SENSE 56 (W. and T. Bradford 1791) (1776).

⁹ See *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

¹⁰ See ALEXIS DE TOCQUEVILLE, *Causes Which Mitigate the Tyranny of the Majority in the United States*, in DEMOCRACY IN AMERICA 348–58 (Francis Bowen ed., Henry Reeve trans., Sever and Francis 1899) (1862).

an administration that would not pursue an aggressive-but-lawful policy, a policy that some people in the government think could help fight our enemies, might be regarded with hindsight as incompetent or negligent its duty to protect the country, especially if another attack ensued.¹¹ A characterization of “lawful” thus becomes an order to act. If, however, the Executive chooses to pursue a legally-dubious strategy, one that it believes is necessary to protect the country, it assumes a hefty risk of not being able to justify its actions to a legally-minded public or to an international community holding an altogether different set of values and laws.

A concrete example of the effects of legality on the public's evaluation of policies may be found in a CNN/USA Today/Gallup poll conducted in January 2006, in which the public was asked to comment on the government's wiretapping program (which was effected before congress amended the Foreign Intelligence Surveillance Act (FISA)). The poll showed a near-perfect correlation between those who believed the program to be illegal under the existing FISA (49%) and those who believed the program to be wrong (50%). Respondents who believed the wiretapping program was probably legal (47%) corresponded to the number of people who replied to the question whether the program was also right (47%).¹²

In this kind of political climate, whether consciously or subconsciously, an administration accords substantial, and perhaps exaggerated, deference to the legal advice it receives. The legal review of any proposed policy becomes the make or break point of pursuing it. The result is that lawyers do not just give legal advice; their advice is what effectively determines government policy. The collapse of legal advice into strategy has been previously described by the former head of the Office of Legal Counsel (OLC), Jack Goldsmith:

This is why the question “what should we do?” so often collapsed into the question “what can we lawfully do?” . . . It is why there was so much pressure to act to the edges of the law. And it is why what the lawyers said about where those edges were ended up defining the contours of the policy.¹³

¹¹ See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 130–31 (2007).

¹² Jeffrey M. Jones, *Public Remains Divided About Wiretapping Controversy*, Gallup Poll, Feb. 16, 2006, <http://galluppoll.com/content/?ci=21499>.

¹³ GOLDSMITH, *supra* note 11, at 131.

Why is this collapse so troubling? Laws may be the first formal indicator we turn to in order to distinguish right from wrong. Both domestically and internationally, laws are enacted to anchor certain values and interests that their legislatures believe are right and just. But on a more fundamental level, we do not generally believe that law can or should exhaust our deliberation of right and wrong. Both morally and pragmatically, it is an imperfect marker. We may find an action condemnable even when there is no law against it: A person who walks by a drowning child and makes no effort to save him even at little risk to himself is reprehensible, even though only few states have bad Samaritan laws. In the same vein, we sometimes commend people (before or after the fact) for acting in violation of the law. The legacy of Rosa Parks offers a constant reminder that our notions of justice versus law are not always commensurate. In fact, the necessity defense in criminal law (which is not unique to U.S. law) is grounded in the notion that some instances of law-breaking are morally justifiable.

In the context of the war on terror, specifically, it may be that a particular act is unlawful, but should nevertheless be pursued. Numerous commentators have expressed support for the idea that the President should be allowed to employ coercive means—even torture—in the rare ticking-bomb case, even though the legal prohibition on torture is clear and absolute. In contrast, some coercive means that fall short of torture, and would therefore be lawful, may actually prove ineffective in the vast majority of interrogations of suspected terrorists.¹⁴

It may equally come to pass, that an unquestionably legal act would be nonetheless better abstained from. The U.S. military's newly-revised Counter-Insurgency Manual warns against the strategic fallout from inflicting civilian casualties in the course of counter-insurgency operations, even though the laws of war do not prescribe a zero-casualty obligation.¹⁵ It is the obligation of the Executive to weigh the strategic, moral, and political implications of civilian casualties, even if the military operations that inflict them fall within the scope of the law. Contrary to political rhetoric, governments should not do *everything* to protect their citizens in the literal sense, but only those things that are actually effective and that make ethical and practical sense.

¹⁴ On the merits and pitfalls of coercive interrogations, see generally Matthew Alexander, *I'm Still Tortured by What I Saw in Iraq*, WASH. POST, Nov. 30, 2008, at B01.

¹⁵ See generally DEP'T OF THE ARMY, FIELD MANUAL 3-24 ("COUNTERINSURGENCY") (2006).

The authority we vest in the President comes with the expectation that the President will exercise his best judgment and take responsibility for his actions when necessary. If President Clinton or his aides truly believed that employing more aggressive methods were necessary to combat the threat of terrorism, the President should have ordered these methods, or acted to change the law, even if his lawyers wavered on the legal implications of such an order. He should then have been ready and willing to justify his actions to the American public, whose reaction would have undoubtedly depended on its perception of the magnitude of the threat and the appropriate emergency responses. Indeed, public criticism of what some argued was President Clinton's inaction grew much stronger after the September 11 attacks; public criticism of President Bush increased as threats of additional attacks remained unfulfilled. This is the political calculus the government must take into account in deciding how to react to a perceived threat; it would be irresponsible leadership to avoid any political ramifications by making law—and lawyers—the ultimate decision-makers.

Whether justified or not, there was a real fear within the Bush administration of the legal ramifications from an admission of breaking the law. True, historically, the number of prosecutions of executive officials in cases implicating national security is very low. Indeed, Abraham Lincoln's suspension of the writ of habeas corpus and his dismissal of the courts' overruling of the suspension during the Civil War is generally lauded, not condemned. Moreover, for present-day practical purposes, in two separate acts—the Detainee Treatment Act and the Military Commissions Act—Congress has ensured immunity for officials from criminal liability. Other sources of immunity protect government and military officials from liability under civil lawsuits. The likelihood of anyone who followed government orders in the course of the war on terrorism actually being held to account in any U.S. court is remote.

Nevertheless, there are growing calls for the indictment of Bush administration officials for war crimes, calls that have intensified following a bipartisan report by the Senate Armed Services Committee that tied Defense Secretary Donald Rumsfeld, his legal counsel, William J. Haynes, Gonzales and Addington to the torture and abuse of

prisoners.¹⁶ Whether or not indictments are ultimately made, there are associated costs (reputation, counsel fees, etc.) that are very real.

The threat of indictment in a foreign court under a paradigm of universal jurisdiction is even greater.¹⁷ To date, lawsuits filed against Rumsfeld, former Central Intelligence Agency director George Tenet, high ranking military officers, and several former government lawyers in Germany, France, and elsewhere, alleging torture and war crimes at Abu Ghraib and Guantanamo Bay, have not materialized into any real action against those cited. After all, the United States is far better able to protect its officials from such proceedings than other countries who face similar risks.¹⁸ The threat of indictment remains, however, and Secretary of Defense Rumsfeld, fearing arrest, did have to flee from France.¹⁹

Real or not, however, the risks of either domestic or international chastising or indictment must be regarded as an occupational hazard that comes with holding office and exercising authority—a smaller risk than that assumed by any member of the U.S. armed forces deployed to a combat zone in the war on terror. It should not, as a normative matter, account for the transfer of responsibility from decision-makers to lawyers.

Naturally, when breaking the law is not an extraordinary and exceptional imperative, but a permanent or broad change of policy (such as wiretapping thousands of individuals), the executive should prefer a strategy of changing the law to violating the law. After the public uproar that ensued when the secret wiretapping program became known, the executive acted in concert with Congress to amend FISA to allow for more wiretapping within the law. Changing the law, however, is not always possible, nor is it always desirable. At times, amending the law would make a program public even though it

¹⁶ See SENATE ARMED SERVICES COMMITTEE INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, 110th Cong., at xiv–xix (2008), available at <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>.

¹⁷ See Milena Sterio, *The Evolution of International Law*, 31 B.C. INT'L & COMP. L. REV. 213, 222–24 (2008) (providing several examples of state leaders tried under universal jurisdiction doctrine by foreign states).

¹⁸ A threat to remove the NATO headquarters from Brussels quickly took care of an indictment against Bush in Belgium. See Paul Chevigny, *The Limitations of Universal Jurisdiction*, Global Policy Forum, Mar. 2006, available at <http://www.globalpolicy.org/opinion/2006/03universal.htm>.

¹⁹ Twice, the German prosecutor has declined to commence a criminal investigation into complaints filed by human rights activists against Secretary of Defense Rumsfeld. See Mark Landler, *Twelve Detainees Sue Rumsfeld in Germany, Citing Abuse*, N.Y. TIMES, Nov. 15, 2006, at A17.

is better kept secret for security reasons. Other times, such as in the case of torture, amending the law would normalize the exception, at a great loss to the normative and symbolic weight of the absolute prohibition. In all such cases, acting outside the law may be inevitable or preferable to amending the law so as to enable a lawful action.

Throughout the post-9/11 era, the dialogue between government lawyers and the Bush administration over counterterrorism strategies has remained predominantly legalistic. In the now-infamous OLC memos that became public, the discussion of detention, coercive interrogations, and the war on terrorism more generally were limited to an analysis of executive power and the interpretation of domestic and international law. The President, who was fearful of the political implications of acting outside the law, sought approval from his lawyers prior to any action taken in the war on terrorism. The lawyers, who did not want to be accused of inhibiting the war on terrorism, became enablers of any and all strategies. Authorizing an unprecedented expansion of executive power, dismissing international law as irrelevant, narrowly interpreting constraining domestic legislation, and consciously and explicitly excluding any moral, political, or pragmatic considerations from their analysis, these lawyers believed they were acting in the best interest of national security in enabling the President's strategies. Jack Goldsmith, although critical of the role played by some of the Bush administration lawyers, described his own sentiment while heading the OLC in a testimony before the Senate Judiciary Committee, quoting, with endorsement, George Tenet: "You simply could not sit where I did and read what passed across my desk on a daily basis and be anything other than scared to death about what it portended."²⁰ Once labeled merely "legal," the more aggressive strategies became more appealing as they grew to be "just" and "right," and to some in the Bush administration, inevitable.

This dynamic proves that the problem did not lie exclusively with the lawyers, who believed, rightly or wrongly, that they were acting in the best interest of national security (albeit under an ideological commitment to greater executive power). The problem lay instead in the type of dialogue that the administration conducted with its lawyers, according "law" near-absolute power as a determinant of policy. It is a derivative of the social, cultural, and political role of law in the United

²⁰ *Preserving the Rule of Law in the Fight Against Terrorism: Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (Statement of Jack Goldsmith, Henry L. Shattuck Professor of Law, Harvard Law School) available at http://judiciary.senate.gov/hearings/testimony.cfm?id=2958&wit_id=6693 (quoting GEORGE TENET, AT THE CENTER OF THE STORM 99 (2007)).

States; of its almost mythical power as a synonym for the distinction between right and wrong; and of the upper echelons in the government seeking legal cover to function as political cover for their actions. It is also a derivative of over-zealous lawyers who sought to please their clients, and over-deferential courts that took only hesitant, incremental steps to assert the law in the face of the government.

Christopher Kutz eloquently described the difference in attitude towards law between Presidents Lincoln and Jefferson, on the one hand, and President Bush on the other:

Certainly many Presidents in U.S. history have argued for, and acted upon, a presumption of extra-statutory authority. The most famous include Jefferson's purchase of the Louisiana Territories, and Lincoln's expansion of the Army and suspension of *habeas corpus*. Both Presidents justified their acts by reference to public necessity. But, as Jules Lobel and Daniel Farber have argued, both also accepted the authority of the law they broke, making possible post-hoc congressional ratification and opening themselves to the legal consequences should that ratification not be forthcoming. In one sense, both Presidents justified their use of extra-judicial authority post hoc, by returning to the scene of their crimes, as it were, and looking for ratification. We must therefore be careful to distinguish claims regarding what must be done from what can actually be done under principles of justified authority [T]he Bush Administration took a different tack. Rather than concede the extra-legality of its positions, the OLC put forward a striking constitutional theory of presidential authority, which rendered even very general congressional limitations on intelligence gathering themselves illegal infringements of Executive prerogative.²¹

The ultimate responsibility for weighing right and wrong, beyond what a particular law at a particular time prescribes, lies with the government, not its lawyers. The government should break the law if it deems it right and necessary for the good of its citizens. It should also avoid lawful policies that are immoral, irresponsible, or counter-productive. It is not the responsibility of the lawyers to make these

²¹ Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 268 (2007).

decisions. By having a conversation about “law,” all other considerations became absorbed by and dissolved into the legal discourse.

The lawyer’s job is neither to give an administration a get-out-of-jail-free card, nor to block national security policies that elected officials deem essential to protect the country. It is only to provide the executive with the best understanding of the legal boundaries pertaining to any proposed action. Because of the view of law as a trump card in the decision-making process, however, it is also incumbent on the lawyer to remind the client that legal advice is just that and no more. Whatever the possible ramifications of violating the law at a given moment, it is the duty of the decision-maker to weigh those ramifications in the overall calculus of the proposed strategy.

The Bush administration lawyers did not do this. Instead, they felt they had to justify any government action under legal terms, for fear of tying the government’s hands. By doing so, they legalized illegal actions. They normalized and made routine the exceptional. “Clear and present danger” became every danger; remote possibilities turned into probable events; emergency became normalcy. This behavior did a great disservice not only to their clients, but to the rule of law. The source of this malpractice was not so much that lawyers did not perform their roles; it was, in the main, that they did not, or perhaps could not, trust their clients to perform their own role of governing.

It is possible that this failure to accord law its appropriate place may call for some institutional reforms in the government lawyer-client relationship. Currently, the President and the cabinet members are the designated clients of the OLC,²² and some commentators have suggested that the correct view of the client must be the American people, not any particular official or decision-maker. Neal Katyal even proposed that many of the advisory functions of the OLC be turned over to an independent agency acting as an adjudicative body.²³ Nina Pillard suggested a greater role for the Inspector General in the

²² According to the Department of Justice website, “By delegation from the Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides authoritative legal advice to the President and all the Executive Branch agencies.” U.S. Dept. of Justice, Office of Legal Counsel, <http://www.usdoj.gov/olc/> (last visited Feb 3, 2009).

²³ Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314, 2336–40 (2006).

Department of Justice.²⁴ Eric Posner and Adrian Vermeule have called for bipartisan appointments of lawyers to the OLC.²⁵

All of these proposals may be useful in distancing the clients from the lawyers, but none would resolve the underlying problem of both lawyers and presidents fearing the paralysis brought upon by an “illegal” characterization. If, as I believe, this problem derives from the social and cultural precedence of law in American political life, its only real remedy is courageous and wise leaders who would pick the right instances for breaking the law and be willing to defend their decisions. A modern Lincoln could restore law into its rightful place: an all-powerful, *but not absolute*, guide for action.

To conclude, several clarifications are in order. First, I do not mean to suggest that the Bush administration necessarily cared about the law; it is clear that it believed that the exigencies of the day called for extreme measures, whether perfectly legal or questionably so. It did, however, care about what it could *say* about the law. The law was twisted and turned so as to offer the administration the legal cover for its actions. The administration sought this cover believing that it could not publicly admit to breaking the law even in the name of security exigencies. The lawyers played along out of a similar understanding of the role of law in public opinion.

Second, I wish to emphasize that, contrary to other commentators, my claim is not one of “too many lawyers.” I do not believe that lawyers should stay out of national security matters or refrain from commenting on the legal merits of contemplated policies, even when those touch on the core of the most sensitive security questions. Any time a policy or action raises legal questions, which is more often than not, a lawyer should be consulted. My claim, in contrast, is that the lawyer should serve *only* as a consultant; one of many other consultants on matters of security, foreign policy, domestic policy, inter-governmental policy, etc. The Bush administration, in effect, transferred the decision-making responsibility to the lawyers. Lawyers were often the first to be consulted, before even the subject-area experts.²⁶ And again, contrary to what might be thought, it is often not the

²⁴ Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 748–58 (2005).

²⁵ Posner and Vermeule reject Katyal’s proposals as overly rigid and even utopian. Instead, they propose bi-partisanship appointments to the OLC. See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 897–909 (2007).

²⁶ See Remarks of Michael Chertoff at Harvard Alumni Reunion, Oct. 24, 2008, available at <http://www.law.harvard.edu/alumni/class-reunions/past-reunions/fall-2008/fall2008media.html>.

lawyers who infuse themselves into the decision-making process, but instead the decision-maker that de facto delegates the decision-making power to the lawyer, thus shirking responsibility.

Third, it is not that law should not matter or not matter much; it should matter a great deal and we must have a strong, though rebuttable, presumption in favor of operating within the law. It is because I have a deep respect for the law that I believe that the dialogue between the government and its lawyers should be free from the risk of making lawyers decision-makers. Lawyers should express their view of the law, together with relevant considerations of politics, morality, and strategy, without fearing that their decision will be taken by the decision-maker as the final word. For social, moral, security, and political decisions, we elected a government. It is the latter that should make the decisions and face the consequences.