

PROTECTING THE OFFICE OF LEGAL COUNSEL FROM ITSELF

*Harold Hongju Koh**

Pardon me if I act like a black sheep at this symposium of Office of Legal Counsel ("OLC") alumni. Like most OLC alumni, I share the genuine affection and respect for the Office and its traditions that this symposium reflects. But at the same time, I cannot fully accept the undertone of self-congratulation that pervades this panel's two principal papers.¹ My discomfort grows from the inordinate amount of time that I have spent over the last few years disagreeing with OLC positions, particularly in three areas of United States foreign policy. The first concerns the "Iran-Contra" prosecution of Oliver North in the United States District Court for the District of Columbia, in which OLC coauthored a Justice Department brief defending an extraordinarily broad view of executive power in foreign affairs.² The second involves OLC's turnabout with regard to the legality of extra-territorial abductions, which culminated last year in the Supreme Court's decision in *United States v. Alvarez-Machain*,³ appropriately labeled "monstrous" by the dissent.⁴ The third is OLC's recent reversal of position regarding the applicability of United States laws to Haitian refugees interdicted on the high seas, the subject of other liti-

* Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale University. From 1983-1985, I served as an Attorney-Adviser in the Office of Legal Counsel, Department of Justice. This Comment derives from remarks delivered at the panel on the Office of Legal Counsel at the Symposium on Executive Branch Interpretation of the Law held at Benjamin N. Cardozo School of Law on November 15, 1992.

¹ Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993).

² Memorandum of Law of the United States Department of Justice, as *Amicus Curiae* with respect to the Independent Counsel's Opposition to the Defendant's Motions to Dismiss or Limit Count One, *United States v. North*, 708 F. Supp. 375 (D.D.C. 1988) (No. 88-0080-02). As Doug Kmiec has elsewhere noted, the Justice Department's brief in the *North* case was jointly authored by OLC and the Department's criminal division. See DOUGLAS W. KMEIC, *THE ATTORNEY GENERAL'S LAWYER* 184-85 (1992). For a critique of the position taken in that brief, see HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 28-29 (1990).

³ 112 S. Ct. 2188 (1992).

⁴ *Id.* at 2201-02 (Stevens, J., dissenting) (quoting *The Apollon*, 22 U.S. (9 Wheat.) 362, 371 (1824)). I served as counsel of record on the Brief *Amicus Curiae* of the Allard K. Lowenstein International Human Rights Clinic and the Center for Constitutional Rights in Support of Respondent, *Alvarez-Machain* (No. 91-712).

gation in which I have been deeply involved.⁵

None of these three unfortunate episodes disproves the basic propositions stated in the symposium papers presented by Douglas Kmiec and John McGinnis. To the contrary, I view them as exceptions that prove those papers' basic thesis: that over the years, OLC has developed certain informal procedural norms designed specifically to protect its legal judgments from the winds of political pressure and expediency that buffet its executive branch clients. Both papers properly emphasize the tension between the Attorney General's role as advocate and counsel, noting how the Attorney General has, over time, come to delegate her opinion-writing function to the Office of Legal Counsel as a device to mitigate that tension and mediate between those two roles.⁶ In turn, OLC has developed its own informal procedural norms both to protect its independence and to ensure that the Office will pursue what Professor McGinnis dubs a "court-centered" or "independent authority" model of government lawyering instead of the "opportunistic" model of a private lawyer.⁷ The closing section of McGinnis's paper states a number of institutional rules and norms that have infiltrated OLC's culture principally to protect the Office's independence from political pressure.⁸ These include both procedural requisites (*e.g.*, that opinions be rendered in writing), as well as "jurisdictional" requirements (*e.g.*, informal rules whereby OLC refrains from rendering opinions regarding matters in litigation or to requesting agencies that have not themselves first provided legal opinions setting forth their own positions on contested interagency matters).

Although I readily endorse these rules, I find missing from the principal papers a fuller explanation of exactly why they have evolved. McGinnis argues that these rules play the same role for OLC that Alexander Bickel's "passive virtues"⁹ have played for courts, namely, to "permit OLC to avoid entanglements that would be unwise and preserve its political capital for other decisions that will be of more use both to the President and to its own reputation."¹⁰ Although this is true, the key point is not that these rules exist to

⁵ I also served as counsel of record in *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) and *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992), *rev'd sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

⁶ Kmiec, *supra* note 1, at 337-38; McGinnis, *supra* note 1, at 421-25.

⁷ McGinnis, *supra* note 1, at 382-400.

⁸ *Id.* at 425-35.

⁹ Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 51 (1961).

¹⁰ McGinnis, *supra* note 1, at 435.

preserve OLC's political capital, but rather that *they exist to protect OLC from itself*. Like all accommodating lawyers, OLC is eager to please its clients so that it can both maximize its own business and "stay in the loop." The procedural and jurisdictional rules that McGinnis describes exist to counter OLC's own understandable desire to please its principal client, the President, by telling him what he wants to hear. They are classic examples of "rules enforced on oneself," or what Thomas Schelling describes as rules that individuals or institutions adopt "to constrain their own behavior at future moments in time when their preferences (or whatever impulses, temptations, phobias, fears, and passions control their choices) determine acts that are different from what they *now* prefer to do *then*."¹¹ Upon reflection, each of the unfortunate episodes I have mentioned—OLC's positions in the *North* prosecution, the extraterritorial abduction case, and the Haitian refugee litigation—came about precisely because OLC violated its own rules, thus falling prey to three predictable problems that plague a law office blessed with willful clients who tend to act first and consult counsel later.

I call the first of these problems "lock-in." Wherever possible, OLC has sought to be consulted *before* the United States government irrevocably commits itself to an action so that the Office can impartially evaluate the legality of the proposed action *ex ante*, rather than being locked into a position by its client's action and then being forced to issue a legal opinion justifying that action after the fact. It was partly to combat this problem that OLC adopted its practice of refusing to opine on matters that are already in litigation. On such matters the United States government's legal posture is already fixed by the adversary process, thereby making it extremely difficult for OLC to take a fresh look.

I call OLC's second problem "opacity," namely, the danger that it will support political action with a legal opinion that cannot be publicly examined or tested. To meet this problem, OLC has admirably decided to publish its opinions. By so doing, OLC has "creat[ed] a product that has the appearance of deliberative and authoritative judicial opinions,"¹² and constructed a self-referential system of precedent that Justice Department attorneys can consult as future cases come along.

¹¹ Thomas L. Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357, 358 (1985). As my colleague Paul Kahn has described, the executive branch regularly promulgates rules with an eye toward enforcing those rules on itself. See Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185, 211-16 (1986).

¹² McGinnis, *supra* note 1, at 428.

A third problem OLC has encountered is that of "overruling." When is the Office of Legal Counsel justified in overruling one of its own past opinions, particularly on questions of statutory or treaty interpretation where the underlying language or history of the legal instrument has not changed in the intervening period? On this point, the Office has tended to believe that its client is the institutional presidency, not any particular President. Thus, OLC has adopted a rule suggesting that past precedent should be accorded a certain measure of *stare decisis* from administration to administration, even if those administrations represent different political parties and strikingly different political philosophies.¹³

The cited examples starkly illustrate why OLC should honor its own rules. The *North* case¹⁴ stands as perhaps the classic example of a case that was underlawyered going in, and hence overlawyered going out. Apparently, OLC did not render legal advice to the Attorney General at the outset of the Iran-Contra Affair.¹⁵ To my knowledge, the only two legal opinions sought by the executive branch as the affair began were a controversial opinion by the CIA's general counsel suggesting that the President could make an intelligence finding retroactively¹⁶ and a cursory analysis of the applicability of the Boland amendments (which Oliver North hid in his White House safe) that was authored by an attorney who had failed the bar examination four times.¹⁷ Thus, it was not until 1988, two years into the Iran-Contra Affair and well into the Oliver North prosecution, that the Office of Legal Counsel was finally assigned the task of defending the executive branch's position, which it did with an extreme brief broadly denying that Congress, the courts, or the Independent Counsel had any significant role to play in checking North's conduct.¹⁸ It will never be known whether OLC would have written the same legal position, had it been consulted early in the affair when the government was not already locked into its legal position.¹⁹ But when our government

¹³ See, e.g., David A. Strauss, *Presidential Interpretation of the Constitution*, 15 *CARDOZO L. REV.* 113, 127-28 (1993). One example of this continuity is the President's consistent opposition to the constitutionality of the legislative veto, which ultimately culminated in the Supreme Court's decision striking down that device. See *INS v. Chadha*, 462 U.S. 919 (1983).

¹⁴ *United States v. North*, 910 F.2d 940 (D.C. Cir.), *cert. denied*, 111 S. Ct. 2235 (1990).

¹⁵ As President Reagan's White House counsel later recalled, "[o]ne of the real problems with the Iran-Contra episode was that not only was it not well-lawyered, but it was not lawyered in most respects." Vicki Quade, *The President Is His Only Client*, *BARRISTER*, Winter-Spring 1988, at 4, 7 (interview with A.B. Culvahouse, Jr., Counsel to the President).

¹⁶ See Kirk Victor, *CIA Counsel's Role Questioned*, *NAT'L L.J.*, Feb. 2, 1987, at 3, 8.

¹⁷ See Fox Butterfield, *Key Contra Ruling Claimed by Novice*, *N.Y. TIMES*, June 9, 1987, at A1.

¹⁸ See *KOH*, *supra* note 2, at 28-29.

¹⁹ In at least one analogous case, the Reagan administration's attempted "reinterpretation"

commits itself to a political position and then becomes locked in, with a weak legal opinion or no legal opinion at the front end, the OLC legal opinion that finally issues will be suspect precisely because we can no longer be certain that its result has not been "precooked."

The second problem, opacity, highlights the pressing need to publish OLC opinions promptly and to make them widely available. Publication serves at least three purposes: first, accessibility; second, unveiling the factual predicate upon which an opinion is based; and third and most important, to prevent the client (or third parties who acquire an OLC opinion as "holders in due course") from stripping a carefully nuanced opinion of all its subtleties and thereby reducing it to the simplistic conclusion that "OLC says we can do it."

The need to make OLC opinions more accessible was recently brought home in a graphic way during the Haitian refugee litigation. Under a new policy first announced in May 1992, the United States government has been interdicting and returning to Haiti, without process, any boats containing fleeing Haitian refugees that are stopped in international waters, pursuant to President Bush's "Kennebunkport Order."²⁰ In early November 1992, the Coast Guard intercepted a boatload of Haitians ten miles off the coast of Florida and began making plans to repatriate them to Haiti, based apparently on the mistaken impression that the territorial sea begins three, rather than twelve, miles off the United States coastline. As counsel for the Haitian class members, I knew that in 1988 the President had issued a proclamation extending our territorial sea from three to twelve miles in breadth, but at first I could not locate the OLC opinion that underlay that proclamation.²¹ By utter chance, I glanced at Doug Kmiec's draft paper to this conference—which had just arrived in the mail—and learned that the only place where that opinion was then published was an obscure law review called the *Territorial Sea Journal*.²² Using that cite, my students and I were able to intercede with the Coast Guard and draw the opinion to their attention. After the Coast

of the Anti-Ballistic Missile Treaty to accommodate the Strategic Defense Initiative, the Legal Adviser of the State Department became similarly locked into a broad reinterpretation (later withdrawn by the Clinton administration) that he had asserted, apparently with less than full analysis, shortly after he assumed office. See generally Harold H. Koh, *The President Versus the Senate in Treaty Interpretation: What's All the Fuss About?*, 15 YALE J. INT'L LAW 331 (1990); Harold H. Koh et al., *The Treaty Power*, 43 U. MIAMI L. REV. 101 (1988).

²⁰ For further description of this policy, see Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350 (2d Cir. 1992), *rev'd sub nom.* Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 2549 (1993).

²¹ Proclamation No. 5928, 3 C.F.R. § 547 (1988), *reprinted in* 43 U.S.C. § 1331 (1989).

²² See Douglas W. Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 TERR. SEA J. 1 (1990), *cited in* Kmiec, *supra* note 1, at 363 n.100.

Guard consulted with the State and Justice Departments, they then brought the boat into shore, rather than repatriating its occupants to Haiti. Suffice it to say that matters of such consequence should not turn on happenstance of this kind. Had that OLC opinion continued to languish in obscurity, I simply do not know what would have happened.

The costs of failing to publish were again revealed in the *Alvarez-Machain* case,²³ which involved the official United States government's kidnapping of a criminal suspect from Mexico in the face of a United States-Mexico extradition treaty that nowhere authorized state-sponsored kidnapping. Based on the contemporaneous understanding of the contracting parties, there was no need for the treaty to prohibit state-sponsored kidnapping explicitly, because that conduct breaks one of the clearest rules of international law—that one sovereign shall not violate the territory of another. Indeed, only two months after the treaty entered into force, while the extraterritorial abduction of rogue financier Robert Vesco was being contemplated, the Office of Legal Counsel issued an opinion which concluded that “the FBI only has lawful authority [to engage in extraterritorial apprehension] when the asylum state acquiesces to the proposed operation.”²⁴ OLC reasoned that,

a forcible abduction, when coupled with a protest by the asylum state is a violation of international law. . . . It is regarded as an impermissible invasion of the territorial integrity of another state. . . . Nor do there appear to be any doctrines of self-help or self-defense applicable in this context.²⁵

All of this would seem unremarkable if in June 1989, the Office of Legal Counsel had not issued a second, *confidential* opinion partially reversing the 1980 opinion. Over the next few years, OLC rebuffed repeated congressional efforts to obtain that opinion, citing both attorney-client and executive privilege. Yet in congressional testimony delivered in November 1989, then Assistant Attorney General William Barr testified before a House subcommittee that “the content of the 1989 Opinion . . . must remain confidential,” but added that he was “happy to share with the Committee our legal reasoning and con-

²³ *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

²⁴ *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B Op. Off. Legal Counsel 543, 544 (1980).

²⁵ *Id.* at 549. The 1980 OLC opinion also concluded that the FBI could not apprehend fugitives in contravention of international law under its general enabling statutes, reasoning that those statutes must be construed restrictively to prohibit any departure from the standards of international law. *Id.* at 551-53.

clusions.”²⁶ Barr went on to concede that extraterritorial apprehension departs from customary international law, but argued that the President could override it, claiming that the “1989 Opinion does not address the legal implications of deploying the FBI in violation of provisions of self-executing treaties or treaties that have been implemented by legislation,” a category that includes extradition treaties.²⁷

Barr’s continuing refusal to release the 1989 opinion left outsiders with no way to tell whether it rested on factual assumptions that did not apply to the earlier situation, which part of the earlier opinion had not been overruled, or whether the overruling opinion contained nuances, subtleties, or exceptions that Barr’s summary in testimony simply omitted. Although I understand that the 1989 opinion has now finally been published, four years after the fact,²⁸ during the intervening period OLC acted as if a prior opinion had been overruled without ever clarifying on what factual basis the later opinion rested or explaining precisely why the previous opinion was wrongly reasoned.

What makes this failure to disclose particularly egregious is that while the 1989 opinion remained confidential, the Justice Department argued and won the *Alvarez-Machain* case before the Supreme Court.²⁹ When the Justice Department overrules a prior opinion that is less than a decade old—claiming for the first time general executive authority not simply to override customary international law, but to read a kidnapping exception into a duly ratified treaty—the least that OLC could do is to explain itself publicly, particularly when a related matter is pending before the United States Supreme Court.

The issue of overruling arose yet again in the Haitian refugee litigation, which brought into question not one, but two, OLC opinions. In 1981, the United States government began the practice of “interdicting” Haitians fleeing on the high seas and “screening” them (e.g., determining whether or not they have a credible fear of political persecution). Those who were found to have such a credible fear—the so-called “screened-ins”—were brought to the United States to

²⁶ *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 9, 11 (1989) (statement of William P. Barr, Assistant Attorney General, Off. of Legal Counsel, U.S. Dep’t of Justice).

²⁷ *Id.* at 12.

²⁸ I am now told that four years later, on January 15, 1993, the Office of Legal Counsel finally released a preliminary print of opinions from 1983-1992 which included the infamous “snatch authority” opinion. See McGinnis, *supra* note 1, at 376 n.1.

²⁹ *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

pursue their asylum claims, while those found wanting—the “screened-outs”—were returned to Haiti.

Both the Coast Guard and the Immigration and Naturalization Service followed this program of interdiction plus screening for more than a decade. After the overthrow of President Jean-Bertrand Aristide in the fall of 1991 however, Haitians began fleeing by boat in large numbers, causing the Bush administration to change the policy in two respects. First, rather than bringing screened-in Haitians directly to the United States, the government began holding them in barbed wire camps on the United States Naval Base in Guantanamo Bay, Cuba. In response to protests by refugee advocates that this practice violated the Haitians’ due process rights, the government responded that the Haitians had no rights while on Guantanamo, because they were being held outside the United States and therefore did not enjoy the benefits of United States law. Second, in late May 1992, the Bush administration simply dispensed with the screening process and began returning all fleeing Haitians directly to Haiti without any kind of screening whatsoever, a practice that the Second Circuit invalidated, but which the Clinton administration eventually defended before the Supreme Court.³⁰

Upon examination, neither practice—claiming that aliens have no rights on Guantanamo or dispensing with screening altogether—could be reconciled with past OLC opinions. The United States government had not lightly instituted the screening procedure in 1981. To the contrary, in 1968 the United States had acceded to the United Nation’s Protocol Relating to the Status of Refugees,³¹ thereby accepting as domestic law Article 33 of the 1951 Refugee Convention, which mandates “[n]o Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his . . . political opinion.”³² Upon evaluating the legality of the proposed interdiction in 1981, OLC concluded that even on the high seas, Article 33 obliged the United States to ensure that interdicted Haitians “who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims” through some kind of screening process.³³ This opinion was reaffirmed in a subsequent

³⁰ See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

³¹ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.

³² Convention Relating to the Status of Refugees, Jan. 31, 1967, art. 33, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176.

³³ 5 Op. Off. Legal Counsel 242, 248 (1981).

OLC memorandum written the same year.³⁴ Based on a fair reading of that opinion, along with subsequent legal instruments governing Haitian interdiction,³⁵ my colleagues and I at Yale's Lowenstein International Human Rights Clinic concluded that the United States government, in intercepting and returning Haitians on the high seas, was strictly bound by Article 33's principle of non-return.

Furthermore, in paging through old OLC opinions, I ran across a charming 1982 opinion entitled *Installation of Slot Machines on U.S. Naval Base, Guantanamo Bay*.³⁶ In that opinion, OLC determined that "[t]he base at Guantanamo Bay . . . operates under an unusual international agreement with the Republic of Cuba which authorizes the United States to exercise complete jurisdiction and control" there, and concluded that the so-called Anti-Slot Machine Act³⁷ applies on Guantanamo.³⁸ If the Anti-Slot Machine Act applies on Guantanamo, we reasoned, then so too must the Fifth Amendment's Due Process Clause!

As it turned out, the Second Circuit later sustained both legal conclusions: that the non-return principle applies on the high seas and that the Due Process Clause applies on Guantanamo.³⁹ Imagine our

³⁴ Memorandum from Larry L. Simms, Deputy Assistant Att'y Gen., Off. of Legal Counsel, to the Assoc. Att'y Gen. (Aug. 5, 1981) ("Those who claim to be refugees must be given a chance to substantiate their claims [under Article 33]."), quoted in Joint Appendix at 222, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) [hereinafter Flanigan Memorandum] (on file with author).

³⁵ Prior to the issuance of President Bush's Kennebunkport Order in May 1992, every legal instrument governing Haitian interdiction mandated that the U.S. government, in intercepting and returning Haitians on the high seas, strictly observe Article 33's principle of non-return. See Agreement Effected by Exchange of Notes, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559 (citing "the international obligation mandated in the Protocol" and promising that the United States did not intend to return "any Haitian migrants whom the United States authorities determine to qualify for refugee status." *Id.* at 3559-60); Exec. Order No. 12,324, § 2(c)(3), 46 Fed. Reg. 48,109 (1981) (requiring that the INS and Coast Guard take whatever steps necessary to guarantee "the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland" and to ensure that "no person who is a political refugee will be returned without his consent"); IMMIGRATION AND NATURALIZATION SERVICE, INS ROLE IN AND GUIDELINES FOR INTERDICTION AT SEA (1981) (mandating that INS personnel be constantly watchful "for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol").

³⁶ 6 Op. Off. Legal Counsel 236 (1982).

³⁷ Anti-Slot Machine Act, 15 U.S.C. § 1175 (1989).

³⁸ 6 Op. Off. Legal Counsel 236, 237 (1982).

³⁹ See *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), vacated as moot *sub nom.* *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992), *rev'd sub nom.* *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993); *Haitian Ctrs. Council, Inc. v. Sale*, No. 92-CV-1258, 1993 U.S. Dist. LEXIS 8215 (E.D.N.Y. June 8, 1993) (permanent injunction ordering release of Haitians being held on Guantanamo).

surprise then, when we filed the *Haitian Centers Council* suit against the government relying in part on our reading of OLC's own opinions, and the government responded by seeking Rule 11 sanctions⁴⁰ against us for filing a "frivolous" lawsuit and a \$10 million bond, one of the largest ever requested.

My colleagues and I later learned that in fact, OLC had overruled its 1981 published opinion in an unpublished opinion letter drafted during the course of prior Haitian refugee litigation.⁴¹ Thus, this later OLC opinion, which justified the Bush summary return program, illustrates both the problems of opacity and lock-in. The overruling opinion was neither accessible nor, in my view, reliable, given that neither the text nor the operative legal provisions of any of the key instruments had been amended during the intervening period. Moreover, the overruling opinion was clearly drafted in haste during litigation, precisely the circumstance in which OLC is locked-in and hence, incapable of taking a balanced, neutral look at the law.

These experiences have left me with a few lessons, which I leave in turn as unsolicited advice for the new Assistant Attorney General of OLC. For the first time in twelve years, a Democratic administration has supplanted three consecutive Republican ones. During the presidential campaign, President Clinton promised to change numerous Bush policies and executive orders regarding the retroactivity of the 1991 Civil Rights Act,⁴² the restriction against gays and lesbians serving in the military,⁴³ the abortion counseling gag rule,⁴⁴ not to mention the Bush executive order governing summary return of Haitian refugees.⁴⁵ My bittersweet experience litigating the Haitian refugee case against the Clinton administration has taught me that all of those changes may not swiftly occur. But over time, I would expect

⁴⁰ FED. R. CIV. P. 11.

⁴¹ See Memorandum from Timothy E. Flanigan, Acting Assistant Att'y Gen., Off. of Legal Counsel, to Edwin D. Williamson, Legal Adviser, Dep't of State (Dec. 12, 1991). This memorandum concurred with a memorandum received the previous day from the Legal Adviser of the State Department. The Legal Adviser's memo, which repudiated OLC's 1981 legal conclusions, relied on the newly uncovered negotiating history of the Refugee Convention, which purported to show that Article 33 did not apply on the high seas. Significantly, the new memo was drafted about one month *after* the United States had been sued about the legality of the Haitian interdiction program in *Haitian Refugee Ctrs., Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992).

⁴² Neil A. Lewis, *Justice Dept. Seeks to Apply '91 Bias Law Retroactively*, N.Y. TIMES, Apr. 1, 1993, at 9.

⁴³ *Excerpts From President-Elect's News Conference in Arkansas*, N.Y. TIMES, Nov. 13, 1992, at A18.

⁴⁴ *Id.*

⁴⁵ Steven A. Holmes, *Haitian Leader Calls on Clinton to Set a Deadline For His Return*, N.Y. TIMES, Mar. 5, 1993, at 3.

to see a certain amount of overruling of past OLC opinions from the new administration.

What steps can OLC's new chair take to protect the Office from itself? I can suggest three. First, that he try wherever possible to offer the Office's legal advice on matters *before* and not after the United States government has become irrevocably locked into its position on those matters. Moreover, to avert lock-in before it happens, he should take special pains to ensure that OLC does not come to play the same role vis-à-vis the White House Counsel's Office that the State Department has too often played with regard to the National Security Council in recent administrations, namely, the President's legal counselor of second, rather than first, resort. Second, he should attack the problem of opacity by ensuring prompt and full publication of OLC opinions, particularly those that either wholly or partially overrule past-published OLC opinions.

Third and most important, in the first major opinion overruling a past OLC opinion, the new Assistant Attorney General should publicly state the principles that govern overruling in the Office of Legal Counsel. In articulating such principles, he can begin, but need not end, with part III of the opinion by Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴⁶ That opinion urges judicial adherence to the principle of stare decisis to a rule unless it has been found unworkable, can be removed without serious inequity to those who have relied upon it, has been rendered "a doctrinal anachronism discounted by society," or its factual premises have so far changed as to render its central holding somehow irrelevant or unjustifiable.⁴⁷ OLC needs to articulate its own *Casey* principles, and soon, to prevent repeated, untimely replays of *Alvarez-Machain* and the Haitian cases.

In short, OLC must be protected from its own eagerness to please. The skill of the next few Assistant Attorneys General in designing such protections will help determine whether the integrity and reputation of that great Office will remain ones of which we, its alumni and most avid observers, can remain justifiably proud.

⁴⁶ 112 S. Ct. 2791, 2808 (1992).

⁴⁷ *Id.* at 2808-11.