

# Government Lawyers in the Trump Administration

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*The words and actions of candidate, President-Elect, and now President Donald Trump indicate that this administration will aggressively seek to use state power with little regard for the rule of law. A great deal has been written about the constitutional and administrative law regulating inter and intra branch separation of powers. However, there is no comprehensive legal and theoretical analysis of government lawyers as lawyers.*

*This Article engages with numerous contested issues in the law of lawyering, the history of unethical behavior by government attorneys, and jurisprudence to provide a constructive legal and ethical conception of government legal advisors. In practical terms, it may serve as a source of guidance for lawyers in the new administration, or as a roadmap for discipline by lawyer regulators. More theoretically, it defends a conception of the rule of law as a practice of reason-giving, not dependent upon legal objectivity or determinacy. The Executive Order banning travel to the United States from several Muslim-majority countries, and the subsequent firing of Acting Attorney General Sally Yates, are case studies illustrating the ethical analysis in this Article.*

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## INTRODUCTION:

## THE TRUMP ADMINISTRATION AND THE RULE OF LAW

Lawyers in President Donald Trump’s administration have already faced, and will continue to face, unprecedented pressure to approve unlawful policies and actions. What should an ethical lawyer do under these circumstances? The President is entitled to have his policy positions respected and implemented by Executive Branch actors. Lawyers who advise the Executive Branch are obligated, by generally applicable agency law, rules of professional conduct, and longstanding traditions of professional ethics, to seek to further the client’s lawful

objectives.<sup>1</sup> While any official “elected or appointed to an office of honor or profit in the civil service” must take an oath to support and defend the Constitution,<sup>2</sup> lawyers have additional obligations. A lawyer may not “counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”<sup>3</sup> Depending on the nature of the client’s proposed course of conduct and the lawyer’s state of mind with respect to it, a lawyer may have at least the right, and possibly also the duty, to refuse to provide assistance. Lawyers also have duties of competence,<sup>4</sup> communication,<sup>5</sup> and independence.<sup>6</sup> These professional norms add up to an institutional embodiment of the political ideal of the rule of law, and a vision of professionalism that locates the ethical value of the legal profession in sustaining a common social framework of rights and duties that contributes to the stability and the protection of the equality and dignity of citizens.<sup>7</sup>

However, we are all legal realists now.<sup>8</sup> Law is, to a considerable extent, an autonomous discursive practice that involves giving reasons of a particular type. These reasons emphasize considerations such as generality, consistency, integrity, publicity, stability, and systematicity.<sup>9</sup>

1. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (AM. LAW INST. 2000).

2. 5 U.S.C. § 3331 (2012). Executive branch constitutionalism is now a well-recognized feature of our system of checks and balances. *See, e.g.*, Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 687 (2005); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L. & CONTEMP. PROBS. 105, 117 (2004); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (arguing that the increasing practice by presidents of using the executive branch agencies as extensions of their policies and political agendas comport with the law because Congress should be understood to have left authority to the President to direct his executive branch officials); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 566 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (arguing that the current presidential power over every party involved in executing laws is a large departure from the Framers’ original vision of the executive branch’s role).

3. MODEL RULES OF PROF’L CONDUCT r. 1.2(d) (AM. BAR ASS’N 2003). State courts adopt rules of professional conduct pursuant to their inherent authority to regulate the practice of law. *See* LAW GOVERNING LAWYERS: REGULATION OF LAWYERS—IN GEN. § 1 cmt. c; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.2 (1986). To avoid the tedious repetition of “Model Rules” in main text, I will refer to them as Rule xx, unless it is necessary to distinguish Model Rules from state versions.

4. PROF’L CONDUCT r. 1.1; LAW GOVERNING LAWYERS § 52(1).

5. PROF’L CONDUCT r. 1.4; LAW GOVERNING LAWYERS § 20.

6. PROF’L CONDUCT r. 2.1.

7. *See* SCOTT J. SHAPIRO, LEGALITY (2011); W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010).

8. Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927–1960 (1986)). The relationship between legal realism and the ethical duties of lawyers has long been recognized. *See, e.g.*, Benjamin C. Zipursky, *Legal Positivism and the Good Lawyer: A Commentary on W. Bradley Wendel’s Lawyers and Fidelity to Law*, 24 GEO. J. LEGAL ETHICS 1165 (2011); Tim Dare, *Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers*, 7 LEGAL ETHICS 24 (2004); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990); David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 (1987).

9. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 44 (2008); *see also* Scott

The theory of the rule of law will be developed in the pages that follow. For now, the important point about realism is that a citizen subject to law and a lawyer representing a client may conceivably adopt a range of interpretive attitudes toward the law. However, the law cannot specify in advance the interpretive attitude one is obligated to adopt. A significant normative question is therefore left open, concerning the interpretive attitude a lawyer ought to take with respect to the law. A client or lawyer may act as the proverbial Holmesian bad man, interested only in knowing the severity and likelihood of potential sanctions.<sup>10</sup> A client or lawyer might be interested in knowing what the law requires, not just what it begrudgingly allows, but even in that case the law may admit a range of interpretations, and the answer to the question “is it legally permissible to do X?” may depend on how aggressively one is willing to push the law’s boundaries.

Lawyers serve in advisory roles throughout the Executive Branch. The most studied are lawyers in the Office of Legal Counsel (“OLC”), which exercises authority delegated by the Attorney General to advise the President in his capacity as head of the Executive Branch; a sophisticated literature exists analyzing the duties of lawyers in the OLC as a matter of constitutional law.<sup>11</sup> In addition, lawyers in the White House Counsel’s Office provide legal advice concerning political appointments to Executive Branch agencies, conflicts of interest and other ethical obligations of presidential staff, the President’s relationship with the Justice Department and Congress, and presidential authority generally.<sup>12</sup> There are also, of course, thousands of career civil-service lawyers employed within government, some of whom exercise significant compliance and policy-making responsibilities.<sup>13</sup> The question is what ethical responsibilities, as a matter of legal regulation and normative ethical theory, do these lawyers have when dealing with a President who

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Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1202 (2015).

10. Holmes famously proposed that if you want to know what the law is, you should ask a bad man. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459–62 (1897).

11. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007) (by examining the actions taken by the Bush Administration, Professor Johnsen analyzes executive branch legal interpretation and builds upon a best practices statement for the White House Office of Legal Counsel); Pillard, *supra* note 2 (examining the White House Office of Legal Counsel’s “torture memos” to illustrate how executive branch lawyers failed to provide interpretations in good faith of governing law).

12. See, e.g., Maryanne Borrelli et al., *The White House Counsel’s Office*, in *THE WHITE HOUSE WORLD: TRANSITIONS, ORGANIZATION, AND OFFICE OPERATIONS* 193 (Martha Joynt Kumar & Terry Sullivan, eds., 2003).

13. See, e.g., David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 23 (2012) (focusing on “civil service legalism”); Thomas W. Merrill, *High-Level, “Tenured” Lawyers*, 61 L. & CONTEMP. PROBS. 83, 84 (1998) (describing lawyers in the “mixing zone” between the high-level civil service lawyer and the bottom of the thin layer of political appointees).

appears to take an unusually dismissive stance toward legal limitations on his executive power. This is not another discussion of whether “judicial supremacy” or “departmentalism” is the best conception of the *constitutional* obligations of government officials.<sup>14</sup> Rather, the issue is the *ethical* obligations of lawyers *as lawyers*, when they are advising government decisionmakers. What constrains the lawyer in taking an aggressive interpretive stance? The public interest?<sup>15</sup> The President’s preferences? Something inherent in the concept of law or the political value of the rule of law? Lawyers advising the President need some normative theoretical response.

Historical practices do not reveal a consensus on the appropriate stance a legal advisor should take with respect to the law. George Washington is reported to have told his first Attorney General, Edmund Randolph, that he wished for a “skilled, neutral expounder of the law rather than a political advisor.”<sup>16</sup> This has been described as a quasi-judicial role, and has been advanced by some high-level government lawyers as the ideal for all legal advisors.<sup>17</sup> Andrew Jackson, on the other hand, supposedly said to his chief legal advisor, “You must find a law authorizing the act or I will appoint an Attorney General who

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14. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (interpreting the founding of the United States, emphasizing the ideals of popular sovereignty, and illustrating how personal and active living under the Constitution was for early Americans); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 43 (1993); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) (analyzing the Court’s use of the *Chevron* Test in understanding how much deference the modern court gives to the executive branch’s interpretation of laws); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986) (arguing the weight of judicial supremacy, legislative supremacy, and departmentalism, which ultimately advocates for departmentalism); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (arguing against judicial supremacy and for the executive branch’s co-equal interpretive authority with the courts); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373 (1994) (responding to Michael Stokes Paulsen’s article, *The Most Dangerous Branch*, and a questioning of Paulsen and his critics); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (challenging traditional American views of judicial review and judicial supremacy by urging for the creation of a populist constitutional law, in which judicial declarations are given no special consideration).

15. In an influential article, Geoffrey Miller argues that government lawyers should not act on their own conception of the public interest, because the Constitution establishes a procedure for approximating the content of this ideal, through elections, political appointment of agency heads, and so on. Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294–95 (1987).

16. Griffin B. Bell, *Office of Attorney General’s Client Relationship*, 36 BUS. LAW. 791, 791 (1981).

17. See Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1309 (2000) (quoting President Franklin Pierce’s Attorney General, Caleb Cushing).

will.”<sup>18</sup> Repeated statements by the President indicate that his expectations for legal advisors are much closer to Jackson’s than Washington’s. To be clear, I believe there is nothing wrong with government lawyers helping their clients come up with novel and creative ways to accomplish their objectives.<sup>19</sup> A President may require the lawyers in his administration to be flexible, open-minded, and even a bit aggressive in looking for lawful alternative means to implement the President’s policies. However, there is a difference between doggedly seeking a lawful solution to problems facing a President and his administration and assisting government officials in unlawful conduct. Legal realism compounds the problem of prescribing interpretive attitudes for legal advisors. This Article contends that a normative model of legal advising can be constructed, not from history or theory alone, but from a constructive interpretation of the law governing lawyers.

The constraining function of the law governing lawyers is surprisingly underappreciated in the literature on government lawyers’ advising function. This law, including state rules of professional conduct, establishes limitations on what lawyers ethically may do while representing any client, including a government official.<sup>20</sup> Government lawyers who consider only the constitutional law that applies to an issue may overlook the rules of professional conduct that apply to all lawyers qua lawyers. Some of these norms may be systematically under-enforced. For example, the rule requiring a lawyer to give independent advice to a client, even if unwelcome,<sup>21</sup> is unlikely to be the frequent basis for a disciplinary grievance filed by the client against the lawyer. It is more likely that the client will simply fire the lawyer or ignore the lawyer’s advice. This does not mean, however, that the duty to provide independent advice is somehow not a genuine one. It is a familiar insight that under-enforced political rights merely shift responsibility from the

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18. CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 18 (1992). The quote is apocryphal but its persistence “stems from its power as parable. Every attorney general knows that the day may come when the president will make the blunt point Jackson supposedly made to Taney.” HAROLD H. BRUFF, *BAD ADVICE: BUSH’S LAWYERS IN THE WAR ON TERROR* 26 (2009).

19. See GOLDSMITH, *supra* note 11, at 35; Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17 (1995) (arguing that the role of White House Counsel should be more realistic in its representation of the President and the Office and the counsel’s role should be determined by ordinary incentive structures, rather than by professional norms or legal requirements).

20. I intend to focus here on the regulation of government lawyers *as lawyers*, and will not take into account statutes and regulations that apply to all government employees, including lawyers. This Article does not consider, for example, the Ethics in Government Act, 5 U.S.C. app. § 101, *et seq.*, or statutory conflict of interest rules such as 18 U.S.C. § 207.

21. MODEL RULES OF PROF’L CONDUCT R. 2.1 (AM. BAR ASS’N 2003). Comment 1 to Rule 2.1 states: “Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. . . . However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.” *Id.*

judiciary to other institutional actors.<sup>22</sup> Similarly, in the case of under-enforced professional duties, lawyers themselves must take up the slack where state disciplinary authorities do not have the resources to fully enforce the rules of conduct. Otherwise the claim of lawyers to belong to a *profession* is nothing more than a self-serving rhetorical effort at legitimating its relative freedom from intrusive regulation by other institutions.<sup>23</sup> In any event, no complete account of the ethical obligations of government lawyers can proceed without a thorough understanding of the legal regulation of lawyers.

In the months following the September 11th terrorist attacks, lawyers in the Office of Legal Counsel (“OLC”) were called upon to provide legal advice concerning the treatment of detainees. They provided advisory memoranda on the permissibility of the use of so-called “enhanced interrogation techniques.” This advice subsequently came under scrutiny from the Justice Department’s Office of Professional Responsibility (“OPR”).<sup>24</sup> The OPR concluded that two lawyers, John Yoo and Jay Bybee, engaged in professional misconduct by failing to provide “thorough, objective, and candid” legal analysis.<sup>25</sup> A senior lawyer in the Justice Department declined to adopt the OPR’s findings,<sup>26</sup> for reasons

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22. See LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 93–128 (2004); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (arguing that when the federal judiciary refuses to enforce constitutional norms out of concern for institutional issues, Congress and state courts must be allowed to step in and enforce the norm to the extent that it is valid and enforceable).

23. For examples of powerful arguments supporting this notion, see Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992) (arguing that the legal profession’s vision of ethical conduct—its *nomos*—is only one among a plurality of competing ethical visions); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 667 (1981).

24. See, e.g., BRUFF, *supra* note 18; GOLDSMITH, *supra* note 11 (critiquing the Bush Administration justifications for their inflation of presidential powers and the legal advice provided to the Administration with regards to such acts as enhanced interrogation techniques and wire tapping American citizens); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008) (narrating an account of the United States’ involvement in pursuing terrorists and the impact of the key players’ exploitation of the September 11 attacks to further an agenda to enhance executive powers); DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 162–205 (2007); PHILIPPE SANDS, TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES (2008) (investigating the Rumsfeld Memo, authorizing controversial interrogation techniques, served as a divergence from the Geneva Convention and the Torture Convention, and holding key players in the Bush Administration accountable for their failure to abide by international law); W. Bradley Wendel, *Executive Branch Lawyers in a Time of Terror: The 2008 F.W. Wickwire Memorial Lecture*, 31 DALHOUSIE L.J. 247 (2008).

25. See DEP’T OF JUSTICE, OFFICE OF PROF’L RESP., REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 260 (2009).

26. See Memorandum from David Margolis, Assoc. Deputy Attorney Gen., to the Attorney Gen., on Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists (Jan. 5, 2010).

discussed below,<sup>27</sup> but stated that it was a close question and the advice provided by the lawyers represents an “unfortunate chapter in the history of the Office of Legal Counsel.”<sup>28</sup> As I will argue, many aspects of the OPR report’s analysis of the duty to provide objective legal advice are sound, and represent not an aspirational standard for Department of Justice lawyers; they are basic, mandatory obligations for all lawyers.<sup>29</sup> Lawyers in the current administration should carefully consider this interpretation of the rules of professional conduct and the background law of lawyering. To put the point more sharply, this Article might be seen as a roadmap for *ex post* professional discipline for lawyers in the Trump administration who engage in similar abusive manipulation of the law on behalf of their political superiors. More positively, it can be regarded as an *ex ante* guide for government lawyers to avoid discipline, or who are considering responses such as whistleblowing and resignation.

Having said that, I am well aware of the risk of using disciplinary proceedings to re-litigate political disputes. Courts and disciplinary authorities are properly reluctant to second-guess the professional judgment of lawyers, even in ordinary private-client representations. They should be even more reluctant to become involved if disciplinary proceedings or lawsuits are being “weaponized” in a political conflict. The government would not be well served by lawyers who fear being caught up in time-consuming, expensive disciplinary proceedings for giving candid advice that turned out to be a political liability. The risk of creating a chilling effect on lawyers providing unpopular advice is not to be disregarded. But the answer cannot be that no institution will serve to monitor the compliance of lawyers with legal and ethical standards. The legal profession claims to be self-regulating, not unregulated.<sup>30</sup> Someone has to guard the guardians of the rule of law within the government. The political ideal of the rule of law provides ethical guidance or constraint to government lawyers that is, at least in principle, independent of the policy preferences of the President. However, one must first disentangle it from a great deal of baggage, ranging from the assumption that if there is not one right answer to a question of law, then there are no ethical constraints on a lawyer’s advice, to the assumption that lawyers serving as counselors must reason as though they were writing a judicial opinion.

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27. See *infra* Part II.D.

28. Margolis, *supra* note 26, at 67.

29. See *id.* at 68 (“... OPR’s analysis in this case depends on an analytical standard that reflects the Department’s high expectations of its OLC attorneys rather than the somewhat lower standards imposed by applicable Rules of Professional Conduct.”).

30. MODEL RULES OF PROF’L CONDUCT Preamble 12 (AM. BAR ASS’N 2003) (“The legal profession’s relative autonomy carries with it special responsibilities of self-government.”).



Competent professional representation does not require getting the right answer, nor does it depend on a strong conception of legal determinacy.

Part I argues that lawyers in the Trump Administration will continue to experience intense pressure to compromise their ethical responsibilities. Several episodes early in the administration, including the firing of Acting Attorney General Sally Yates, the even more troubling firing of Federal Bureau of Investigation (“FBI”) Director James Comey, and Trump’s anger at his own Attorney General Jeff Sessions for following established procedures, reveal the President’s contempt for the ideal of the impartial administration of the law. These episodes are consistent with much of Trump’s rhetoric as a candidate, including his promise to pursue a politically motivated prosecution against Hillary Clinton.<sup>31</sup> Although his penchant for speaking hyperbolically is well known, it appears that Trump meant exactly what he said in many cases. Thus, for government lawyers who find themselves caught between their professional obligations and the demands of political superiors, the remainder of the article is intended as a roadmap to the doctrinal and theoretical basis for legal liability and criticism in ethical terms.

Part II sets out the legal basis for disciplining government lawyers who provide assistance to unlawful conduct. It considers numerous contested issues in the law of lawyering, including the disciplinary authority of state courts, the identity of the client of government lawyers, whether government and private lawyers have different ethical obligations, the requirement of providing candid advice, confidentiality and whistleblowing, and the permission of lawyers to withdraw from employment. The aim is not simply to provide an overview of the governing law. Rather, the discussion is intended to address several specific issues that have been controversial, argue for the best resolution of each of them, and then to draw the analysis together into a large-scale “immanent rationality” of the legal regulation of government lawyers.<sup>32</sup> The conclusion of this analysis is a constructive ethical vision of the responsibilities of government lawyers as having fiduciary duties including loyal client service, creative problem-solving, competence and independence in advising, and respect for the rule of law. Government lawyers are not required, or even permitted, to act directly on what they perceive to be the public interest, or their own moral or political commitments. Rather, as agents of democratically accountable

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31. See Benjamin Wittes, *Grab ‘Em by the Constitution: Trump and the Justice Department*, LAWFARE (Oct. 10, 2016, 3:07 PM), <https://www.lawfareblog.com/grab-em-constitution-trump-and-justice-department> (quoting numerous reports of then-candidate Trump’s statements that Clinton was guilty of crimes and would be prosecuted for them).

32. See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 956–57 (1988).

government officials they should be guided by the President's priorities and the bounds of the law.

As Part III elaborates, however, the concept of the rule of law imposes significant constraints on legal advising. This thesis is sometimes interpreted—wrongly—as requiring an implausible conception of neutrality, objectivity, or right answers to legal questions. In fact, the rule of law is fundamentally about reason-giving.<sup>33</sup> The rule of law ideally requires that the exercise of government power be justified by a reasonable application of relevant legal authorities. Lawyers and scholars tend to focus on the conclusion of a legal argument instead of on the word “reasonable.” Ethical legal advising is characterized by a practice of reason-giving that responds to considerations of publicity, generality, clarity, impartiality, and the democratic process. The rule of law serves as a regulative ideal, and that is the vision of ethical legal advising defended in this Article.

### I. TRUMP'S THREATS TO THE RULE OF LAW

Criticisms of lawyers for the President tend to reflect disagreement with that President as a matter of ideology.<sup>34</sup> Distinguishing between a politically neutral critique of professional conduct and policy-based disagreement is particularly difficult when the head of the Executive Branch was maddeningly vague about policy during his campaign, and continues to be in the early stages of his administration. Complicating the analysis of Trump's views on the rule of law is his tendency to exaggerate, play to his base, contradict himself, and speak off the cuff on issues about which he knows very little.<sup>35</sup> One theme of post-election analysis is that Trump's critics erred by not taking him seriously but taking his statement literally, while his supporters took him seriously but did not take his statements literally.<sup>36</sup> Former campaign manager Corey Lewandowski, now a CNN commentator, said of the media, “You guys took everything Donald Trump said so literally. And the problem with

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33. For an admirable exception, see Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003).

34. See, e.g., Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1934 (2008) (“All too commonly, the call for independence functions merely to disguise dissatisfaction or disagreement with an administration's political goals . . .”). Jay Bybee's brief in response to the OPR Report raises the possibility that “[e]thics charges and bar complaints will become the licensed currency of political disagreements.” See Classified Response to the U.S. Department of Justice Office of Professional Responsibility Classified Report Dated July 29, 2009 at 4, Submitted on Behalf of Judge Jay S. Bybee (Oct. 9, 2009) [hereinafter Bybee Response].

35. See, e.g., Philip Bump, *Parsing Donald Trump's Confused, Confusing Explanation of Why He Doesn't “Use” Obamacare*, WASH. POST (Oct. 25, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/10/25/parsing-donald-trumps-confused-confusing-explanation-of-why-he-doesnt-use-obamacare/?utm\\_term=.0d7745b3de95](https://www.washingtonpost.com/news/the-fix/wp/2016/10/25/parsing-donald-trumps-confused-confusing-explanation-of-why-he-doesnt-use-obamacare/?utm_term=.0d7745b3de95) (quoting Trump seemingly misunderstanding the difference between employer-provided insurance and the individual market for health insurance).

36. See Salena Zito, *Taking Trump Seriously, Not Literally*, ATLANTIC, Sept. 23, 2016.

that is the American people didn't."<sup>37</sup> Some of the President's outrageous statements and public fights might be nothing more than a way to distract attention from actions that might attract controversy otherwise.<sup>38</sup> On the other hand, some actions of the administration suggest that taking the statements of candidate Trump literally was entirely warranted.

Even making allowances for the unscripted nature of Trump's campaign, the likelihood that anyone might misspeak over the course of months in the public eye, and his practice of stirring up controversy as a way of changing the story when his conduct is in question, Trump has been consistent in his disdain for the traditions of separation of powers, the limitations of presidential power, and the rule of law. Following is a non-exhaustive list of statements made by Trump, either during his campaign or the transitional phase prior to Inauguration Day, or his actions as President, which tend to reveal his beliefs about the relationship between power and the lawful means of exercising it. Relying on the principle of charity,<sup>39</sup> American citizens must assume that the statements of a presidential candidate communicate information about how the candidate intends to act in office. Even if a statement like Trump's threat to "open up" libel laws cannot be taken literally, because the President has no power to alter the state tort and federal constitutional law of defamation,<sup>40</sup> the statement does communicate a message about the candidate's attitude toward freedom of the press. My claim is simply that a lawyer deciding whether to work in the Trump administration would be well advised to consider what the statements below indicate about the President-elect's attitude toward legal constraints on his power.

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37. Jonah Goldberg, Opinion, *Take Trump Seriously but Not Literally? How, Exactly?*, L.A. TIMES (Dec. 6, 2016, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-goldberg-trump-seriously-literally-20161206-story.html>.

38. *Washington Post* columnist Dana Milbank refers to this as the "dead cat" strategy to distract attention from aggressive moves to consolidate Trump's power. Dana Milbank, Opinion, *Don't Get Distracted by Trump's 'Dead Cats'*, WASH. POST (Jan. 25, 2017), [https://www.washingtonpost.com/opinions/2017/01/25/e59a8ab6-e34a-11e6-ba11-63c4b4fb5a63\\_story.html](https://www.washingtonpost.com/opinions/2017/01/25/e59a8ab6-e34a-11e6-ba11-63c4b4fb5a63_story.html).

39. DONALD DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION 197 (2d ed. 2001).

40. See, e.g., Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO, Feb. 26, 2016, (reporting Trump's statement: "One of the things I'm going to do if I win, and I hope we do and we're certainly leading. I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected . . ."). Libel is, of course, a matter of state tort law with extensive constitutional limitations. See, e.g., RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:16 (2d ed. 1986 & Supp. 2016). Short of appointing enough Supreme Court Justices with an inclination to overrule *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), there is virtually nothing the President could do to affect the scope of a media defendant's liability for defamation in a lawsuit brought by a public figure or public official.

## A. TRUMP VS. THE FREE PRESS

During the campaign, Trump repeatedly expressed frustration with the way he was covered by the mainstream media. *The Washington Post* was a frequent target of his attacks. Before he hit back by revoking the paper's press credentials,<sup>41</sup> he explicitly threatened to retaliate against owner Jeff Bezos by targeting Amazon, which Mr. Bezos also owns, for scrutiny under tax and antitrust laws.<sup>42</sup> It is not clear from Trump's statement why he believes Amazon has an antitrust problem. The test for an antitrust violation is whether Amazon is engaging in illegal behavior that harms consumers, and Trump did not specify what this might be.<sup>43</sup> After taking office, an unnamed source within the administration stated that Trump regarded a pending merger between AT&T and CNN's parent company, Time Warner, as potential "leverage" over CNN, the administration's "adversary."<sup>44</sup> Again, the threat was to direct government lawyers to reach a negative judgment regarding the anti-competitive effects of a merger as a means of retaliating for negative press coverage. Mr. Bezos and CNN have reason to take these sorts of threats seriously. An investigation by a federal agency would be costly and disruptive. The Federal Trade Commission is an independent agency, but the Antitrust Division of the Department of Justice is under the control of the politically appointed Attorney General. Trump's statements may reasonably be interpreted as a warning to the owner of a high-profile media platform to tone down criticism of the President. Along with Trump's aggressive stance toward the press, including frequent episodes of banning journalists who criticized him during the

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41. See Margaret Sullivan, *Does It Matter That Donald Trump Has Banned Us? Not in the Way You'd Think*, WASH. POST (June 14, 2016), [https://www.washingtonpost.com/lifestyle/style/does-it-matter-that-donald-trump-has-banned-us-not-in-the-way-you-d-think/2016/06/14/e11aa0c2-324f-11e6-95c0-2a6873031302\\_story.html](https://www.washingtonpost.com/lifestyle/style/does-it-matter-that-donald-trump-has-banned-us-not-in-the-way-you-d-think/2016/06/14/e11aa0c2-324f-11e6-95c0-2a6873031302_story.html).

42. Paul Farhi, *'Not an Appropriate Way for a Presidential Candidate to Behave': Bezos Fires Back at Donald Trump*, WASH. POST (May 18, 2016), [https://www.washingtonpost.com/lifestyle/style/not-an-appropriate-way-for-a-presidential-candidate-to-behave-bezos-fires-back-at-donald-trump/2016/05/18/b72f5054-1d1a-11e6-8c7b-6931e66333e7\\_story.html](https://www.washingtonpost.com/lifestyle/style/not-an-appropriate-way-for-a-presidential-candidate-to-behave-bezos-fires-back-at-donald-trump/2016/05/18/b72f5054-1d1a-11e6-8c7b-6931e66333e7_story.html). Trump continued to refer to the paper as the "Amazon Washington Post" months after taking office. See, e.g., Dana Milbank, Opinion, *This Column Brought to You by the "Amazon Washington Post,"* WASH. POST, (July 25, 2017), [https://www.washingtonpost.com/opinions/this-column-brought-to-you-by-the-amazon-washington-post/2017/07/25/0189b49c-716f-11e7-8839-ec48ec4cae25\\_story.html](https://www.washingtonpost.com/opinions/this-column-brought-to-you-by-the-amazon-washington-post/2017/07/25/0189b49c-716f-11e7-8839-ec48ec4cae25_story.html).

43. Amazon has been criticized by publishers for setting low prices for electronic versions of books, and might be alleged to have engaged in predatory pricing, but it likely would not be found liable because it could justify low e-book prices as an investment that drives sales of its Kindle platform. See Zachary C. Flood, *Antitrust Enforcement in the Developing E-Book Market: Apple, Amazon, and the Future of the Publishing Industry*, 31 BERKELEY TECH. L.J. 879, 897–99 (2016). None of his public statements suggests that Trump had the e-book market in mind as Amazon's "antitrust problem."

44. See Philip Bump, *Would the Trump Administration Block a Merger Just to Punish CNN?*, WASH. POST (July 6, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/07/06/would-the-trump-administration-block-a-merger-just-to-punish-cnn>.

campaign,<sup>45</sup> his threats against Amazon and CNN were suggestive of a desire to use official power against critics.

After becoming President, Trump did not change his attitude toward a free and vigorous press. In addition to referring to the media as the “enemy of the people,”<sup>46</sup> tweeting an altered video showing himself repeatedly punching a figure with “CNN” superimposed over his face,<sup>47</sup> and repeatedly denouncing hard-hitting coverage as “fake news,”<sup>48</sup> he renewed his threat to attempt to change the law of defamation to allow him to bring lawsuits against media organizations whose coverage he deems unfair. Several months into his presidency, his chief of staff stated in an interview with ABC News that the administration had been looking into a constitutional amendment that would “change the libel laws.”<sup>49</sup> As a private citizen, Trump sued a book publisher for \$5 billion, alleging that an authorized biography by writer Tim O’Brien, then a business reporter for the *New York Times*, had understated Trump’s net worth.<sup>50</sup> As a candidate, Trump threatened to sue the *Times* for publishing the account of two women who accused him of touching them inappropriately.<sup>51</sup>

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45. See Paul Farhi, *Trump Lifts Ban That Excluded the Washington Post and Other News Media*, WASH. POST (Sept. 7, 2016), [https://www.washingtonpost.com/lifestyle/style/trump-lifts-ban-that-excluded-the-washington-post-and-other-news-media/2016/09/07/29b11d86-7501-11e6-8149-b8d05321db62\\_story.html](https://www.washingtonpost.com/lifestyle/style/trump-lifts-ban-that-excluded-the-washington-post-and-other-news-media/2016/09/07/29b11d86-7501-11e6-8149-b8d05321db62_story.html) (describing denial of press credentials to the *Washington Post*, *BuzzFeed*, *The Daily Beast*, *Politico*, and *The Huffington Post*).

46. See Andrew Higgins, *Trump Embraces ‘Enemy of the People,’ a Phrase with a Fraught History*, N.Y. TIMES (Feb. 26, 2017), <https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html>.

47. See Michael M. Grynbaum, *Trump Tweets a Video of Him Wrestling ‘CNN’ to the Ground*, N.Y. TIMES (July 2, 2017), <https://www.nytimes.com/2017/07/02/business/media/trump-wrestling-video-cnn-twitter.html>.

48. See Rebecca Morin, *Trump Accuses “Fake News” Media of Making Up Sources*, POLITICO (May 28, 2017, 8:59 AM), <http://www.politico.com/story/2017/05/28/trump-fake-news-media-238894>.

49. See Eugene Volokh, Opinion, *White House Chief of Staff Reince Priebus on Changes to Libel Law*, WASH. POST (May 1, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/01/white-house-chief-of-staff-reince-priebus-on-changes-to-libellaw>.

50. See Ian Tuttle, *The Litigious—and Bullying—Mr. Trump*, NAT’L REV. (Feb. 19, 2016, 4:00 AM), <http://www.nationalreview.com/article/431575/donald-trump-tim-obrien-courtroom-story>.

51. See Alan Rappeport, *Donald Trump Threatens to Sue the Times over Article on Unwanted Advances*, N.Y. TIMES (Oct. 13, 2016), <https://www.nytimes.com/2016/10/14/us/politics/donald-trump-lawsuit-threat.html>. The Assistant General Counsel to the paper wrote a brilliant response which, while reiterating the public interest in receiving newsworthy information, also pointed out that candidate Trump’s reputational problems were largely of his own making:

The essence of a libel claim, of course, is the protection of one’s reputation. Mr. Trump has bragged about his non-consensual sexual touching of women. He has bragged about intruding on beauty pageant contestants in their dressing rooms. He acquiesced to a radio host’s request to discuss Mr. Trump’s own daughter as a “piece of ass.” Multiple women not mentioned in our article have publicly come forward to report on Mr. Trump’s unwanted advances. Nothing in our article has had the slightest effect on the reputation that Mr. Trump, through his own words and actions, has already created for himself.

See Letter from David E. McCraw, Vice President & Assistant Gen. Counsel, *New York Times*, to Mark E. Kasowitz, Attorney, Kasowitz, Benson, Torres & Friedman LLP (Oct. 13, 2016),

There is little reason to believe that the President shares the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>52</sup>

#### B. DELEGITIMIZING JUDICIAL INDEPENDENCE

One of the most bitterly controversial moments of the campaign was Trump’s criticism of Judge Gonzalo Curiel, a federal district court judge presiding over a class action fraud lawsuit against Trump University. Trump not only stated that the judge would be biased because he is “Mexican”—in fact, Judge Curiel is an American citizen, born in Indiana to parents who immigrated to the United States from Mexico—but he issued a vague threat promising reprisal if he were elected.<sup>53</sup> Trump subsequently intensified his criticism, claiming that Judge Curiel had an “absolute conflict” because of Trump’s promise to build a wall on the border with Mexico.<sup>54</sup> The lawsuits regarding Trump University settled after Election Day.<sup>55</sup>

A certain amount of criticism of judges by elected officials is a healthy part of inter-branch competition and checking of power. President Obama did not avoid criticism of the judiciary, and spoke out frequently against decisions with which he disagreed, such as the Supreme Court’s *Citizens United* opinion.<sup>56</sup> What is novel and troubling about the episode with Judge Curiel is the ad hominem nature of the criticism, indicating Trump’s tendency to personalize disputes; his assumption that the only reason he may have lost on summary judgment is that the judge is a “hater” or is of Mexican heritage; the utter lack of any engagement with policy issues in the litigation; and the threat of some unspecified payback against the judge if he should be elected President.<sup>57</sup>

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<https://www.nytimes.com/interactive/2016/10/13/us/politics/david-mccraw-trump-letter.html>. As of Nov. 2017, Kasowitz has not filed the threatened libel lawsuit.

52. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

53. Adam Liptak, *Donald Trump Could Threaten U.S. Rule of Law, Scholars Say*, N.Y. TIMES (June 3, 2016), <https://www.nytimes.com/2016/06/04/us/politics/donald-trump-constitution-power.html>.

54. *See, e.g.*, Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016, 10:03 AM), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

55. *See* Steve Eder, *Donald Trump Agrees to Pay \$25 Million in Trump University Settlement*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/19/us/politics/trump-university.html>.

56. *See, e.g.*, JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 293–94 (2016) (reporting on Obama’s criticism of the case during the State of the Union address, and Justice Alito’s response).

57. *See* David Post, *Opinion, On Donald Trump and the Rule of Law*, WASH. POST (May 29, 2016),

In one of the first major initiatives of the new administration, President Trump issued an executive order prohibiting entry into the United States by all refugees and all citizens of seven majority-Muslim countries, even those with lawful permanent residence in the United States.<sup>58</sup> The travel ban episode serves as a case study in Part IV of this Article, but on the subject of judicial independence, it is worth noting Trump's reaction to the use of litigation to determine the lawfulness of the order. The order was enjoined nationwide by a federal district judge in the Western District of Washington, and that injunction was upheld by the Ninth Circuit.<sup>59</sup> Trump reacted to the district judge's order by tweeting: "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!"<sup>60</sup> Judge Bybee, dissenting from the Ninth Circuit's denial of en banc rehearing regarding the panel's denial of a stay pending appeal, concluded with a remarkable defense of judicial independence—remarkable because it was addressed to a sitting President:

The personal attacks on the distinguished district judge and our colleagues were out of all bounds of civic and persuasive discourse—particularly when they came from the parties. It does no credit to the arguments of the parties to impugn the motives or the competence of the members of this court; *ad hominem* attacks are not a substitute for effective advocacy. Such personal attacks treat the court as though it were merely a political forum in which bargaining, compromise, and even intimidation are acceptable principles. The courts of law must be more than that, or we are not governed by law at all.<sup>61</sup>

### C. BRINGING BACK "ENHANCED INTERROGATION TECHNIQUES"

During the campaign, Trump spoke out in favor of returning to the "enhanced interrogation techniques" which had been determined during the George W. Bush administration to constitute legally prohibited torture. Trump stated that "torture works" and that he would "authorize

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<https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/29/on-donald-trump-and-the-rule-of-law>.

58. See, e.g., Michael D. Shear, Nicholas Kulish, & Alan Feuer, *Judge Blocks Trump Order on Refugees amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html>.

59. See *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. Feb. 9, 2017).

60. Amy B. Wang, *Trump Lashes out at 'So-Called Judge' Who Temporarily Blocked Travel Ban*, WASH. POST: THE FIX (Feb. 4, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban>.

61. *Washington v. Trump*, 858 F.3d 1168, 1185 (9th Cir. 2017) (Bybee, J., dissenting).

something beyond waterboarding” if elected President.<sup>62</sup> During one of the Republican primary debates, Trump stated:

They then came to me, what do you think of waterboarding? I said it’s fine. If we want to go stronger, I’d go stronger, too . . . . We should go for waterboarding and tougher than waterboarding.<sup>63</sup>

But then he walked his position back somewhat, reportedly after a conversation with his Defense Secretary nominee, General James Mattis. Despite having said that “only a stupid person would say it doesn’t work,”<sup>64</sup> Trump apparently was persuaded by General Mattis’s contrary view.<sup>65</sup> As with other contradictory campaign statements, it is hard to know what Trump really thinks, but experience with the Bush Administration shows that strong advisors can effectively make policy decisions.<sup>66</sup> Trump, with no military experience of his own, may be even more likely to defer to military and national security professionals in making policy decisions about the treatment of detainees. Perhaps his previous statements were for show and Trump will not direct the Central Intelligence Agency Director nor Secretary of Defense to waterboard detainees.<sup>67</sup> But the possibility remains that he might, which raises the question to be considered in the remainder of this Article, namely what ethical responsibilities government lawyers would have in that event.

#### D. INTERFERING WITH AN INVESTIGATION: THE COMEY FIRING

On May 9, 2017, President Trump fired the Director of the FBI, James B. Comey.<sup>68</sup> Comey’s actions figured prominently in the 2016 general election campaign, with his public statements about whether Democratic candidate Hillary Clinton’s use of a private email had violated federal law. Comey initially said, in July, that Clinton’s handling

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62. Jenna Johnson, *Donald Trump on Waterboarding: ‘Torture Works,’* WASH. POST (Feb. 17, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/17/donald-trump-on-waterboarding-torture-works>.

63. Tierney Sneed, *Trump: ‘We Should Go for Waterboarding and Tougher than Waterboarding,’* TALKING POINTS MEMO (Mar. 3, 2016, 10:22 PM), <http://talkingpointsmemo.com/livewire/trump-waterboarding>.

64. See Jenna Johnson, *Trump Says ‘Torture Works,’ Backs Waterboarding and ‘Much Worse,’* WASH. POST (Feb. 17, 2016), [https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425\\_story.html](https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html).

65. Matt Apuzzo & James Risen, *Donald Trump Faces Obstacles to Resuming Waterboarding,* N.Y. TIMES (Nov. 28, 2016), <https://www.nytimes.com/2016/11/28/us/politics/trump-waterboarding-torture.html>.

66. See, e.g., MAYER, *supra* note 24, at 120–24 (detailing the roles of Vice President Dick Cheney and Secretary of Defense Donald Rumsfeld in formulating interrogation policy).

67. See Jack Goldsmith, *Trump’s Self-Defeating Executive Order on Interrogation,* LAWFARE (Jan. 25, 2017, 12:13 PM), <https://www.lawfareblog.com/trumps-self-defeating-executive-order-interrogation>.

68. See Michael D. Sheer & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump,* N.Y. TIMES, May 10, 2017, at A1.



of classified information was “careless” but not criminal, but in the closing weeks of the campaign he announced that the FBI was reopening the investigation after classified emails supposedly were found on the laptop of former Representative Anthony Weiner.<sup>69</sup> This late announcement is widely perceived to have shifted the dynamics of the election at a critical moment.<sup>70</sup> At the time, Trump praised Comey, saying it took “a lot of guts” to make the announcement.<sup>71</sup>

Comey was also leading the investigation by the FBI into alleged contacts between Russian intelligence operatives and the Trump campaign. In initial accounts, White House officials stated that Trump fired Comey on the recommendation of recently confirmed Deputy Attorney General Rod J. Rosenstein. “It was all [Rosenstein],” said press secretary Sean Spicer, and stated that he was unaware of a direction from any of Rosenstein’s superiors (including Trump or Attorney General Jeff Sessions, who had recused himself from the Russia investigation) to consider Comey’s termination as FBI Director.<sup>72</sup> A subsequent statement suggested, however, that Trump had been “strongly inclined to remove” Comey, and made a final decision after receiving Rosenstein’s memo.<sup>73</sup> Then Trump himself changed the explanation, stating in an interview with Lester Holt of NBC News that he would have fired Comey regardless of what Mr. Rosenstein said, explicitly referring to the Russia investigation: “[W]hen I decided to just do it, I said to myself, I said, ‘You know, this Russia thing with Trump and Russia is a made-up story.’”<sup>74</sup> Trump told Russian officials in a meeting the next day that firing the “nut job” had taken off the pressure of the investigation.<sup>75</sup> Eventually, Mr. Rosenstein appointed Robert S. Mueller III as special prosecutor to investigate possible coordination between Russian officials and associates of Trump.<sup>76</sup>

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69. See, e.g., Matt Apuzzo, Michael S. Schmidt, Adam Goldman, & Eric Lichtblau, *Comey Tried to Shield the F.B.I. from Politics. Then He Shaped an Election*, N.Y. TIMES (Apr. 22, 2017), <https://www.nytimes.com/2017/04/22/us/politics/james-comey-election.html>.

70. See, e.g., Sean McElwee, Matt McDermott, & Will Jordan, *4 Pieces of Evidence Showing FBI Director James Comey Cost Clinton the Election*, VOX (Jan. 11, 2017, 9:40 AM), <https://www.vox.com/the-big-idea/2017/1/11/14215930/comey-email-election-clinton-campaign>.

71. See, e.g., Nolan D. McCaskill, *Trump Praises Comey for Having ‘a Lot of Guts,’* POLITICO (Oct. 31, 2016, 2:01 PM), <http://www.politico.com/story/2016/10/trump-praises-james-comey-230542>.

72. See, e.g., Jenna Johnson, *After Trump Fired Comey, White House Staff Scrambled to Explain Why*, WASH. POST: POST POLITICS (May 10, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/10/as-trump-fired-comey-his-staff-scrambled-to-explain-why>.

73. See Peter Baker & Michael D. Shear, *Trump Shifts Rationale for Firing Comey, Calling Him a ‘Showboat,’* N.Y. TIMES (May 11, 2017), <https://www.nytimes.com/2017/05/11/us/politics/trump-comey-showboat-fbi.html>.

74. *Id.*

75. See Matt Apuzzo et al., *Trump Told Russians That Firing ‘Nut Job’ Comey Eased Pressure from Investigation*, N.Y. TIMES (May 19, 2017), <https://www.nytimes.com/2017/05/19/us/politics/trump-russia-comey.html>.

76. See, e.g., Devlin Barrett et al., *Deputy Attorney General Appoints Special Counsel to Oversee*

E. THE DIFFERENCE IT MAKES: WHAT LAWYERS MAY  
BE CALLED UPON TO DO

After a few months into his presidency, it has become clear that some of Trump's campaign statements were pure bluster, while in other cases his administration's ineptitude thwarted his stated ambitions.<sup>77</sup> Construction has not begun on the promised border wall between the United States and Mexico,<sup>78</sup> Trump's "secret plan to defeat ISIS" strongly resembled the Obama Administration's approach,<sup>79</sup> and arguably was further weakened by the decision to end covert aid to Syrian rebel groups,<sup>80</sup> and Trump angered some of his supporters by going back on a campaign promise to deport undocumented immigrants protected by the Deferred Action for Childhood Arrivals program ("DACA").<sup>81</sup> The Comey firing, however, as well as the earlier dismissal of Sally Yates as Acting Attorney General (to be discussed further in Part IV, below), show that Trump is willing to put considerable pressure on government lawyers he considers insufficiently loyal.<sup>82</sup> Jack Goldsmith, the former head of the OLC, observes that senior, politically appointed government lawyers often feel a sense of loyalty to the President and alignment with his policy

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*Probe of Russian Interference in Election*, WASH. POST (May 18, 2017), [https://www.washingtonpost.com/world/national-security/deputy-attorney-general-appoints-special-counsel-to-oversee-probe-of-russian-interference-in-election/2017/05/17/302c1774-3b49-11e7-8854-21f359183e8c\\_story.html](https://www.washingtonpost.com/world/national-security/deputy-attorney-general-appoints-special-counsel-to-oversee-probe-of-russian-interference-in-election/2017/05/17/302c1774-3b49-11e7-8854-21f359183e8c_story.html).

77. See, e.g., Benjamin Wittes, *Malevolence Tempered by Incompetence: Trump's Horrifying Executive Order on Refugees and Visas*, LAWFARE (Jan. 28, 2017, 10:58 PM), <https://lawfareblog.com/malevolence-tempered-incompetence-trumps-horrifying-executive-order-refugees-and-visas>.

78. See Noah Bierman & Brian Bennett, *Trump's 'Big Beautiful Wall' Is Not in the Spending Plan. Will It Ever Get Built?*, L.A. TIMES (May 1, 2017), <http://www.latimes.com/politics/la-na-pol-trump-wall-20170501-story.html>.

79. Brian P. McKeon, *Trump's 'Secret Plan' to Defeat ISIS Looks a Lot Like Obama's*, FOREIGN POL'Y (May 31, 2017, 3:44 PM), <http://foreignpolicy.com/2017/05/31/trumps-secret-plan-to-defeat-isis-looks-a-lot-like-obamas>.

80. See David E. Sanger, Eric Schmitt, & Ben Hubbard, *Trump Ends Covert Aid to Syrian Rebels Trying to Topple Assad*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/19/world/middleeast/cia-arming-syrian-rebels.html>.

81. See Dara Lind, *It's Official: Trump Is Keeping 750,000 Unauthorized Immigrants Safe from Deportation*, VOX (June 16, 2017, 12:04 PM), <https://www.vox.com/policy-and-politics/2017/6/16/15815850/trump-daca-dapa-dreamers>. Trump subsequently changed his mind and ended DACA; he strongly suggested, however, that he would support Congressional authorization for continuing the program. See Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>.

Trump and Senate leaders later met and agreed that there would be no reauthorization of DACA in omnibus spending bills being considered. See Jordain Carney, *Trump, GOP Senators: No DACA Deal in Spending Bill*, THE HILL (Nov. 2, 2017), <http://thehill.com/homenews/senate/358448-trump-gop-senators-no-daca-deal-in-spending-bill>.

82. See Glenn Thrush & Maggie Haberman, *'Looking like a Liar or a Fool': What It Means to Work for Trump*, N.Y. TIMES (May 12, 2017), <https://nytimes.com/2017/05/12/us/politics/trump-sean-spicer-sarah-huckabee-sanders.html>.

goals, while all lawyers face pressure to be team players lest they find themselves marginalized in the decisionmaking process.<sup>83</sup>

Suppose that a high-ranking lawyer—a section chief or assistant chief with the Department of Justice Antitrust Division, Telecommunications and Media Enforcement Section—gets word from a politically appointed supervising lawyer in the DOJ that it is a priority for the President to “look into” potential anticompetitive effects of Amazon’s purchase of Whole Foods. Suppose further that “this merger is a no-brainer to approve under existing antitrust doctrines.”<sup>84</sup> Perhaps existing doctrine might be criticized, but as the law stands, the merger should be approved. The lawyer nevertheless is savvy enough to understand the tacit message communicated by her supervisor: The President wants to pressure Amazon’s Jeff Bezos to rein in the so-called “Amazon *Washington Post*.” The lawyer believes there are sufficient grounds to investigate the merger. She is also experienced enough to know how to delay proceedings, run up costs and generally create a headache for Amazon, even if the merger is ultimately approved. What should the lawyer do? The sections that follow consider the answers given in the law governing lawyers and in the political values that support the ethical rights and duties of government lawyers.

## II. GOVERNMENT LAWYERS AND THE LAW OF LAWYERING

This Article uses the term “law governing lawyers” instead of referring to the rules of professional conduct as “ethics rules” or the subject as “legal ethics.” The law of lawyering is positive law, just like the securities or antitrust laws. One may lament that “codes” of ethics are no more than “mere” law, or that legal ethics as taught in law schools is not actually about ethics,<sup>85</sup> but the fact remains that courts and disciplinary authorities interpret the rules of professional conduct like any other body of positive law.<sup>86</sup> Sometimes the law of lawyering requires lawyers to do

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83. Jack Goldsmith, *Lawyerly Integrity in the Trump Administration*, LAWFARE (May 14, 2017, 7:21 AM), <https://www.lawfareblog.com/lawyerly-integrity-trump-administration>.

84. See Hal Singer, *Will Amazon-Whole Foods Survive Antitrust Scrutiny Under Trump?*, FORBES: WASH. BYTES (July 3, 2017, 8:22 AM), <https://www.forbes.com/sites/washingtonbytes/2017/07/03/will-amazon-whole-foods-survive-antitrust-scrutiny-under-trump/#1009b1128e1e> (discussing the potential harms of Amazon’s acquisition of Whole Foods).

85. See, e.g., Deborah L. Rhode, *Teaching Legal Ethics*, 51 ST. LOUIS U. L.J. 1043 (2007); William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65 (1991); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985).

86. See, e.g., Timothy P. Terrell, *Toward Duty-Based Lawyering?: Rethinking the Dangers of Lawyer Civil Disobedience in the Current Era of Regulation*, 54 ALA. L. REV. 831 (2003). See W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV. 727 (2012); W. Bradley Wendel, *Legal Ethics as “Political Moralism” or the Morality of Politics*, 93 CORNELL L. REV. 1413 (2008) (reviewing DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007)).

things that an ordinarily decent human being would do anyway. In other cases, however, it represents a balancing of interests with which one might have reasonable disagreement. One might of course adopt a critical, external, “ethical” stance toward the duties of government lawyers, and make a normative argument that they ought to be different. The subject of this Article, however, is the scheme of regulation that actually exists, as a matter of positive law.

#### A. ARE GOVERNMENT LAWYERS SPECIAL?

It is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice, who represent non-governmental persons and entities.<sup>87</sup>

It is far from uncontroversial that government lawyers have a greater responsibility to pursue the common good than lawyers representing clients in private practice.<sup>88</sup> It seems instead that the mainstream position is that a government lawyer’s obligation to the public good is no stronger than a private lawyer’s.<sup>89</sup> The Restatement of the Law Governing Lawyers takes the position that the basic duty of a lawyer representing a government entity is to “act in a manner reasonably calculated to advance the lawful objectives of the client entity as defined by persons authorized to instruct the lawyer on behalf of the client.”<sup>90</sup> This is exactly the same duty that applies to lawyers representing private organizational clients such as corporations.<sup>91</sup>

It is certainly true that *prosecutors* have distinctive ethical obligations.<sup>92</sup> For one thing, because charging decisions are almost entirely unregulated by courts,<sup>93</sup> prosecutors essentially adjudicate the

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87. See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 789 (2009).

88. See Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 238 (2000) (“To the extent that government lawyers consider these questions, they do not necessarily agree; nor is there a consensus in the professional literature.”).

89. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105 (1995); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993); Miller, *supra* note 15.

90. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. a (AM. LAW INST. 2000).

91. See MODEL RULES OF PROF’L CONDUCT r. 1.13(a) (AM. BAR ASS’N 2003); LAW GOVERNING LAWYERS §§ 16(1), 21(2), 96.

92. A frequently cited dictum from a 1935 Supreme Court decision should be understood in its context, as describing the duties of prosecutors. The court said that a government lawyer “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 . . . is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

93. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996); *United States v. Batchelder*, 442 U.S. 114 (1979); *Oyler v. Boles*, 368 U.S. 448 (1962).

value of cases. Some commentators have even argued they should adopt something of a quasi-judicial attitude of neutrality when making charging decisions.<sup>94</sup> At the very least a prosecutor may not prosecute a charge absent probable cause.<sup>95</sup> Decisional and statutory law, rules of criminal procedure, and rules of professional conduct also impose responsibilities such as disclosing exculpatory evidence to the accused,<sup>96</sup> and “confessing error” if there is a procedural irregularity affecting the rights of the accused.<sup>97</sup> Prosecutors also must reconcile the interests of a diverse constituency, including defendants, victims of crime and those who are harmed by discriminatory police practices.<sup>98</sup> When there is a decision that is relatively unconstrained by law, and which implicates the tension between the duties “to convict and punish lawbreakers but to avoid harming, and certainly to avoid punishing, innocent people,”<sup>99</sup> prosecutors do face a unique ethical obligation to ensure that justice is done.

But not all government lawyers have heightened ethical obligations as compared with lawyers in private practice.<sup>100</sup> In all cases where government attorneys are sanctioned or admonished by a court for violating their professional responsibilities, a private lawyer who engaged in the same conduct would be subject to the same penalties.<sup>101</sup>

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94. H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *FORDHAM L. REV.* 1695, 1700–01 (2000).

95. *PROF'L CONDUCT* r. 3.8(a).

96. *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring disclosure of material exculpatory evidence); *Giglio v. United States*, 405 U.S. 150 (1972) (requiring disclosure of information potentially useful for impeachment of government witnesses); The Jencks Act, 18 U.S.C. § 3500 (2012) (requiring disclosure of witness statements to defense); *PROF'L CONDUCT* r. 3.8(d) (requiring disclosure of “all evidence or information . . . that tends to negate the guilt of the accused or mitigates the offense”).

97. *See Young v. United States*, 315 U.S. 257, 258 (1942) (stating that “[t]he public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when . . . a miscarriage of justice may result from their remaining silent.”).

98. R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 *SAN DIEGO L. REV.* 93, 95 (2011); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 *VAND. L. REV.* 45, 57–58 (1991).

99. Bruce A. Green, *Why Should Prosecutors “Seek Justice?”*, 26 *FORDHAM URB. L.J.* 607, 642 (1999).

100. *See Green, supra* note 88, at 240 (“Unlike in the criminal context, in the civil context it is generally not accepted that government lawyers must ‘seek justice.’”); *see also Lybbert v. Grant Cty.*, 1 P.3d 1124 (Wash. 2000) (representing county in personal-injury action did not act improperly by waiting to inform plaintiff that he had served the wrong official until after the statute of limitations had run); ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 94-387 (1994) (explaining that a government lawyer in civil litigation has same obligation as private lawyer and need not disclose to opposing counsel in settlement negotiations that statute of limitations has run on opposing party's claim). The consensus in Canada is also that, other than prosecutors, government lawyers do not have a higher ethical duty than private lawyers. *See Adam M. Dodek, Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law*, 33 *DALHOUSIE L.J.* 1, 15 (2010).

101. *See, e.g., Precision Specialty Metals v. United States*, 315 F.3d 1346 (Fed. Cir. 2003) (imposing sanctions under Fed. R. Civ. P. 11 on a Justice Department litigator who mischaracterized, by selective

In those cases, however, one frequently encounters statements about the special obligations of government lawyers. These are, almost without exception, nothing more than rhetorical makeweights. For example, in a frequently cited D.C. Circuit case,<sup>102</sup> Judge Mikva excoriated lawyers for the Federal Energy Regulatory Commission (“FERC”) for not withdrawing an order that interfered with settlement of the litigation.<sup>103</sup> But all of the duties cited by Judge Mikva apply to private as well as to government lawyers. It is improper to bring or defend a proceeding without a good faith basis in law and fact for doing so.<sup>104</sup> Lawyers must “make reasonable efforts to expedite litigation, consistent with the interests of the client,”<sup>105</sup> and the interests of FERC would in no way have been compromised by vacating the first order. In the course of representing a client, lawyers may not employ “means that have no substantial purpose other than to . . . delay[] or burden a third person,”<sup>106</sup> and here there was no purpose for continuing to defend the first order; as Judge Mikva observed, the only apparent motivation was “the desire to pound an opponent into submission.”<sup>107</sup> The case does not stand for the existence of a *freestanding* obligation of a government lawyer to ensure that justice was done. There was only the obligation of any lawyer representing a client in civil litigation to refrain from certain enumerated types of abusive conduct.

It matters a great deal whether statements about the heightened duties of government lawyers are merely window dressing. For one thing, while judges may think they are aiming at elevating the standards of practice of government lawyers, the effect of the differentiation they posit may in fact be tacitly to condone an imaginary view of private lawyers’ conduct as shady but permissible.<sup>108</sup> A greater risk of believing that

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quotation, a court’s holding in a brief filed by the government); *United States v. Shaffer Equip. Co.*, 11 F.3d 450 (4th Cir. 1993) (sanctioning Justice Department lawyers for failing to disclose that expert witness had lied about his credentials); *Douglas v. Donovan*, 704 F.2d 1276 (D.C. Cir. 1983) (criticizing lawyer for Department of Labor who did not inform court that divorcing spouses had settled an alimony issue, mooted an order garnishing federal employment benefits); *United States v. Sumitomo Marine and Fire Ins. Co., Ltd.*, 617 F.2d 1365 (9th Cir. 1980) (precluding government from introducing evidence as sanction for 18-month delay in complying with discovery order).

102. *Freeport-McMoRan Oil & Gas Co. v. Fed. Energy Reg. Comm’n*, 962 F.2d 45 (D.C. Cir. 1992).

103. *Id.* at 47.

104. MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 2003).

105. *Id.* at r. 3.2.

106. *Id.* at r. 4.4(a).

107. *Freeport-McMoRan*, 962 F.2d at 47.

108. The Margolis interprets the Office of Professional Responsibility Report as imposing a heightened duty on lawyers in the Office of Legal Counsel to advise on the issue of torture, the right against which is fundamental and the prohibition of which is a *jus cogens* norm in international law. See Margolis, *supra* note 26, at 12. I do not believe the duty to provide candid, independent advice varies according to either the identity of the lawyer’s client (the government, a private corporation, or an individual), or the importance of the issue under consideration, even though the consequences of an erroneous decision may vary.

government lawyers are subject to heightened ethical obligations is that one may come to believe the converse—that government lawyers have distinctive ethical *permissions*. The specific issue of whistleblowing will be considered in more detail below,<sup>109</sup> but one scholar has read this D.C. Circuit case as support for the conclusion that the “higher duty” of government lawyers creates an implied exception to the usual obligation of confidentiality, permitting disclosures the lawyer believes to be in the public interest.<sup>110</sup> That is a serious analytic mistake and could lead to disciplinary exposure for a lawyer. For the most part, the law governing lawyers has evolved away from aspirational and open-ended standards such as “appearance of impropriety” and the obligation to do justice.<sup>111</sup> Apart from the special case of prosecutors, the regulation of government lawyers looks very much like the regulation of lawyers representing private clients.

On the subject of special roles, it is important to emphasize that the analysis in this Article pertains to lawyers serving as advisors, not taking positions on behalf of clients in litigated proceedings. Lawyers representing clients in litigated matters must make the strongest available arguments for the clients’ positions, subject to limitations on advancing unmeritorious or frivolous contentions.<sup>112</sup> This “principle of partisanship”<sup>113</sup> follows from the fiduciary nature of the lawyer-client relationship, which implies duties of loyalty and care owed to the client.<sup>114</sup> The principle of partisanship is often summarized as “zealous advocacy within the bounds of the law.”<sup>115</sup> Government lawyers appearing in a litigated proceeding in a civil matter on behalf of the United States or a particular federal agency or officer are advocates like any other. They are duty bound to make vigorous and effective arguments for their client’s position.

But not all lawyers are litigators. The lawyers that are the primary concern of this analysis are serving as counselors; they provide advice to

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109. See *infra* Subpart III.E.3.

110. See Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125, 140–41 (2003) (discussing *Freeport-McMoRan Oil & Gas Co. v. Fed. Energy Reg. Comm’n*, 962 F.2d 45 (D.C. Cir. 1992)).

111. See, e.g., Reed Elizabeth Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311 (1987) (lamenting this trend).

112. MODEL RULES OF PROF’L CONDUCT r. 1.3, 3.1 (AM. BAR ASS’N 2003); FED. R. CIV. P. 11.

113. See Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978).

114. See, e.g., 2 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 15:6 (2017).

115. The slogan appeared in the 1969 ABA Code of Professional Responsibility, which has since been replaced in all U.S. jurisdictions with the Model Rules. (California has a quirky sets of rules, supplemented by provisions of its civil code, which are based neither on the Model Code nor the Model Rules.) The only reference to zealous advocacy in the Model Rules is in Comment 1 to Rule 1.3, on diligence. That comment provides: “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” PROF’L CONDUCT r. 1.3, cmt. 1.

government actors on the legality of a proposed course of action.<sup>116</sup> As I have argued elsewhere, whatever permission lawyers have to urge partisan interpretations of the law and facts on a tribunal is grounded in the existence of procedures to ensure that one-sided presentations by one party are countered by another.<sup>117</sup> Adversarial procedures are necessary to ensure that judges remain open-minded and consider both sides' cases impartially.<sup>118</sup> However, the function of the advocate defines the limits of advocacy,<sup>119</sup> both within litigation and a fortiori in non-litigation contexts. A client may be just as interested as a judge in keeping an open mind and not reaching a premature conclusion. Because the client is receiving advice from only one side it is essential that the lawyer provide a balanced treatment of the law and not just the type of partisan argument that would be appropriate in litigation. As discussed further in Part II, Subpart D below,<sup>120</sup> providing clear, candid, impartial legal analysis is one of a lawyer's core obligations, and that obligation in no way resembles the litigators' duty to zealously advocate for the client.<sup>121</sup>

#### B. DISCIPLINARY AUTHORITY—RULE 8.5 AND THE MCDADE AMENDMENT

The proposition that a lawyer employed by the federal government is subject to discipline in his or her admitting jurisdiction is now clearly established. State courts have always asserted the authority to discipline lawyers licensed to practice in the jurisdiction, no matter where their conduct occurred and, implicitly, no matter the identity of their employer.<sup>122</sup> They possess this authority as an aspect of the inherent

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116. This is not to say that Trump-specific issues may not also arise for government litigators. For example, after the President tweeted several messages that directly contradicted the position taken by Justice Department lawyers over the travel-ban executive order, some commentators noted that these lawyers would have to be very careful not to make statements of fact they know are false. Given Trump's statement that he intended the order to be a permanent ban on entry, not a temporary pause while government agencies improved vetting procedures, a lawyer representing the government in litigation would not be able to argue that the President intended for the immigration ban to be temporary. See Alison Frankel, *Trump Tweets Could Create Ethics Headaches for DOJ Lawyers*, REUTERS (June 7, 2017, 11:44 AM), <https://www.reuters.com/article/us-otc-ethics-idUSKBN18Y2SR>; David G. Savage, *Trump Undercuts His Lawyers with Tweets About Travel Ban*, L.A. TIMES (June 5, 2017, 7:15 PM), <http://www.latimes.com/politics/la-na-pol-trump-court-tweets-20170605-story.html>.

117. WENDEL, *supra* note 7 at 80–81.

118. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958).

119. *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 15311 (9th Cir. 1986), *on denial of reh'g*, 809 F.2d 584, 588 (9th Cir. 1987) (Noonan, J., dissenting from denial of rehearing); 2 MALLEN & SMITH, *supra* note 114, § 19:12 (contrasting advocacy and advisory functions of lawyers).

120. See *infra* Part III.D.

121. Cf. Alice Woolley, *The Lawyer as Advisor and the Practice of the Rule of Law*, 47 U.B.C. L. REV. 743 (2014) (arguing for a similar position, although based on a constructive normative interpretation of the Canadian law governing lawyers).

122. MODEL RULES OF PROF'L CONDUCT r. 8.5(a) (AM. BAR ASS'N 2003).



power of the judiciary to regulate the legal profession.<sup>123</sup> But prior presidential administrations clashed with state courts over the preemption by federal regulations of state rules of professional conduct.<sup>124</sup> In the George H.W. Bush Administration, Attorney General Richard Thornburgh took the position that federal prosecutors were exempt from state rules of professional conduct.<sup>125</sup> Thornburgh contended that state courts had unnecessarily expanded state rules, particularly the prohibition on a lawyer directing communications with a target of an investigation known to be represented by counsel in the matter, and thus interfered with the mandate of law enforcement.<sup>126</sup> Thornburgh wanted blanket immunity from discipline for Justice Department lawyers. His position on behalf of the Justice Department was based in part on the Supremacy Clause, but also on the aggressive assertion of a categorical difference between federal lawyers and other lawyers, and between prosecutors and other lawyers. Thornburgh wrote that “the responsibility of federal attorneys engaged in law enforcement is simply different than other attorneys.”<sup>127</sup> This argument did not sit well with critics who foresaw a broader effort by the Bush Administration to exempt government lawyers from regulation by state courts.<sup>128</sup>

The debate was finally resolved when Congress passed the McDade Amendment.<sup>129</sup> Representative Joseph McDade (R-Pa.) got an up-close look at the power of federal prosecutors after being indicted on corruption charges, which cost him the chairmanship of the powerful House Appropriations Committee. He complained that federal investigators “harassed” and “hounded” him for the preceding 44 months and that they turned his life into “a living nightmare.”<sup>130</sup> He filed numerous motions alleging prosecutorial misconduct, but they were all

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123. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 2.2.2 (1986).

124. See, e.g., Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000); Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355 (1996); Todd S. Schulman, *Wisdom Without Power: The Department of Justice’s Attempt to Exempt Federal Prosecutors from State No-Contact Rules*, 71 N.Y.U. L. REV. 1067 (1996); Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992).

125. See Memorandum from Richard L. Thornburgh Attorney Gen., to all Justice Dep’t Litigators (June 8, 1989), reprinted in *In re Doe*, 801 F. Supp. 478, 489 (D.N.M. 1992); see also Dick Thornburgh, *Ethics and the Attorney General: The Attorney General Responds*, 74 JUDICATURE 290 (1991) (defending the position in the memo).

126. Thornburgh, *supra* note 125, at 290–91.

127. Thornburgh, *supra* note 125, at 335.

128. See Jerry E. Norton, *Ethics and the Attorney General*, 74 JUDICATURE 203, 206–07 (1991).

129. See Ethical Standards for Federal Prosecutors Act and the Citizen’s Protection Act of 1998, Pub. L. No. 105-277, 113 Stat. 9, codified as 28 U.S.C. § 530B (1998); see also Ethical Standards for Attorneys for the Government, 28 C.F.R. § 77.1 (2005) (implementing regulations).

130. Michael deCourcy Hinds, *Top Republican on a House Panel Is Charged with Accepting Bribes*, N.Y. TIMES (May 6, 1992), <http://www.nytimes.com/1992/05/06/us/top-republican-on-a-house-panel-is-charged-with-accepting-bribes.html>.

denied.<sup>131</sup> After his acquittal,<sup>132</sup> he spearheaded the passage of a statute to clarify, once and for all, the applicability of state rules of professional conduct to federal government employees. Federal legislation now provides that an attorney employed by the federal government “shall be subject to state laws and rules, and local Federal court rules, governing attorneys in each state where such attorney engages in that attorney’s duties, to the same extent as other attorneys in that state.”<sup>133</sup>

With the passage of the McDade Amendment, it is now clear that state disciplinary authorities may proceed against lawyers employed by the federal government who are admitted in that state. Even if a state disciplinary authority does not pursue a grievance proceeding against a federal lawyer, the McDade Amendment still clarifies the legal norms regulating the conduct of government lawyers. The legal profession proudly claims to be largely self-regulating, and even if lawyers are actually subject to considerable external regulation,<sup>134</sup> it is nevertheless a core commitment of the ideal of professionalism that lawyers should not need to be coerced into complying with their ethical responsibilities.<sup>135</sup> The under-enforcement of particular norms, or the reluctance of state disciplinary authorities to pursue cases against particular types of lawyers (for example, big-firm or government), does not alter the significance of the underlying standards of conduct. It is now clear that those standards are given by state rules of professional conduct.

### C. CLIENT IDENTIFICATION FOR GOVERNMENT LAWYERS—MODEL RULE 1.13

Questions concerning the relationship between the legal profession and the rule of law presuppose a lawyer-client relationship. The most basic statement of lawyers’ duties under agency and tort law is that they must seek to advance their clients’ lawful ends, as defined by the client after consultation.<sup>136</sup> It is for the client to determine the objectives of the representation.<sup>137</sup> Therefore, a lawyer without a client is almost a

131. See, e.g., *United States v. McDade*, 827 F. Supp. 1153 (E.D. Pa. 1993), *aff’d*, 28 F.3d 283 (3d Cir. 1994); *United States v. McDade*, No. 92-249, 1992 WL 382351, at \*2–3 (E.D. Pa. Dec. 11, 1992); *United States v. McDade*, No. 92-249, 1992 WL 187036, at \*2 (E.D. Pa. July 30, 1992).

132. See Eric Pianin, *Rep. McDade Acquitted of Bribery, Racketeering Charges*, WASH. POST (Aug. 2, 1996), [https://www.washingtonpost.com/archive/politics/1996/08/02/rep-mcdade-acquitted-of-bribery-racketeering-charges/07af5f6a-330e-496c-9025-c059ab1f5f85/?utm\\_term=.7f37aa552e3a](https://www.washingtonpost.com/archive/politics/1996/08/02/rep-mcdade-acquitted-of-bribery-racketeering-charges/07af5f6a-330e-496c-9025-c059ab1f5f85/?utm_term=.7f37aa552e3a).

133. 28 U.S.C. § 530B(a) (2010).

134. See Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

135. See, e.g., DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 16–17 (2000).

136. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (AM. LAW INST. 2000).

137. MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 2003). This is an important anti-paternalist aspect of the ethics of a lawyer’s role. See, e.g., David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (1981); Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010).

contradiction in terms. Some of the biggest messes in the regulation of lawyers arise in the context of the representation of organizational clients, where lines of authority are unclear and the usual lawyer-over-client hierarchy of control is destabilized.<sup>138</sup> The situation is, if anything, more muddled in the case of lawyers working for the government.<sup>139</sup> While erroneous client identification can subject private lawyers to sanctions,<sup>140</sup> for government lawyers it can throw off the whole analysis of their ethical obligations.<sup>141</sup>

Consider the argument, frequently encountered, that the client of a government attorney is not a particular official or government agency, but “the American public and its collective interests and values.”<sup>142</sup> This

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138. See Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, in *ETHICS IN PRACTICE* 177, 183–85 (Deborah L. Rhode, ed., 2000); see also Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. REV. 625 (1979) (arguing that the former Model Code of Professional Responsibility did not deal well with situations in which the lawyer’s client is not a readily identifiable human being).

139. See, e.g., Geoffrey C. Hazard, Jr., *Conflicts of Interest in Representation of Public Agencies in Civil Matters*, 9 WIDENER J. PUB. L. 211 (2000); James R. Harvey III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569 (1996); Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991); 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 (1991); William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539 (1986). The Model Rules contain a Rule specifying the duties owed by a lawyer for an organization; here, the relevant provision is that the lawyer represents the organization itself, acting through duly authorized constituents. See PROF’L CONDUCT r. 1.13(a). One thing that is clear from this rule is that a lawyer representing a government organization does not represent any individual officers or government employees, but instead owes her duties of loyalty and confidentiality to the organization itself. See, e.g., *Salt Lake Cty. Comm’n v. Salt Lake Cty. Attorney*, 985 P.2d 899 (Utah 1999); *Gray v. Rhode Island Dep’t of Children, Youth and Families*, 937 F. Supp. 153 (D.R.I. 1996). What is less clear is the identity of “the organization” in the context of government service. A comment to the Rule unhelpfully states that, “[a]lthough in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.” PROF’L CONDUCT r. 1.13, cmt. 9. Accordingly, as discussed in text, *infra* notes 145-49, and accompanying text, it is necessary to clarify the purpose for which one is asking the client-identity question. The answer may differ, depending on whether the legal issue pertains to confidentiality, conflicts of interest, or the duty to provide independent advice.

140. See, e.g., *United States v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. 2009), *rev’d on other grounds sub. nom.*, *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

141. The District of Columbia Bar considered a revision to the Model Rules to recognize distinctive ethical obligations for government lawyers. See REPORT BY THE DISTRICT OF COLUMBIA BAR SPECIAL COMMITTEE ON GOVERNMENT LAWYERS AND THE MODEL RULES OF PROFESSIONAL CONDUCT, *reprinted in* WASH. LAW. 53 (Sept./Oct. 1988). The D.C. Bar Committee rightly observed that important conclusions about lawyers’ obligations follow from the identity of the client, including some conflict of interest issues, the appropriateness of disclosing confidential information, and the amount of discretion a lawyer can exercise in the course of the representation. *Id.* at 54.

142. Richard B. Bilder & Detlev Vagts, *Speaking Law to Power: Lawyers and Torture*, in *THE TORTURE DEBATE IN AMERICA* 153 (Karen Greenberg ed., 2006); see also William R. Dailey, CSC, *Who is the Attorney General’s Client?*, 87 NOTRE DAME L. REV. 1113 (2012) (arguing that the client of the Attorney General is the American people, as mediated by the President and Congress); Griffin B. Bell, *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among*

may be merely a metaphor, in which case no harm is done as long as the lawyer understands that it falls to some particular government official or agency to determine the content of the public interest on the matter in question.<sup>143</sup> And it is true, as noted above, that *prosecutors* have a diverse constituency, the interests of which they must reconcile in deciding how to proceed on behalf of the government. But if the argument is understood literally in other contexts, a government lawyer may be misled into believing that certain legal permissions and obligations follow. For example, if the lawyer's client is the American public and a government official is engaged in conduct that the lawyer believes to be contrary to the public interest, then should the lawyer be permitted to inform her "real" client, the public? Some scholars have taken the position that a lawyer should not regard a government agency as having the same interest in confidentiality as a private client does, because the public interest in disclosure is the interest of the lawyer's client.<sup>144</sup> Or, if the lawyer's client is the American public or some reified conception of the public interest, then the lawyer should not simply follow the lawful instructions of an authorized government official, but should make an independent determination of whether the official's instructions are in the public interest.<sup>145</sup> This approach to the allocation of decision-making authority shifts power from the client to the lawyer to determine both the ends of the representation and the means by which it will be carried out.<sup>146</sup>

As these considerations suggest, lawyers should ask the client identification question because they are interested in determining what obligations they owe.<sup>147</sup> If the issue is the duty of loyalty, for example, as it might come up in a motion to disqualify for conflicts of interest, then the client identity issue may be resolved by considering the interests that any client would have in the loyalty of a lawyer and determining which government officials or agencies have that interest. Conflicts of interest cases involve not only client identity, but consideration of the scope of duties owed to any would-be client. Consider a well-known conflicts case

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*Many?*, 46 *FORDHAM L. REV.* 1049, 1069 (1978) ("Although our client is the government, in the end we serve a more important constituency: the American people.").

143. See Miller, *supra* note 15.

144. See, e.g., James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 *TEMP. POL. & C.R. L. REV.* 633, 634-35 (2005) (arguing that "the government lawyer works for a public-abiding client, one that would expect disclosure of internal government wrongdoing").

145. See, e.g., Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 *B.C. L. REV.* 789, 789 (2000).

146. Nelson Lund, *The President as Client and the Ethics of the President's Lawyers*, 61 *L. & CONTEMP. PROBS.* 65, 77 (1998).

147. Robert P. Lawry, *Who Is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 *FED. B.J.* 61 (1978).

arising out of the representation of a government client.<sup>148</sup> In that case, Covington & Burling represented a tobacco company, Brown & Williamson, in a challenge to New York State's ban on direct-mail sales of cigarettes. After the firm noticed the deposition of two attorneys in the state attorney general's office, the attorney general moved to disqualify the firm on the ground that it had represented various state agencies for over twenty-five years on matters relating to the state's public assistance programs, and argued that the entire executive branch of the state government was the firm's client.<sup>149</sup>

Conflict of interest rules, in general, protect the client's reasonable expectation of its lawyer's undivided loyalty. Would it be disloyal for Covington to help a client sell more cigarettes in New York while simultaneously advising the state on Medicare, Temporary Assistance for Needy Families, and other federally-funded public-welfare programs? One could certainly imagine an individual client caring about the health and well-being of low-income New Yorkers and thus being appalled at the thought of making it easier for these same citizens to purchase tobacco products. It may be, however, that a government client has a different, and equally reasonable expectation of loyalty. "Among the myriad State interests," the court observed, "it may be the case that those implicated by C&B's representation are relatively narrow."<sup>150</sup> Thus the district court, after cautioning that the client-identification issue could not be approached formalistically, looked to the factors that often underlie motions to disqualify for conflicts of interest, including whether it is likely that the vigor of the firm's representation of the moving party would be diminished by the other client relationship, and whether it could acquire confidential information in one representation that could be used against the other client in the second representation.<sup>151</sup> Using this approach, the court concluded that the firm's government client was the specific agency responsible for the public-assistance programs, not the state or the executive branch as a whole.

The Restatement also takes this position, as noted above. A government lawyer's client is generally the represented agency, exercising its authority through officers authorized to make decisions on behalf of the agency.<sup>152</sup> (A government official may seek representation in his or her individual capacity, but the Restatement rule is the default.) Maintaining that the client of a government lawyer is "the people" or "the public interest" effectively shifts power to the lawyer to make decisions about what is in the public interest, but of course this is exactly what

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148. *Brown & Williamson Tobacco Co. v. Pataki*, 152 F. Supp. 2d 276 (S.D.N.Y. 2001).

149. *Id.* at 280–81, 286.

150. *Id.* at 285.

151. *Id.* at 286, 288.

152. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97, cmt. c (AM. LAW INST. 2000).

elections are for. No matter how sincere or strongly held, a lawyer's belief about the content of the public interest is just that: a belief.<sup>153</sup>

Unfortunately, the Restatement approach does not entirely solve the agency problem arising from potential divergence between the lawyer's view of the interests of a represented agency and the views of its incumbent agency head. Consider the White House Counsel's Office which, by tradition represents the office of the President, not necessarily the interests of the specific President currently serving in office.<sup>154</sup> A lawyer serving in that office must be attentive to the long-range interests of the Presidency, the independence, and have the fortitude to resist demands by the current President that may be contrary to these longer-term interests. Of course, the incumbent President may see this kind of resistance as disloyal. Certainly President Trump, who is reportedly obsessed with the loyalty of his subordinates,<sup>155</sup> would be unlikely to take it very well if his White House Counsel advised him that a proposed action was contrary to the interests of the office of the President. Evidence for this proposition comes from Trump's anger at Attorney General Jeff Sessions for recusing himself from the investigation of Russian interference with the election.<sup>156</sup> This may be referred to as an *apparent* agency problem, because what the President perceives as disloyal may in fact be respect for the obligations of White House

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153. See Miller, *supra* note 15, at 1294–95. This argument should not be taken as a decisive objection to the conception of legal advising that requires government lawyers to provide their best view of the law, as distinguished from a view that comports with the President's policy objectives and would not subject a lawyer to sanctions if offered as a legal argument in a litigated matter. The views of some lawyers, particularly those in the Office of Legal Counsel ("OLC") are effectively conclusive for the purpose of establishing the legality of some government action. By the Spider-Man principle, with the great power to establish a conclusive position on the lawfulness of some course of conduct comes the great responsibility to get the law right. See Moss, *supra* note 17, at 1317–18. Note, however, that the client receiving advice that represents the lawyers' best view of the law is the President, not some reified conception of the public interest.

154. *The Lawfare Podcast: Bob Bauer on Trump and the White House Counsel*, LAWFARE (May 27, 2017, 1:30 PM), <https://www.lawfareblog.com/lawfare-podcast-bob-bauer-trump-and-white-house-counsel> (interview with former White House Counsel).

155. See Michael Gerson, Opinion, *The Trump-Comey Contest Is a Titanic Clash of Worldviews*, WASH. POST (June 8, 2017), [https://www.washingtonpost.com/opinions/the-trump-comey-contest-is-a-titanic-clash-of-worldviews/2017/06/08/of622d68-4c91-11e7-9669-250d0b15f83b\\_story.html](https://www.washingtonpost.com/opinions/the-trump-comey-contest-is-a-titanic-clash-of-worldviews/2017/06/08/of622d68-4c91-11e7-9669-250d0b15f83b_story.html). ("Trump lives for loyalty but seems incapable of showing it. He demands sycophancy and yet, driven by his own obsessions and disorders, he regularly exposes his closest aides to public ridicule and humiliation.")

156. See Abby Phillip & Sari Horwitz, *Trump Blasts AG Sessions for Recusing Himself from the Russia Probe*, WASH. POST (July 19, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/07/19/trump-blasts-ag-sessions-for-recusing-himself-from-the-russia-probe>. In testimony before a Senate committee, Sessions stated that recusal was required under a Justice Department regulation. See Kurtis Lee, *Sessions Cites Justice Department Regulation in Recusal from Russia Inquiry*, L.A. TIMES (June 13, 2017, 12:45 PM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-sessions-cites-department-of-justice-1497381828-htlstory.html>.

Counsel. The important point to see here is that this principle of client identification is not formalistic, but supports an allocation of power to make decisions on behalf of the government, and ultimately on behalf of all citizens subject to the decisions of democratically elected officials. A government lawyer is the agent of the citizens of the nation, and stands in a co-agency relationship with the elected officials who may think of themselves (wrongly) as the client of the lawyer. This position is not a special feature of the role of *government* legal advisor. Any lawyer stands in a principal-agent relationship with her client, where one of the signal characteristics is the authority of the principal to make decisions concerning the objectives of representation.<sup>157</sup> Corporate lawyers, similarly, are co-agents with the officers of the corporation of the organization and ultimately of its shareholders.<sup>158</sup> What William Simon terms the “Managerialist Fallacy” is the conflation of the interests of corporate management and the organization itself.<sup>159</sup> Government lawyers engage in similarly fallacious reasoning when they defer to the interests of individual government officials, rather than acting in the best interests of the agency or the executive branch itself.

In short, the role of lawyers as fiduciaries is a feature of professional ethics that cuts across the government/private client distinction. It may also have constitutional significance,<sup>160</sup> but it is fundamental to the normative structure of the attorney’s role that she serve a client who has the authority to make decisions regarding the objectives of the representation.

#### D. INDEPENDENT PROFESSIONAL JUDGMENT

Rule 2.1 provides:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.<sup>161</sup>

There is a lot going on in this little rule. It encompasses duties of competence, communication, honesty, and fidelity to law under the rubric of candid, independent advice. The rule clearly embodies the agency and fiduciary nature of the lawyer’s role. The lawyer’s ethical obligation is to honestly inform clients of the legal and non-legal

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157. See LAW GOVERNING LAWYERS §§ 21(1), (2) (defining scope of client’s presumptive authority).

158. See William H. Simon, *Duties to Organizational Clients*, 29 GEO. J. LEGAL ETHICS 489, 494, 496–97 (2016).

159. *Id.* at 497.

160. See Miller, *supra* note 15, at 1295 (“[T]he idea that government attorneys serve some higher purpose fails to place the attorney within a structure of democratic government.”).

161. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2003).

consequences of their proposed course of action so that the client can make an autonomous decision.<sup>162</sup> Rule 2.1 therefore reinforces the allocation of decisionmaking authority between lawyers and clients, while also supporting the lawyer's duty to ensure the client's compliance with law.<sup>163</sup>

The duty to render independent, candid legal advice was at the center of a five-year investigation by the Department of Justice Office of Professional Responsibility ("OPR") of high-level Department lawyers.<sup>164</sup> The story leading up to the investigation is familiar: In the months after the 9/11 attacks, American special forces, CIA, and allied military and intelligence officers captured several suspected high-level al-Qaeda terrorists, who were believed to have information about imminent operations aimed at American targets.<sup>165</sup> How much force could be used to extract information from such a captive? Senior political officials, most prominently Vice President Dick Cheney and Secretary of Defense Donald Rumsfeld, were pushing hard for legal authorization to employ a range of techniques, many, long been recognized under international and domestic law as torture, to pry information out of suspected terrorists.<sup>166</sup> Farther down the chain of command, however, military and intelligence officers wanted legal cover.<sup>167</sup> Numerous meetings and brainstorming sessions already occurred, in which political officials from defense, intelligence, and national security agencies, along with representatives of the uniformed services, consulted with their respective lawyers about the permissibility of using so-called "enhanced interrogation techniques."<sup>168</sup> The attitude consistently conveyed from the top was that "[t]he President

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162. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986).

163. The Supreme Court stated, in frequently cited dicta in *Upjohn v. United States*, 449 U.S. 383, 389 (1981), that the purpose of the attorney-client privilege is to allow a free flow of confidential communications between attorney and client so that the attorney can learn all the relevant facts and then provide advice to the client on how to comply with the law.

164. DEP'T OF JUSTICE, *supra* note 25; see also Milan Markovic, *Advising Clients After Critical Legal Studies and the Torture Memos*, 114 W. VA. L. REV. 109, 124-32 (2011) (providing overview of the controversy over the Yoo and Bybee memos).

165. See, e.g., MAYER, *supra* note 24, at 139-81 (describing capture and torture of Abu Zubayda, as well as the deliberation surrounding legality of interrogation techniques).

166. See GOLDSMITH, *supra* note 11, at 67-70; MAYER, *supra* note 24, at 143-45; SANDS, *supra* note 24, at 20-21, 32-36, 44-48; see also Heather MacDonald, *How to Interrogate Terrorists*, in *THE TORTURE DEBATE IN AMERICA* 84 (Karen J. Greenberg ed., 2006) (noting that Kandahar detainees had studied American interrogation techniques and had received resistance training).

167. See, e.g., SANDS, *supra* note 24, at 48 (reporting that Major General Michael Dunlavey, the commanding officer of the interrogation unit at Guantánamo Bay, said: "I wanted legal sign-off, I wanted accountability, I wanted top cover.").

168. See, e.g., MAYER, *supra* note 24, at 219-24 (describing paper trail of documents reflecting legal opinions from Donald Rumsfeld's counsel, Jim Haynes, White House Counsel Alberto Gonzales, and counsel to the Vice President David Addington); SANDS, *supra* note 24, at 60-66; GOLDSMITH, *supra* note 11, at 108-20; BRUFF, *supra* note 18, at 235-40, 273-76.



had to do what he had to do to protect the country[,] [a]nd the lawyers had to find some way to make what he did legal.”<sup>169</sup> The linchpin in the legal authorization for the use of techniques such as waterboarding, sleep deprivation, extreme cold temperatures, stress positions, sexually and religiously oriented humiliation, and harsh lights and sound, was advice provided by two lawyers in the Office of Legal Counsel, John Yoo and Jay Bybee.<sup>170</sup>

Yoo and Bybee gave a great deal of advice to the administration concerning aspects of the government’s response to the terrorist threat, but the OPR Report focused most of its analysis on a memo dealing with the legality of interrogation techniques to be used on captured al-Qaeda operatives.<sup>171</sup> The memo reached a number of legal conclusions that astonished commentators when the advice became public: (1) under the statute criminalizing torture, implementing the obligation of the United States under the Convention Against Torture,<sup>172</sup> an actor must have the specific intent to inflict severe pain, and this means that causing severe pain is the actor’s express purpose;<sup>173</sup> (2) the level of pain necessary to satisfy this requirement is that “associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions”;<sup>174</sup> (3) that the infliction of mental harm violates the statute only if it is “lasting, though not necessarily permanent,” such as post-traumatic stress disorder or chronic depression;<sup>175</sup> (4) the defenses of necessity and self-defense are available to a prosecution under the statute;<sup>176</sup> and (5) even if the statute prohibited a method of interrogation and there was no statutory defense,

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169. GOLDSMITH, *supra* note 11, at 81.

170. *Id.* at 142–52. For descriptions of the treatment of detainees including Abu Zubaydah, Khalid Sheikh Mohammed (“KSM”), and Mohammed al-Qahtani, see MAYER, *supra* note 24, at 272–77; SANDS, *supra* note 24, at 4–5, 11–13, 23–24, 156–62; DEP’T OF JUSTICE, *supra* note 25, at 83–90; David W. Bowker, *Unwise Counsel: The War on Terrorism and the Criminal Mistreatment of Detainees in U.S. Custody*, in THE TORTURE DEBATE IN AMERICA 194 (Karen J. Greenberg ed., 2006) (citing an official U.S. Army report, which described torture techniques).

171. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Office of Legal Counsel, U.S. Dep’t of Justice (Aug. 1, 2002), in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua Dratel. eds., 2005); see also DEP’T OF JUSTICE, *supra* note 25, at 67–69, 77–81 (describing the drafting history of Bybee and Yoo memos).

172. 18 U.S.C. §§ 2340–2340A (2012); G.A. Res. 39/46, annex, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

173. Aug. 1, 2002, Memorandum, *supra* note 171, at 175. See Oona Hathaway et al., *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT’L L. 791, 809–22 (2012) (criticizing this reasoning as inconsistent with domestic and international criminal law); DEP’T OF JUSTICE, *supra* note 25, at 130, 168 (reporting OLC attorney Dan Levin’s disbelief “that if I hit you on the head with a . . . hammer, even though I know it’s going to cause specific pain, if the reason I’m doing it is to get you to talk rather than to cause pain, I’m not violating the statute.”).

174. Memorandum, *supra* note 171, at 176.

175. *Id.* at 177.

176. *Id.* at 207–13.

application of the statute to prohibit interrogation techniques ordered by the President would be unconstitutional because it “impermissibly encroache[s] on the President’s constitutional power to conduct a military campaign.”<sup>177</sup> The reasoning in the memos was subjected to severe criticism after it was revealed,<sup>178</sup> and OLC subsequently disavowed much of it.<sup>179</sup>

The OPR Report concluded that Yoo and Bybee committed professional misconduct by violating their duty to “exercise independent legal judgment and render thorough, objective, and candid legal advice.”<sup>180</sup> It painstakingly analyzed the legal advice provided, the arguments in support, and the lawyers’ treatment of adverse authority and counterarguments. The Report is noteworthy in several respects. First, as it should, the Report did not dwell on whether the lawyers reached the right answer, and did not hold against Yoo and Bybee that other lawyers disagreed with them.<sup>181</sup> Lawyers would undoubtedly be cautious about giving advice to a client if they believed they would be disciplined after the fact merely because other lawyers had a different view of the correct result.<sup>182</sup> The Report accordingly disclaimed any intent to punish lawyers who found themselves on one side of a reasonable disagreement. Second, the Report did not proceed from the assumption that there are clear right and wrong answers to legal questions. The duty to give candid, independent legal advice does not require lawyers to hit the target, in the sense of giving the right answer. Instead, the Report examined the OLC lawyers’ process of arriving at

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177. *Id.* at 200.

178. See, e.g., Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1694–1709 (2005), reprinted in TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE (2010); Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1 (2006); Jens D. Ohlin, *The Torture Lawyers*, 51 HARV. INT’L L.J. 193, 199–207 (2010); Daniel Kanstroom, *On “Waterboarding”*: *Legal Interpretation and the Continuing Struggle for Human Rights*, 28 B.C. THIRD WORLD L.J. 269, 283–86 (2008); Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1150 (2006) (noting that the memos blessed the use of techniques that had been employed by Saddam Hussein); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT’L SEC. L. & POL’Y 409, 431–41 (2005).

179. See Memorandum from Daniel Levin, Acting Assistant Attorney Gen., Office of Legal Counsel, to James B. Comey, Deputy Attorney Gen., Office of Assistant Attorney Gen. 2 (Dec. 30, 2004) (disavowing and replacing memos drafted by Yoo and Bybee); see also DEP’T OF JUSTICE, *supra* note 25, at 117–21 (summarizing Jack Goldsmith’s criticism of reasoning in Yoo and Bybee memos); *id.* at 130 (setting out Dan Levin’s criticism of commander-in-chief, specific intent, and severe pain and suffering analysis).

180. DEP’T OF JUSTICE, *supra* note 25, at 11. The lawyers were treated differently on the basis of their *mens rea*. The Report found that Yoo committed intentional professional misconduct, while Bybee acted in reckless disregard of his obligations. *Id.*

181. *Id.* at 160.

182. See, e.g., Julian Ku, *The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice*, 42 CASE W. RES. J. INT’L L. 449, 456–57 (2009).

legal conclusions. In other words, it focuses not on *advice* but on *advising*. At times, for example, Yoo appeared to conduct only cursory research.<sup>183</sup> The memos sometimes failed to cite and discuss contrary authority, even as obviously relevant as the Steel Seizure Case, the leading Supreme Court precedent on the relationship between the Executive Branch and Congress in wartime.<sup>184</sup> The analysis of complex, subtle issues was frequently oversimplified, sometimes to the point of being misleading,<sup>185</sup> and often failed to acknowledge ambiguities, limitations, or counterarguments.<sup>186</sup> The authors of the memos paraphrased statutory language (a no-no, as we teach our law students in statutory interpretation classes) in a way that slanted the analysis toward their preferred conclusion,<sup>187</sup> mischaracterized the holdings of cases and the significance of other authority,<sup>188</sup> and blended the elements of legal doctrines in a way that obscured the significance of certain facts.<sup>189</sup>

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183. DEP'T OF JUSTICE, *supra* note 25, at 166 (reporting that Yoo had stated in interviews that, regarding the specific-intent analysis, he had only “looked at cases quickly,” was working from a recollection of a law review or treatise, and got the impression from talking with criminal law specialists that it was a “we-know-it-when-we-see-it” standard); *id.* at 209 (citing Yoo’s statement that he was unfamiliar with the necessity defense in criminal law and noting that he missed relevant authority from every federal circuit).

184. DEP'T OF JUSTICE, *supra* note 25, at 204 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)); *see also id.* at 207–09 (noting that the discussion of the necessity defense failed to discuss two leading Supreme Court cases); *id.* at 235 (criticizing memos for not mentioning that a federal district court had found waterboarding to be torture in litigation against former Philippine President Ferdinand Marcos, and that the Justice Department had charged a Texas sheriff with civil rights violations for using waterboarding on criminal suspects to coerce confessions).

185. DEP'T OF JUSTICE, *supra* note 25, at 168–73 (noting, among other deficiencies, that Bybee had read a Supreme Court case dealing with the element of willfulness as bearing on the proper understanding of specific intent); *id.* at 184–86 (criticizing memo for oversimplifying ratification history of Convention Against Torture (“CAT”)); *id.* at 217–19 (similarly criticizing authors for citing Reagan Administration reservation to the CAT regarding common-law defenses such as necessity, but not mentioning subsequent reversal of that position by Bush Administration). The Report acknowledged that an attorney may advance a position that extends existing law to novel situations; when doing so, however, it is a violation of professional standards to fail to point out that the position is novel and not supported by existing law, and to omit to raise counterarguments. *Id.* at 230–31.

186. DEP'T OF JUSTICE, *supra* note 25, at 174–75, 174 n.131 (observing that Bybee memo failed to mention that good faith defense developed in the context of tax and financial crimes, may not apply in the same manner to a *mala in se* crime like torture, and in any event may be limited by willful blindness); *id.* at 181 n.135 (criticizing authors for not acknowledging that “severe pain” was given inconsistent definitions in statutes); *id.* at 201–03 (noting that analysis of Commander-in-Chief power did not acknowledge the limitation as applied to such as basic norm as the prohibition on torture).

187. DEP'T OF JUSTICE, *supra* note 25, at 178 (discussing use of medical-benefits statute to define severe pain, and paraphrases such as “serious dysfunction of any bodily organ” becoming “organ failure”).

188. DEP'T OF JUSTICE, *supra* note 25, at 187–90 (criticizing memos for characterizing cases decided under the Torture Victims Protection Act as involving only conduct that is particularly cruel and sadistic); *id.* at 221–23 (noting that memo cited a law review article by a philosopher as a leading authority on the law of self-defense, when in fact the article did not discuss American caselaw and was based on hypotheticals and moral arguments).

189. DEP'T OF JUSTICE, *supra* note 25, at 210–14 (showing how, regarding the necessity defense,

Associate Deputy Attorney General David Margolis reversed the OPR Report's conclusions based on the question of whether the sloppy, cavalier analysis displayed by Yoo and Bybee rose to the level of a violation of governing legal standards.<sup>190</sup> The OPR's Analytical Framework states that a Justice Department attorney "engages in professional misconduct when he or she intentionally violates or acts in reckless disregard of an obligation or standard imposed by law [or] applicable rule of professional conduct . . ."<sup>191</sup> Instead, Margolis seemed to focus on whether there was a *single*, specific bar rule that proscribes the lawyers' conduct.<sup>192</sup> He appears to assign a great deal of weight to the fact that Rule 2.1 almost never serves as the sole basis for discipline in grievance proceedings against lawyers:

OPR has not cited, and I have not located, any case in any jurisdiction that reaches a finding of a violation of Rule 2.1 where an attorney provided the client advice free of any discernable conflict or in which a court considered an alleged violation of Rule 2.1 that was not collateral to violations of other Rules of Conduct.<sup>193</sup>

It is true that there are few, if any, grievance proceedings based only on Rule 2.1 allegations. That does not mean that Rule 2.1 is an empty rule, only that the type of conduct that would constitute an un-aggravated Rule 2.1 violation in the context of private-client representation would ordinarily be addressed by an action for malpractice or breach of fiduciary duty brought by the client. A rule of professional conduct may state a genuine duty even if state bar grievance committees generally do not perform much of an enforcement rule. Simple negligence claims, for example, may result in professional discipline under Rule 1.1,<sup>194</sup> but state regulators tend to punt responsibility for enforcing standards of competent representation to the civil litigation system.<sup>195</sup> In the context of government-agency representation, there are doctrinal reasons, including qualified immunity, why successful malpractice actions are

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the memos' summary of the doctrine overlooked the importance of considerations such as the availability of alternatives to violating the law and the imminence of the threat to the actor).

190. See Markovic, *supra* note 164, at 132–37.

191. See OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE: ANALYTICAL FRAMEWORK 2 (2005), <https://www.justice.gov/sites/default/files/opr/legacy/2006/03/15/framework.pdf>. The OPR Analytical Framework has a comprehensive list of sources of legal obligations for Justice Department attorneys, including the Constitution, federal statutes and case law, court orders and rules of procedure, and the rules of professional conduct of an attorney's admitting jurisdiction and any jurisdiction in which the attorney is litigating. See *id.*

192. Margolis, *supra* note 26, at 12.

193. *Id.* at 24.

194. See ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 20–27 (7th ed. 2011).

195. See, e.g., Florida Bar v. Neale, 384 So.2d 1264, 1265 (Fla. 1980) (suggesting that professional discipline should not be used "as a substitute for what is essentially a malpractice action"); Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705 (1981).

uncommon.<sup>196</sup> Although one might therefore expect state regulators to pick up the slack, a grievance proceeding generally requires a grievant. Government agencies, however, may be reluctant to file professional disciplinary charges against their lawyers, preferring to deal with the matter internally, through discipline or termination.

The Margolis Memo did not say that lawyers have no ethical constraints when serving as advisors. It recognized, as an unambiguous obligation, that lawyers may not “provide advice to their client that was knowingly or recklessly false or issued in bad faith.”<sup>197</sup> It arrived at this subjective standard by reading a number of rules together (as it should): District of Columbia Rule 2.1 on independent judgment, Rule 1.2(d) prohibiting *knowingly* providing assistance to a client’s criminal or fraudulent conduct, Rule 3.3’s requirement of candor to the tribunal, and the prohibition in Rule 8.4(c) on conduct involving dishonesty. Each of these rules, either on their face or as interpreted in bar disciplinary proceedings, has a *mens rea* standard of either knowledge or recklessness. Therefore, the content of the minimal obligation of government lawyers serving in an advisory role is to refrain from giving advice that the lawyers believe to be incorrect. The problem with this approach is that it is highly selective, relied on rules that do not apply to lawyers as advisors, and ignores other aspects of the law governing lawyers that would support an objective standard of reasonableness. In particular, the reliance on Rule 3.3 is bizarre. That rule deals with the introduction of false *factual* testimony or evidence, and reflects the division of labor among advocates and the court in a litigated matter. There has been a decades-long and colorful controversy surrounding the problem of client perjury, particularly in criminal defense cases,<sup>198</sup> and much of the current debate in the cases centers on the *mens rea*

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196. See MALLIN & SMITH, *supra* note 114, § 24:15. In the context of private client representation, the *in pari delicto* defense prevents a client who knowingly engaged in wrongdoing from recovering from a lawyer who advised the client. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54, cmt. F (AM. LAW INST. 2000).

197. Margolis, *supra* note 26, at 26; see also Markovic, *supra* note 164, at 134–35 (reading the Margolis in the same way).

198. Monroe Freedman argued, in one of the best-known articles in professional responsibility literature, that a criminal defense attorney must strike the appropriate balance among three duties—competent representation, confidentiality, and candor to the tribunal. In some situations, there will be no way to satisfy all three of these obligations, so something has got to give. The only question is what. When confronted by a client who intends to take the stand and tell a lie, Freedman argued that candor to the tribunal ought to be subordinated to the constitutionally-protected duty of providing effective assistance of counsel, including a stringent obligation of confidentiality. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474–78 (1966). This stance was so shocking to professional sensibilities at the time that three federal judges filed a disciplinary grievance against Freedman for merely advocating the priority of loyal client service over candor to the tribunal. See Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133, 133 n.1, 136–38 (2008) (retelling this story).

requirement—when will a lawyer have sufficient knowledge of the falsity of the client’s story that taking remedial measures is required?<sup>199</sup> The perjury rule sheds no light whatsoever on the stance a lawyer ought to take toward the law, not facts, when serving as an advisor, not an advocate in litigation.

Margolis did not endorse the position urged by John Yoo’s defense counsel, who claimed that a lawyer can never be subject to discipline for advising a client that the law conforms to the lawyer’s own beliefs, no matter how idiosyncratic. Yoo quotes other OLC lawyers who report that he had maintained an aggressive view about the proper scope of presidential power long before being appointed to OLC.<sup>200</sup> Yoo’s well-known hawkish views were undoubtedly one of the reasons for his appointment to the Bush Administration’s OLC, but they had no bearing on his ethical obligations once appointed. More relevant is a key theme in the law of lawyering—that a lawyer owes a client an objective standard of reasonable competence in the representation. This obligation is clearly established as a matter of constitutional and tort law,<sup>201</sup> and robust across many contexts, including transactional advising, negotiation, settlement, and counseling,<sup>202</sup> as well as advocacy in litigation. The principle that lawyers are not liable for errors of judgment when reasonable lawyers could disagree is correct as far as it goes, but it is important to understand that it is limited by the lawyer’s obligation to conduct a reasonable investigation of both facts and law before making a judgment call; a lawyer may be liable for an erroneous judgment if it is unreasonable under the circumstances.<sup>203</sup> A client is entitled to an *informed* judgment, and also to accurate information about the state of the law. If the law is uncertain on some point, a lawyer must, consistent with fiduciary duties of competence and communication, advise the client about unsettled issues of law, although the lawyer will not be liable for failing to predict an eventual judicial resolution.<sup>204</sup> And while lawyers

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199. See, e.g., *People v. Andrades*, 828 N.E.2d 599 (N.Y. 2005); *State v. McDowell*, 681 N.W.2d 500, 513 (Wis. 2004); *United States v. Midgett*, 342 F.3d 321, 326 (4th Cir. 2003); *United States v. Long*, 857 F.2d 436, 445 (8th Cir. 1988).

200. See Classified Response to the U.S. Department of Justice Office of Professional Responsibility Classified Report Dated July 29, 2009, Submitted on Behalf of Professor John C. Yoo (Oct. 9, 2009).

201. See, e.g., 2 MALLEN & SMITH, *supra* note 114, § 20:3 (explaining that the standard of care for attorneys is the skill and judgment of a reasonable member of the profession); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (explaining that the Sixth Amendment standard of effective assistance of counsel requires reasonableness under prevailing professional norms).

202. See, e.g., *Viner v. Sweet*, 70 P.3d 1046 (Cal. 2003); *Williams v. Ely*, 668 N.E.2d 799, 806 (Mass. 1996).

203. 2 MALLEN & SMITH, *supra* note 114, §§ 19:1, 19:13; *Ziegelheim v. Apollo*, 607 A.2d 1298 (N.J. 1992). The same principle applies to ineffective assistance of counsel claims under the Sixth Amendment. See *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

204. See, e.g., *Wood v. McGrath, North, Mullin & Kratz, P.C.*, 589 N.W.2d 103, 106 (Neb. 1999).

may be disciplined for introducing false factual evidence only when they have actual knowledge of its falsity, the standard for sanctioning lawyers who make inadequately supported legal arguments is well-established as an objective one—there is no “pure heart, empty head” defense for a lawyer who sincerely believes his view of the law is right, against what a hypothetical reasonable lawyer would understand as the weight of authority.<sup>205</sup> Nothing in the Margolis Memo should be understood as establishing a standard that differs from these fundamental principles.

Bruce Ackerman argues that Margolis “completely exonerates” Yoo and Bybee of misconduct and, as a result, makes it more likely that government lawyers in the future will agree to bless an unlawful course of conduct.<sup>206</sup> Similarly, in an acerbic on-line reaction to the Margolis Memo, Jack Balkin reads it as an example of lawyers protecting their own:

[T]he standard for attorney misconduct is set pretty damn low, and is only violated by lawyers who . . . are the scum of the earth. . . . [Rules of professional conduct] are set up by jurisdictions to weed out the worst offenders, leaving the rest of the legal profession to make entirely stupid, disingenuous and asinine arguments that normal people with functioning moral consciences would not make. . . . In effect, by setting the standard of conduct so low, rules of professional conduct effectively work to protect all those lawyers out there whose moral standing is just a hair's breadth about your average mass murderer. This is how the American legal profession simultaneously polices and takes care of its own.<sup>207</sup>

I share Ackerman's and Balkin's frustration that Yoo and Bybee escaped professional discipline for their central role in what even the Margolis Memo characterized as “an unfortunate chapter in the history of the Office of Legal Counsel.”<sup>208</sup> But there are three points to make in the closing of this discussion. First, every government lawyer should pause and reflect that the Margolis Memo found it to be a “close question” whether “Yoo intentionally or recklessly provided misleading advice to his client,”<sup>209</sup> even given the exigent circumstances at the time. Consider the background of enormous political pressure and the general sense of dread pervading the government after 9/11. According to Jack Goldsmith, David Addington declared that if lawyers did not give their blessing to the administration's counterterrorism initiatives, “the blood

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205. See, e.g., *Balthazar v. Atlantic City Med. Ctr.*, 279 F. Supp. 2d 574, 593 (D.N.J. 2003); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986); *Golden Eagle Dist. Co. v. Burroughs Corp.*, 801 F.2d 1531, 1536–38 (9th Cir. 1986).

206. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 108 (2010).

207. Jack Balkin, *Justice Department Will Not Punish Yoo and Bybee Because Most Lawyers Are Scum Anyway*, BALKINIZATION (Feb. 19, 2010, 7:45 AM), <https://balkin.blogspot.com/2010/02/justice-department-will-not-punish-yoo.html>.

208. Margolis, *supra* note 26, at 67.

209. *Id.*

of the hundred thousand people who die[d] in the next attack [would have been] on” their hands.<sup>210</sup> The Margolis Memo notes on several occasions that the situation facing government officials and their legal advisors was at least perceived to be unprecedented in American history; the Memo is pervaded by phrases like “national security crisis” and “context of threat and danger.”<sup>211</sup> Even so, Margolis clearly regretted the quality of the legal analysis provided by Yoo and Bybee and, at least if his own words are to be believed, came close to referring them to state bars for discipline. The unequivocal statements by Trump’s nominees for Attorney General and CIA Director that waterboarding is illegal may also evidence a certain recognition in official Washington circles that the Bush Administration pushed its lawyers too far to sign off on illegal conduct.<sup>212</sup>

Second, if the Margolis Memo’s reversal of the Office of Professional Responsibility Report is simply realpolitik—lawyers protecting their own—then it does not furnish a principled basis for objecting to discipline in a case in which lawyers do much the same thing. Maybe Margolis felt a sense of loyalty to other Justice Department lawyers who lobbied against discipline for Yoo and Bybee, citing the extraordinary circumstances of ongoing credible threats of imminent attacks. Lawyers in a Trump Justice Department had better assure themselves of similarly well-connected allies. Perhaps the lawyers deserve a pass since everyone in the government was terrified of future attacks. But for a future administration, if the issue is objective compliance with ethical norms, then the torture memos provide a clear instance of violation of the duty of providing competent, independent, and candid advice.

Third, and related to the potential future differences in political climate, the Justice Department’s Office of Professional Responsibility may find professional misconduct when a lawyer “intentionally violates or acts in reckless disregard of an obligation or standard imposed by [i] law, [ii] applicable rule of professional conduct, or [iii] Department regulation or policy.”<sup>213</sup> Rules of professional conduct are law, in the sense that they are promulgated by state courts and enforced through professional disciplinary proceedings, so the disjunctive reference to law *or* rules of professional conduct must contemplate discipline for lawyers who violate norms of conduct not necessarily covered specifically by the rules. An intentional or reckless breach of fiduciary duty and the duty of reasonable care that rises to the level of aiding and abetting unlawful conduct by the client would satisfy the government’s own internal ethical standards, even if it would not subject a lawyer to discipline in his or her admitting state.

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210. See, e.g., GOLDSMITH, *supra* note 11, at 71.

211. Margolis, *supra* note 26, at 2, 16–17, 19–21.

212. See Apuzzo & Risen, *supra* note 65.

213. OPR ANALYTICAL FRAMEWORK, *supra* note 191 (emphasis added).



## E. CONFIDENTIAL INFORMATION AND WHISTLEBLOWING

Whistleblowing—the disclosure of what would otherwise be protected confidential information with the aim of disclosing wrongdoing—is a time-honored tactic employed against the abuse of government power. Consider the disclosure by Daniel Ellsberg of the so-called Pentagon Papers during the Vietnam War, revealing secret bombing campaigns in Laos and Cambodia. In a landmark press-freedom case the Supreme Court held that the government had not carried the burden required to enjoin their publication.<sup>214</sup> More recently, the disclosure by Edward Snowden of confidential National Security Agency documents showed that the agency conducted unauthorized surveillance of American citizens.<sup>215</sup> Already, some legal scholars are anticipating that government employees confronted by wrongdoing on the part of officials in the Trump Administration may consider blowing the whistle.<sup>216</sup>

### 1. Confidentiality and Privilege Are Different

All lawyers, no matter the identity of their client, are subject to the duty of confidentiality. As set forth in the Model Rules, it prohibits lawyers from disclosing or using to the disadvantage of a client any “information relating to the representation” of the client.<sup>217</sup> The scope of information protected by the duty of confidentiality is considerably broader than the scope of communications protected by the attorney-client privilege. The evidentiary privilege covers only those communications made in confidence for the purpose of obtaining legal assistance.<sup>218</sup> There has been a great deal of litigation and commentary concerning the attorney-client privilege in the context of investigations of possible criminal conduct by government officials.<sup>219</sup> The granddaddy

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214. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

215. See, e.g., Amanda Holpuch, *Eric Holder Says Edward Snowden Performed “Public Service” with NSA Leak*, GUARDIAN (May 30, 2016, 11:56 AM), <http://www.theguardian.com/us-news/2016/may/30/eric-holder-edward-snowden-nsa-leak-public-service>.

216. See, e.g., Eric Posner, Opinion, *Are There Limits to Trump’s Power?*, N.Y. TIMES (Nov. 10, 2016), <http://www.nytimes.com/2016/11/10/opinion/are-there-limits-to-trumps-power.html> (“If [Trump] directs the F.B.I., I.R.S. or Department of Homeland Security to harass his political opponents, civil servants will probably not cooperate—indeed, they may blow the whistle.”).

217. MODEL RULES OF PROF’L CONDUCT r. 1.6(a), 1.8(b) (AM. BAR ASS’N 2003).

218. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 2000).

219. Much of this litigation and commentary arose from the sprawling investigation by Independent Counsel Kenneth Starr of misconduct by President Clinton, originating with the Whitewater matter. See, e.g., *In re Lindsey*, 158 F.3d 1263, 1278 (D.C. Cir. 1998) (holding that Deputy White House Counsel could not assert attorney-client privilege to avoid answering grand jury questions concerning alleged criminal wrongdoing relating to Monica Lewinsky); *In re Grand Jury Subpoena*, 112 F.3d 910, 925–26 (8th Cir. 1997) (reversing denial of Independent Counsel’s motion to compel notes taken by White House counsel pertaining to Whitewater-related subjects, including billing records of Hillary Clinton’s former law firm); see also *In re A Witness Before the Special Grand*

of this controversy is of course the assertion by President Nixon, and the denial by the Supreme Court, of executive privilege in tape recordings of communications in the White House.<sup>220</sup> One might therefore believe that, because the weight of authority is against an attorney-client privilege in the setting of an investigation of wrongdoing by a government official, the duty of confidentiality applies differently to government lawyers. However, there are subtle differences in both the foundations and the practical significance of the privilege and the duty of confidentiality which make the privilege cases inapposite.

The attorney-client privilege is a creature of the law of evidence. As such, it is influenced by the policies underlying that body of law, including Wigmore's "every man's evidence" principle.<sup>221</sup> The Eighth Circuit, in one of the Whitewater cases, cited Wigmore's maxim and stated that any exceptions to that principle must be strictly construed as they stand in derogation of the search for truth.<sup>222</sup> Even where the privilege has constitutional dimensions, as in the case of the Nixon tapes, the needs of the government's criminal justice process are paramount.<sup>223</sup> The privilege does not block an official investigation of alleged criminal

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Jury 2000-2, 288 F.3d 289, 295 (7th Cir. 2002) (not a Starr vs. Clinton case; denying attorney-client privilege for communications between counsel to Illinois Secretary of State and then-Secretary, later Governor George Ryan). For representative commentary, see, e.g., Patricia E. Salkin & Allyson Phillips, *Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*, 39 IND. L. REV. 561, 572-82 (2006); Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469, 494-96 (2002); Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 474-49 (1998); Katherine L. Kendall, Note, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, 112 HARV. L. REV. 1995, 2006-07 (1999); Adam M. Chud, Note, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682, 1702-16 (1999); Bryan S. Gowdy, Note, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 FLA. L. REV. 695, 718-21 (1999); Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1733-44 (1988). Following *Lindsey*, courts have held that the attorney-client privilege also applies in civil litigation involving government entities. See, e.g., *Spears v. First Am. eAppraiseIT*, 75 F. Supp. 3d 208, 211-12 (D.D.C. 2014) (documents reflecting communications between the Office of Thrift Supervision and agency counsel); *A.N.S.W.E.R. Coalition v. Jewell*, 292 F.R.D. 44, 47-49 (D.D.C. 2013).

220. See *United States v. Nixon*, 418 U.S. 683, 713 (1974).

221. See, e.g., *Trammel v. United States*, 445 U.S. 40, 50 (1980). The principle has been summarized by the Supreme Court as follows:

Dean Wigmore stated the proposition thus:

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

*United States v. Bryan*, 339 U.S. 323, 331 (1950).

222. *In re Grand Jury Subpoena*, 112 F.3d at 918 (citing *Bryan*, 339 U.S. at 323 (quoting 8 J. WIGMORE, EVIDENCE § 2192 (3d ed. 1940))).

223. *In re Grand Jury Subpoena*, 112 F.3d at 919.

wrongdoing by government officials. It does not follow, however, that government lawyers are not subject to obligations of confidentiality that prohibit the voluntary disclosure of information—such that, disclosure not in response to an official demand as part of a criminal investigation. The rule of professional conduct governing confidentiality has exceptions that differ from the exceptions to the privilege, for the simple reason that it embodies different policy considerations. The *privilege* cases reflect the competing interests of ascertaining the truth through litigation—hence the Wigmore maxim and the narrow construction of all evidentiary privileges—and, on the other side the free flow of confidential communications between attorney and client so that the attorney can learn all the relevant facts and then provide advice to the client on how to comply with the law, as the Supreme Court stated in *Upjohn v. United States*.<sup>224</sup> The *duty* of confidentiality, by contrast, is concerned with only one side of that policy balance. It enforces the lawyer's fiduciary duty of loyalty to the client, ensuring that confidential information will not be disclosed to the client's detriment or used to further the interests of other clients or the attorney's own interests.<sup>225</sup> When it comes to interpreting the duty of confidentiality, there is no other side of the coin reflecting the societal interests in the truth coming to light. Finding out the truth is a role for the judicial system, but individual lawyers, including government lawyers, cannot disclose confidential client information in furtherance of the truth-finding function of the system.

## 2. Exceptions to Confidentiality

As President, Trump has railed repeatedly against “leaks” and “leakers,” although sometimes he uses the word expansively.<sup>226</sup> For the purposes of this Article, an attorney would engage in prohibited conduct by disclosing confidential client information without express or implied

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224. *Upjohn v. United States*, 449 U.S. 383, 391 (1981).

225. See MODEL RULES OF PROF'L CONDUCT r 1.6 cmt. 2 (AM. BAR ASS'N 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59, cmt. b (AM. LAW INST. 2000); 2 MALLIN & SMITH, *supra* note 114, § 18:5. The protection of confidential information is also the rationale underlying conflict of interest prohibitions in concurrent and successive representations. See LAW GOVERNING LAWYERS § 121 cmt. b, § 132 cmts. a & b.

226. See, e.g., Ashley Parker, *Trump Accuses Comey of Illegally Leaking Classified Information*, WASH. POST (July 10, 2017), [http://www.washingtonpost.com/news/post-politics/wp/2017/07/10/trump-accuses-comey-of-illegally-leaking-classified-information/?utm\\_term=.c029e4947483](http://www.washingtonpost.com/news/post-politics/wp/2017/07/10/trump-accuses-comey-of-illegally-leaking-classified-information/?utm_term=.c029e4947483); Jordan Fabian, *Trump Lawyer Accuses Comey of “Improperly” Leaking Memo to Press*, THE HILL (June 8, 2017, 2:22 PM) <http://origin-ny1.thehill.com/blogs/blog-briefing-room/news-other-administration/336985-trump-lawyer-attacks-comey-over-leaks> (discussing grievance filed by Trump's personal attorney Marc Kasowitz, against James Comey for allegedly disclosing classified information, notwithstanding the fact that Comey was not acting in an attorney-client representative capacity when he had the communications with Trump).

authorization, or the informed consent of the client.<sup>227</sup> Modifying the facts surrounding the firing of FBI Director James Comey,<sup>228</sup> suppose a Justice Department lawyer participated in a meeting in which the President strongly suggested that the FBI should drop an investigation against a family member. The lawyer believes this request is a serious violation of an unwritten norm protecting the neutrality of the FBI. The lawyer further believes that the public interest in transparency and exposing wrongdoing by government officials would be furthered by disclosing the President's directive to the FBI.

For two decades after the promulgation of the 1983 Model Rules of Professional Conduct, Rule 1.6 contained few exceptions permitting disclosure of confidential information to serve the interests of third parties. There was a narrow exception permitting disclosure if necessary to prevent imminent death or substantial bodily harm resulting from a criminal act by the client.<sup>229</sup> But the American Bar Association ("ABA") Commission that drafted the 1983 rules had rejected a proposed exception that would have permitted lawyers to disclose confidential information to prevent financial frauds.<sup>230</sup> Lawyers and scholars argued vehemently that the lawyer's role is characterized by client loyalty above all, and should not be compromised by establishing even a permission—let alone an obligation—to disclose confidential information to protect a non-client.<sup>231</sup> An antifraud disclosure exception was proposed when the ABA's Ethics 2000 Commission revised the rules in 2002, but the ABA House of Delegates rejected it.<sup>232</sup> After the financial accounting frauds at Enron and other companies, and partly in response to political pressure from Congress and the Securities and Exchange Commission, the ABA finally relented in 2003.<sup>233</sup> Rule 1.6(b) now contains exceptions permitting disclosure of confidential information to the extent reasonably necessary to prevent, rectify, or mitigate substantial injury to the financial interests or property of another that is reasonably certain to result from a criminal or fraudulent act of the client, in which the lawyer's services have been used.<sup>234</sup> This is still a relatively narrow exception, requiring that (1) the client's conduct constitutes a

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227. See PROF'L CONDUCT r. 1.6.

228. See Benjamin Wittes, *What James Comey Told Me About Donald Trump*, LAWFARE (May 18, 2017, 8:02 PM), <https://www.lawfareblog.com/what-james-comey-told-me-about-donald-trump>.

229. See PROF'L CONDUCT r. 1.6(b)(1).

230. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677, 719–23 (1989).

231. See, e.g., Monroe H. Freedman, *Lawyer—Client Confidence: The Model Rules' Radical Assault on Tradition*, 68 A.B.A. J. 428, 429–32 (1982).

232. *Id.*

233. See Roger C. Cramton, George M. Cohen and Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 731–32 (2004).

234. PROF'L CONDUCT r. 1.6(b)(2), (3).

crime or civil fraud, (2) the injury is to a third party's financial interests or property, (3) the harm is substantial, (4) the harm is reasonably certain, and (5) the lawyer's services were used in the commission of the crime or fraud.

Thus, while the Eighth Circuit in the *Grand Jury Subpoena* attorney-client privilege case referred to a "general duty of public service," which "calls upon government employees and agencies to favor disclosure over concealment,"<sup>235</sup> it would be a serious misreading of the confidentiality rule to construe an exception permitting disclosure where it would generally be in the public interest. In the example of the Justice Department attorney who overheard Trump's directive that the FBI drop an investigation, it may be the case that the public interest cuts in favor of disclosure, but disclosure would nevertheless be a violation of the duty of confidentiality stated in Model Rule 1.6.

The antifraud exceptions, in both the Model Rules and state rules before 2003, are typically narrowly construed. For example, a lawyer may not disclose false statements made on job applications, misstatements of a client's tax liability, or failure to file tax returns, if not technically frauds.<sup>236</sup> The Washington Supreme Court confirmed the narrowness of the fraud exception when it issued a six-month suspension to a lawyer who had disclosed confidential client information that led to a state judge's removal for corruption.<sup>237</sup> The client, Hamilton, sought the lawyer's assistance in purchasing a bowling alley; he told the lawyer that he was getting a good deal because the estate administrator, Anderson, had been "milking" the estate for years.<sup>238</sup> Soon thereafter, Anderson was appointed to the bench. As the court put it, the lawyer became "obsessed" with Judge Anderson's corruption. Despite Hamilton's pointed refusal to consent to the disclosure, the lawyer either talked or sent documents to the FBI, the IRS, the Washington State Bar Association, the Washington Commission on Judicial Conduct, and several local newspapers.<sup>239</sup> The lawyer was probably astonished to learn that the court was more concerned with his breach of his client's trust than with the judge's corruption. Although it erroneously conflated the privilege and the duty of confidentiality, the court's reasoning shows the seriousness with which professional secrecy is regarded, even in the face of countervailing public interests in disclosure:

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235. *In re Grand Jury Subpoena*, 112 F.3d 910, 920 (8th Cir. 1997).

236. *See, e.g., In re Smith*, 991 N.E.2d 106, 108 (Ind. 2013); *In re Botimer*, 214 P.3d 133, 140 (Wash. 2009); *In re Lackey*, 37 P.3d 172, 177 (Or. 2002); Conn. Informal Ethics Op. 01-13 (2001).

237. *In re Schafer*, 66 P.3d 1036, 1040 (Wash. 2003).

238. *Id.* at 1038.

239. *Id.* at 1039.

Erosion of this privilege through willful breaches of a client's trust by an attorney is undoubtedly harmful to society because these breaches weaken the public perception that people can seek assistance and rely on an attorney as an expert and counselor "free from the consequences or the apprehension of disclosure."<sup>240</sup>

The court concluded by reminding lawyers that they do not have a roving commission to right social wrongs, but are agents serving clients, with duties of loyalty and confidentiality:

Douglas Schafer holds himself above the code of his profession and above the law—he claims too much. Schafer asserts the right to define morality—to carve out his own exceptions to a time-honored obligation of his chosen profession. A valid directive cannot be sacrificed to aid a lawyer in his personal vendetta. Who will be safe? The client who tells too much? The client who reveals an indiscretion unrelated to the subject of the representation? The potential exposure is enormous.<sup>241</sup>

Lawyers considering disclosing confidential information in the public interest should note carefully the court's distinction between the lawyer's own moral code and "the code of his profession."<sup>242</sup> Confidentiality rules are controversial.<sup>243</sup> Some lawyers and commentators think they are too restrictive, with too few permissions to disclose information to protect third parties or the public,<sup>244</sup> while others believe they are too porous and insufficiently protective of client interests. The extensive public debate that surrounded the adoption by the Securities and Exchange Commission ("SEC") of a relatively modest, incremental expansion in the authority of corporate lawyers to disclose evidence of client wrongdoing shows that this is an issue not likely to be resolved by deliberating about what is really in the public interest.<sup>245</sup> Maybe the public interest is best served by a strict duty of confidentiality that signals clearly to clients that they can trust lawyers never to reveal information learned in the course of representation. On the other hand, allowing some latitude for disclosure may give lawyers greater leverage in dealing with powerful clients who are up to no good, thereby

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240. *Id.* at 1042 (citing *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).

241. *Id.* at 1048.

242. *Bryan*, 339 U.S. at 331.

243. *See, e.g.*, Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 356 (1989).

244. *See, e.g.*, RHODE, *supra* note 135, at 110–11 (arguing that concerns about the rights of clients do not "explain why the rights of clients should always take precedence over the rights of everyone else, particularly where health and safety are at stake."); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 55–57 (1998); Daniel Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 33 (1998) (arguing that stringent lawyer confidentiality rules unfairly benefit lawyers in inter-professional competition with accountants, bankers, management consultants, and others offering similar services).

245. *See, e.g.*, Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1257–60 (2003); Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281, 1287–88 (2003); John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1294 n.3 (2003).

enhancing the socially valuable independence of the bar. Interpreting the exceptions for disclosure to prevent client fraud is therefore not wholly an exercise in moral reasoning.

What about the exception permitting disclosure to the extent the lawyer reasonably believes necessary to “comply with other law or a court order”?<sup>246</sup> The usual application of that exception is to court-ordered discovery, and the “reasonably necessary” limitation has been interpreted to require lawyers first to seek to quash a subpoena or otherwise make nonfrivolous objections to disclosure until the court orders it.<sup>247</sup> It also permits disclosure in response to legal obligations established by child-abuse reporting statute and the requirement of the Internal Revenue Code to identify clients and report cash payments in excess of \$10,000 on Form 8300.<sup>248</sup> In these cases, a lawyer is potentially caught between two mandatory duties—confidentiality under Rule 1.6 and the statutory, regulatory, or judicially imposed obligation to disclose. The exception in Rule 1.6(b)(6) gives the lawyer discretion to extricate herself from this dilemma. But what if disclosure is merely permissive, not mandatory? This situation can arise when lawyers seek legal protection as a whistleblower. As the next Part shows, lawyer whistleblowing raises difficult, technical questions, the resolution of which is not as simple as asserting the priority of one duty over the other.

### 3. Whistleblower Protection and Encouragement Statutes

By providing certain protections to government employees, the Whistleblower Protection Act (“WPA”) encourages them to reveal information about waste, fraud, and abuse.<sup>249</sup> For example, federal agencies may not take adverse action against employees who disclosing evidence of a violation of law, “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”<sup>250</sup> Unfortunately, these categories line up only imprecisely with the exceptions to the duty of confidentiality for lawyers. As noted, Rule 1.6(b) does permit disclosure to prevent substantial bodily

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246. MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(6) (AM. BAR ASS'N 2003).

247. See, e.g., ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-385 at 248-51 (1994); D.C. Bar Ethics Op. 288 (1999).

248. See Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 222-23 (1992); New York City Bar Ass'n, Ethics Op. 1997-2 (1997) (explaining that lawyers may disclose child abuse under the “required by law” exception); *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 505 (2d Cir. 1991) (discussing Form 8300 disclosures); Matthew P. Harrington & Eric A. Lustig, *IRS Form 8300: The Attorney-Client Privilege and Tax Policy Become Casualties in the War Against Money Laundering*, 24 HOFSTRA L. REV. 623, 675 (1996); Ellen S. Podgor, *Form 8300: The Demise of Law as a Profession*, 5 GEO. J. LEGAL ETHICS 485, 494, 522-30 (1992).

249. Whistleblower Protection Act (WPA) of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended in various sections of 5 U.S.C.).

250. 5 U.S.C. § 2302(b)(8).

harm to another, or to prevent, rectify, or mitigate substantial financial injury to another if the lawyer's services have been used in connection with the fraud.<sup>251</sup> But there is no exception permitting disclosure of violations of law more generally, nor of mismanagement, waste, or abuse of authority. For lawyers, whether disclosure falls within the scope of the WPA is neither here nor there; one must still ask the separate question whether the disclosures are permitted by the ethical rules. Roger Cramton has inferred from the absence of a federal statute addressing attorney confidentiality that the WPA supersedes the state rules requiring confidentiality.<sup>252</sup> After the McDade Amendment,<sup>253</sup> however, a state disciplinary authority would begin with the state rule rather than federal law.

The conclusion that federal whistleblower-protection statutes do not preempt state rules of professional conduct is supported by recent decisions involving whistleblowing by private lawyers. This has become a frequently litigated issue as Congress has expanded encouragement to disclose wrongdoing by corporations. The Dodd-Frank Act, which required the SEC to issue regulations providing a financial bounty to employees who report violations of securities laws,<sup>254</sup> now coexists with the much older False Claims Act,<sup>255</sup> which allows those who provide information about fraud in the federal government to share in the government's recovery. In *United States v. Quest Diagnostics*,<sup>256</sup> the Second Circuit affirmed the district court's dismissal of an action under the False Claims Act. The relator, a former in-house counsel for the defendant, had disclosed more confidential information than was permitted by the state disciplinary rules. As a former lawyer, the relator was subject to the New York version of Rule 1.9(c),<sup>257</sup> whose permission to use or disclose confidential information tracks exactly the exceptions to confidentiality in Rule 1.6(b). As it happens, New York has an exception to the duty of confidentiality that differs from the Model Rules. The New York rules permit a lawyer to disclose confidential information "to the extent that the lawyer reasonably believes necessary . . . to prevent the client from committing a crime."<sup>258</sup> The district court concluded, and the Second Circuit agreed, that the lawyer/relator disclosed more

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251. PROF'L CONDUCT r. 1.6(b)(1), (2), (3).

252. Cramton, *supra* note 139.

253. *See supra* notes 127–31.

254. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended at 15 U.S.C. § 78u-6 (2012)); *see also* Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-4(b)(4)(iv) (2011).

255. 31 U.S.C. § 3729 (2012).

256. *United States v. Quest Diagnostics*, 734 F.3d 154 (2d Cir. 2013).

257. NEW YORK RULES OF PROF'L CONDUCT r. 1.9(c) (2009). The New York Rule is worded slightly differently than Model Rule 1.9(c), but is substantively the same.

258. NEW YORK RULES OF PROF'L CONDUCT r. 1.6(b)(2).



confidential information than was reasonably necessary to prevent his former client from committing a crime.<sup>259</sup>

More importantly for the purposes of this Article, the Second Circuit also held that the False Claims Act, with its broad encouragement to disclose confidential information to ferret out fraud on the federal government, does not preempt state rules of professional conduct.<sup>260</sup> The exception in the New York confidentiality rule, permitting disclosure to the extent reasonably necessary to prevent the client from committing a crime, embodies the same balancing of interests reflected in the False Claims Act; thus, there can be no conflict between federal law and the state rule of professional conduct.<sup>261</sup> The preemption analysis regarding other federal legislation may be different. For example, the SEC promulgated regulations under the Sarbanes-Oxley Act, which establish standards of conduct for attorneys appearing and practicing before the SEC.<sup>262</sup> These regulations expressly preempt conflicting state laws.<sup>263</sup> The conflict created by the Sarbanes-Oxley regulations is more theoretical than practical, as the only provision dealing with disclosure of confidential information is discretionary with the lawyer, not mandatory.<sup>264</sup> A lawyer may exercise her discretion not to report out, but if she does elect to disclose confidential information, the disclosure may be permitted by either Rule 1.6(b)(2)–(3) or Rule 1.13(c).<sup>265</sup>

Where there is no applicable exception, however, a lawyer reports out at his or her peril. In a case involving the former general counsel of a state banking regulator, the Kansas Supreme Court held that a lawyer could not maintain a wrongful discharge claim where she was fired for disclosing confidential information.<sup>266</sup> The lawyer should have done first what all lawyers must do when confronted by the possibility of client wrongdoing—raise the issue with the client and counsel the client to

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259. See *Quest Diagnostics*, 734 F.3d at 165; see also *id.* at 158–59 (discussing factual and statutory predicates for claimed violations of federal Anti-Kickback Statute).

260. *Id.* at 163.

261. *Id.* at 164.

262. See SEC Final Rule, 69 Fed. Reg. 70342, 17 C.F.R. § 205.

263. See 17 C.F.R. § 205.1 (“Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.”); *Final Rule: Implementation of Standards of Professional Conduct for Attorneys*, U.S. Sec. & Exch. Comm’n (Aug. 5, 2003), <http://www.sec.gov/rules/final/33-8185.htm>; see also *Wadler v. Bio-Rad Labs., Inc.*, 212 F. Supp. 3d 829, 857 (N.D. Cal. 2016). A federal district court held, in a retaliatory discharge action brought by a company’s former general counsel, that the strict duties of confidentiality under the California Rules of Professional Conduct are preempted by the Sarbanes-Oxley regulations permitting reporting to the SEC. The court found that the California rule conflicted with the permission granted by the SEC regulations, 17 C.F.R. § 205.3(d)(1), to use a report of evidence of a material violation of law in connection with any litigation in which an attorney’s compliance with the regulations is an issue.

264. See 17 C.F.R. § 205.3(d).

265. See *supra* notes 233–234, and accompanying text (analyzing antifraud disclosure permissions under Rule 1.6(b)).

266. *Crandon v. State*, 897 P.2d 92 (Kan. 1995).

comply with the law.<sup>267</sup> The identity of the client as a government agency, and credible evidence of wrongdoing, does not confer immunity on a lawyer who discloses confidential information.

A lawyer-whistleblower may not be in the clear even if disclosure of confidential information can be justified under a confidentiality exception. A financial bounty may create a conflict of interest under Rule 1.7.<sup>268</sup> The rule prohibits lawyers from representing a client if “there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer.”<sup>269</sup> The interest in receiving a financial bounty for disclosing confidential information is clearly within the scope of personal interests that may create a material limitation on the lawyer’s representation of the client. Conflicts rules reflect a theme that once again bears repeating: The lawyer-client relationship is fiduciary, and a lawyer must always act solely to achieve the client’s lawful objectives.<sup>270</sup> Sometimes this duty requires the lawyer to forego some benefit that might be available to someone not in a fiduciary role.<sup>271</sup> No one ever said it would always be easy to be a lawyer. But the obligation of loyalty to one’s client is a constitutive aspect of the lawyer-client relationship.

#### F. LOYALTY, RESISTANCE, AND SABOTAGE

Some Trump administration officials have complained about resistance from the “deep state.”<sup>272</sup> Scholars use the term to describe a shadowy network of military and intelligence officers who exercise power over a civilian government; it is generally applied to nations like Turkey (where the term originated), Egypt, and Pakistan. As the saying goes, however, just because you are paranoid it does not mean they are not after you. There is a substantial body of public law scholarship in the United States arguing that constitutional limitations on the aggressive assertion of presidential authority is not a matter only of inter-branch competition, but may also depend on intra-branch separation of power.<sup>273</sup> Competing power centers are employed to establish “rivalrous,

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<sup>267</sup> *Id.* at 99.

<sup>268</sup> See New York County Lawyer’s Ass’n, Formal Op. 746, at 10–12 (2013).

<sup>269</sup> MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(2) (AM. BAR ASS’N 2003).

<sup>270</sup> 2 MALLEN & SMITH, *supra* note 114, §§ 15:1, 17:3, 18:4.

<sup>271</sup> See RESTATEMENT (THIRD) OF AGENCY § 8.01, cmt. b (AM. LAW INST. 2006) (“[T]he general fiduciary principle requires that the agent subordinate the agent’s interests to those of the principal and place the principal’s interests first as to matters connected with the agency relationship.”); Roy R. Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 241–42 (1994) (noting distinction between fiduciary and contract norms, particularly that one in a fiduciary relationship is not entitled to bargain at arms’ length with the other).

<sup>272</sup> See David Remnick, *First as Tragedy*, NEW YORKER 29–30 (Mar. 20, 2017) (describing the complaints and the background of the phrase “deep state”).

<sup>273</sup> See, e.g., Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016); Margo Schlanger, *Offices of*

heterogeneous institutional counterweights to protect liberty, promote democratic accountability, and ensure compliance with the rule of law.”<sup>274</sup> Anticipating Trump’s threats to the rule of law, legal scholars quickly began to map out strategies of resistance by career employees of federal agencies. Jennifer Nou, for example, lists a number of techniques of bureaucratic opposition, including foot-dragging, building a record to make it difficult for political appointees to go against the wishes of career employees, leaking information to sympathetic journalists, working with internal watchdog offices, and public resignation.<sup>275</sup> Should government lawyers consider engaging in such acts of sabotage? As it happens, these issues were aired decades ago in connection with lawyers joining another allegedly powerful, dangerous institution: large corporate law firms.

In one of the early skirmishes in the Critical Legal Studies wars of the 1980s, Professor Duncan Kennedy cautioned Harvard Law School graduates heading for jobs at large law firms that they were entering an “evil,” even “demonic” realm of practice.<sup>276</sup>

Corporate lawyers are in alliance with selfish business interests. They lobby against regulatory legislation and then try to pick it to pieces in the courts; they do their best to bust unions, or to preserve “union free environments;” and by tax practice they mean tax minimization. In exchange for all this antisocial activity, they receive grotesque monetary rewards, which they take without an apparent trace of shame—indeed, with a combination of glee and smugness, as though to say, at one and the same time, how delightful it is to have ripped everyone else off, and that nothing could be more richly deserved than big bucks for top quality.<sup>277</sup>

What is a progressive or radical law school graduate to do? Kennedy suggests the “politicization of corporate law practice,” by which he “means doing things and not doing things in order to serve left purposes, not because they fit or don’t fit” the rules of professional conduct.<sup>278</sup> Some of what he means by “politicization” is good advice from any political perspective. Faced with a client whose actions caused harm but

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*Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297 (2006); Kagan, *supra* note 2.

<sup>274</sup> Michaels, *supra* note 273, at 235.

<sup>275</sup> Jennifer Nou, *Bureaucratic Resistance from Below*, NOTICE AND COMMENT (Nov. 16, 2016), <http://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/>.

<sup>276</sup> Duncan Kennedy, *Rebels from Principle: Changing the Corporate Law Firm from Within*, HARV. L. SCH. BULL. 36 (1981).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 39.

who insists on defending a tort lawsuit using specious (but legally non-frivolous) arguments to avoid liability, a law firm associate should consider the option of raising his or her concerns with supervisory lawyers. Maybe this is a firm “in which senior partners test associates to see if they are such sell-outs that they’ll do anything, no matter how ethically questionable.”<sup>279</sup> That seems unlikely, but it may nevertheless be the case that more senior lawyers will appreciate the associate’s effort to introduce broader ethical considerations into the representation of the client. It may, of course, also be the case that senior lawyers raised the issues with the client and were directed to go along with the client’s decision to litigate the case to the hilt. If the associate either acquiesces in that decision or asks to be taken off the case, it seems likely that no harm would be done, either to the client or to the associate’s career.

This anodyne advice is not the main thrust of Kennedy’s article, however. He is much more interested in comprehensive politicization, so that law students enter practice primed to “resist illegitimate hierarchy and alienation anywhere, any time, on any issue,”<sup>280</sup> by using “sly, collective tactics within the institution where you work, to confront, outflank, sabotage or manipulate the bad guys.”<sup>281</sup> It is hard to know whether to take this call to arms seriously,<sup>282</sup> or regard it as nothing more than an attention-getting reminder that large organizations have structural features that make it possible for otherwise well-intentioned people to engage in serious wrongdoing.<sup>283</sup> Hierarchies of command and obedience, like a lawyer-client relationship, are inevitable but have a well-known tendency to distort judgment.<sup>284</sup> Awareness of this tendency may help avoid uncritical deference to authority, but there are psychological mechanisms that can make it difficult for people in the position of Kennedy’s associate to recognize the ethical dimension of

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279. *Id.*

280. *Id.* at 38.

281. *Id.* at 39.

282. Some readers have suggested that Kennedy’s hyperbole undercuts an important, albeit mainstream message. See, e.g., Philip E. Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 264 n.54 (1984); see also David W. Kennedy, *Duncan Kennedy, A Critique of Adjudication: Fin de Siecle*, 22 CARDOZO L. REV. 991, 995–96 (2001) (reviewing DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIECLE* (1997)) (observing the performative aspects of Kennedy’s writing).

283. See, e.g., MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT* (2011) (summarizing extensive psychological research on ethical perception and decision-making within organizations); PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007) (building on groundbreaking social research in social psychology including the Stanford Prison Experiment); ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* (1988) (describing how norms and incentives of organizations constrain ethical decision making); IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* (2d ed. 1982); John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in *CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS* 13 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

284. DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 265–66 (2007).

their actions.<sup>285</sup> Again, however, if Kennedy is concerned only with alerting lawyers to the danger of becoming enmeshed in organizational wrongdoing, it is hard to find fault with his advice, even if it is mischaracterized as “politicizing” legal practice.

The legal and ethical shortcoming with Kennedy’s battle plan (apart from the pragmatic problems that come from sabotaging your employer) is that lawyers owe strict duties of loyalty to their clients. The hallmark of any fiduciary relationship is the discretionary power of the agent over the principal.<sup>286</sup> If a reader takes Kennedy at his word, he is advocating that lawyers abuse that power so their client will give up something to which they have a legal right. Kennedy is a critic of the whole apparatus of liberal legal rights,<sup>287</sup> so this implication would likely not trouble him. To accept Kennedy’s ethical prescription in its strongest form is to stand outside the liberal project altogether, denying the legitimacy of the client’s rights simply because they are provided for by law. One could certainly do that as a theoretical matter, but in legal terms, the lawyer’s liability presupposes that a client is entitled to instruct its agents to use lawful means to pursue its lawful rights.<sup>288</sup> There is latitude within the lawyer-client relationship to consult over the means by which to pursue the client’s objectives,<sup>289</sup> and the rules of professional conduct also contemplate an ethical dialogue about the “moral, economic, social and political factors” implicated by the representation.<sup>290</sup> But if the client in Kennedy’s hypothetical determines, after consultation, to defend a morally unjust position in the tort litigation based on a non-frivolous factual and legal defense, any sort of trickery employed to dupe the client into giving up its legal right would be a breach of fiduciary duty.<sup>291</sup> All lawyers are responsible for complying with the rules of professional conduct,<sup>292</sup> and given the vicarious liability of law firms for the

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285. BAZERMAN & TENBRUNSEL, *supra* note 283, at 29–34 (describing phenomenon of “ethical fading”).

286. See, e.g., Alice Woolley, *The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations*, 65 U. TORONTO L.J. 285 (2015); Roy R. Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 268 n.212 (1994); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879 (1988).

287. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997).

288. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (AM. LAW INST. 2000); see also *id.* § 50, cmt. d (“A lawyer must exercise care in pursuit of the client’s lawful objectives in matters within the scope of the representation. . . . The client’s objectives are to be defined by the client after consultation. . . .”).

289. Indeed, consultation over the means of representation is a duty under the Rules. See MODEL RULES OF PROF’L CONDUCT r. 1.2(a), 1.4(a)(2) (AM. BAR ASS’N 2003).

290. *Id.* at r. 2.1.

291. See LAW GOVERNING LAWYERS § 49 cmt. b (explaining that fiduciary duties owed to client include “dealing honestly with the client”). Liability for breach of fiduciary duty follows from duties specified by agency law. A lawyer would also be liable under tort principles for failing to perform services where the client reasonably relied on the lawyer’s undertaking to do so. See *id.* § 50 cmt. b.

292. PROF’L CONDUCT r. 5.2(a). The only exception to this rule is if the subordinate lawyer acts in

negligence and breaches of fiduciary duties of its employees,<sup>293</sup> a firm would be well advised to fire any associate who took Kennedy seriously. As the analysis in Part II.F showed,<sup>294</sup> government lawyers have fiduciary duties of loyalty that parallel those owed to private clients. As a matter of the legal duties of government lawyers, Kennedy-style covert subversion is impermissible.

Not every act of resistance by a lawyer is necessarily “sabotage.” Lawyers have a well-known dual obligation to provide loyal, competent client service that still remains within the bounds of the law. A lawyer who refused to provide assistance to an agency’s unlawful acts would not be engaging in sabotage, she would be fulfilling a core ethical obligation. It is important to remember, however, that lawyers differ from other employees of the civil service exercising checking power over political appointees. Lawyers differ from other agents in that their power is limited by the client’s legal entitlements. Perhaps lawyers should spend time trying to get a recalcitrant client to understand the idea of legitimacy,<sup>295</sup> and the fact that a law seems ill-advised does not alter the fact that a legitimate law need not be wise to create an obligation. In any event, just as one should not be too hasty to condemn legally motivated lawyer resistance as subversive, one should also not leap too quickly to the conclusion that intra-branch separation-of-powers considerations justify a particular act of resistance.

#### G. IF NOT VOICE NOR LOYALTY, THEN EXIT—RULE 1.16

The Model Rules set out conditions for both mandatory and permissive withdrawal from a representation. The Rules requires the lawyer to withdraw when “the representation will result in violation of the rules of professional conduct or other law.”<sup>296</sup> Interestingly, the rule does not contain a mens rea term. Is withdrawal required when a lawyer knows, reasonably believes, or merely has a well-founded suspicion that the representation will result in a violation of law? This omission is striking in light of the inclusion of a mens rea term in one of the *permissive* withdrawal rules. Rule 1.16(b)(2) gives the lawyer discretion to withdraw, but does not require it, when “the client persists in a course of action involving the lawyer’s services that *the lawyer reasonably believes* is criminal or fraudulent.” Other rules addressing client wrongdoing, such as the permission to disclose confidential information

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accordance with the supervisory lawyer’s reasonable resolution of an arguable question of professional duty. *See id.* at r. 5.2(b).

293. *See* LAW GOVERNING LAWYERS § 58.

294. *See supra* notes 88–121 and accompanying text.

295. Donald C. Langevoort, *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering*, 75 *FORDHAM L. REV.* 1615, 1625 (2006).

296. MODEL RULES OF PROF’L CONDUCT r. 1.16(a)(1) (AM. BAR ASS’N 2003).

and the obligation to report corporate wrongdoing up the chain of command, similarly include express mens rea provisions.<sup>297</sup> As one of the drafters of the Model Rules has argued, the omission of a mens rea standard should not be interpreted as creating strict liability, but it is still not immediately clear what standard applies.<sup>298</sup> The only thing to do, then, is try to interpret the rule in light of its purpose and the principles of the law of lawyering.<sup>299</sup> Requiring lawyers to withdraw when ongoing representation would result in a violation of law backstops the prohibition on a lawyer counseling or assisting a client in committing a criminal or fraudulent act.<sup>300</sup> Since that rule contains a knowledge standard, it would be reasonable to require lawyers to withdraw only when they know that continuing to act on behalf of the client would result in a violation of law.

Although the mandatory withdrawal rule is relatively narrow, it is quite a simple matter to find a ground for permissive withdrawal. It is allowed in any case where “withdrawal can be accomplished without material adverse effect on the interests of the client,”<sup>301</sup> and most government lawyers work on teams or in offices where other lawyers are available to pick up the slack if one lawyer leaves. In general, it is unlikely that any one lawyer leaving would result in a material adverse effect. Even if it did, a lawyer may still withdraw by citing “fundamental disagreement” with the client’s action.<sup>302</sup> Morally motivated withdrawal and conscientious objection fall within this provision of the rule. Finally, a catch-all provision allows withdrawal for good cause.<sup>303</sup> A lawyer who wished to resign from government employment would therefore almost certainly not be subject to discipline for doing so.

The most notorious historical precedent for government lawyers resigning in protest of the president’s disrespect for the rule of law is the so-called “Saturday Night Massacre” of 1973.<sup>304</sup> President Nixon’s Attorney General, Elliot Richardson, appointed Special Prosecutor Archibald Cox to investigate the Watergate break-in. Cox angered Nixon by issuing a subpoena for tape recordings made by Nixon of

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297. See *Id.* at r. 1.6(b)(2), (3) (reasonable belief standard), r. 1.13(b) (knowledge standard).

298. Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 *Geo. J. Legal Ethics* 1, 15, 18 (2010).

299. *Id.* at 31.

300. See *PROF’L CONDUCT* r. 1.2(d) (“[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent”).

301. *PROF’L CONDUCT* r. 1.16(b)(1).

302. *Id.* at r. 1.16(b)(4).

303. *Id.* at r. 1.16(b)(7).

304. See, e.g., KENNETH GORMLEY, *ARCHIBALD COX: CONSCIENCE OF A NATION* (1997); Kenneth B. Noble, *Bork Irked by Emphasis on His Role in Watergate*, *N.Y. TIMES*, July 2, 1987, at A22; Carroll Kilpatrick, *President Abolishes Prosecutor’s Office; FBI Seals Records*, *WASH. POST*, Oct. 21, 1973, at A1, A3. For the history of the Watergate crisis as a whole, see STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* (1990).

conversations in the Oval Office. Nixon ordered Richardson to fire Cox, even though it was illegal to fire the Special Prosecutor without cause. Richardson refused the order and resigned in protest, as did his deputy, William Ruckelshaus. “You owe a duty of loyalty to the president that transcends most other duties,” Ruckelshaus told a gathering of former U.S. attorneys in 2009. But “there are lines. . . . In this case, the line was bright and the decision was simple.”<sup>305</sup>

It fell to acting head of the Justice Department, Solicitor General Robert Bork, to fire Cox, which he did (intriguingly, Bork stated in a book published after his death in 2013 that Nixon offered him the next available Supreme Court vacancy if he got rid of the troublesome Cox.)<sup>306</sup> It was clear almost immediately that Nixon miscalculated. Public opinion rapidly coalesced around the view that the scandal was not a “third-rate burglary,” as Nixon’s press secretary called it, but a massive abuse of presidential power.<sup>307</sup> Leon Jaworski replaced Cox as Special Prosecutor and the House Judiciary Committee began considering impeachment proceedings against Nixon.

Richardson and Ruckelshaus are generally regarded as having acted honorably, even heroically, by resigning rather than complying with Nixon’s instructions. More recently, another lawyer whose threat to resign was regarded as heroic was Deputy Attorney General James Comey, then number two in the Justice Department behind John Ashcroft.<sup>308</sup> In early 2004, the Bush Administration was running into difficulty obtaining legal blessing for the National Security Agency’s so-called warrantless wiretapping program (which involved large-scale data mining in violation of the Foreign Intelligence Surveillance Act). Comey met with Ashcroft and explained his concerns about the legality of the program. When Ashcroft was suddenly stricken by pancreatitis and was hospitalized for gallbladder surgery, Comey became acting Attorney General. He explained to Vice President Cheney, White House Counsel Alberto Gonzales, and other high-level political officials that he would not sign off on the program. In a TV-worthy episode, Gonzales and the White House Chief of Staff visited Ashcroft in his hospital room, seeking his signature. Comey rushed to the scene, where despite his heavy dose of painkillers, Ashcroft managed to lucidly explain that Comey was now

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305. Susan Brennehan, *Watergate’s Saturday Night Massacre Gets More Interesting with Age*, L.A. TIMES (Oct. 18, 2013), <http://articles.latimes.com/2013/oct/18/news/la-ol-saturday-night-massacre-watergate-20131018>.

306. See ROBERT H. BORK, *SAVING JUSTICE: WATERGATE, THE SATURDAY NIGHT MASSACRE, AND OTHER ADVENTURES OF A SOLICITOR GENERAL* 86 (2013).

307. U.S. News Staff, *Watergate and the White House: The ‘Third-Rate Burglary’ That Toppled a President*, U.S. NEWS & WORLD REPORT, Aug. 19, 1974, at 24–29.

308. For a recounting of these events, from which this paragraph was drawn, see ERIC LICHTBLAU, *BUSH’S LAW: THE REMAKING OF AMERICAN JUSTICE* 176–85 (2008); see also Dan Eggen & Paul Kane, *Gonzales Hospital Episode Detailed*, WASH. POST, May 16, 2007, at A1.



the attorney general. Comey of course refused to sign the authorization, so the White House decided to go ahead with the program anyway. At this point, Comey prepared his resignation letter, and several other Justice Department lawyers agreed to resign with him. Bush blinked. The program was modified to meet Comey's objections.

The highly publicized confrontation between Comey and Gonzales came to be regarded as "the biggest revolt at the Justice Department since the infamous Saturday Night Massacre."<sup>309</sup> Comey would almost certainly have been within his rights as an attorney to resign in protest of the government's failure to obtain Justice Department clearance for the data-gathering program. It is a bit of a close call whether withdrawal would have been permissible, because "the client [would have been] persist[ing] in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."<sup>310</sup> The issue is not whether Comey had a reasonable belief that the government's conduct would have been criminal—he plainly did under the circumstances—but rather whether the conduct would involve the lawyer's services if the administration did not obtain the usual signoff from the Attorney General. Because Justice Department approval of programs like the NSA wiretapping are generally obtained, the lack of approval could be construed as a kind of participation in the conduct. Nevertheless, there is no need to choose only one basis for withdrawal, and Comey could also have believed that the administration was insisting "upon taking action . . . with which the lawyer has a fundamental disagreement."<sup>311</sup> The dramatic confrontation between Comey, Gonzales, and White House Chief of Staff Andrew Card, and Comey's subsequent refusal to meet with Card without a witness present,<sup>312</sup> is about as "fundamental" as a lawyer-client disagreement can get. As explained in Part II.F, covert strategies of resistance breach the lawyer's most important fiduciary duties. Overt, public strategies of resistance, like Comey's threat to resign along with other attorneys at the Justice Department, are consistent with the ethical responsibilities of lawyers.

### III. THE RULE OF LAW AND THE PROBLEM OF LEGAL DETERMINACY

The last Part was intended as a constructive normative account of the ethical role of government lawyers. To summarize the inherent rationality of the law of lawyering: It envisions a highly fiduciary role in which lawyers use reasonable care and effort to provide accurate, unbiased advice to clients, who then are responsible for deciding how to

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309. LICHTBLAU, *supra* note 308, at 184.

310. MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2) (AM. BAR ASS'N 2003).

311. PROF'L CONDUCT r. 1.6(b)(4).

312. See LICHTBLAU, *supra* note 308, at 182–83. The witness he insisted upon was the Solicitor General of the United States, Ted Olson.

proceed. There is nothing wrong with advising the client that one proposed route to its goal is likely contrary to applicable law, but suggesting there may be a different route to the same goal that would be legally permissible.<sup>313</sup> In that limited sense all lawyers can be said to be zealous advocates, but when lawyers are acting in an advisory capacity, they have an obligation to provide candid advice to clients concerning the law, not merely to come up with an argument that passes the straight-face test and would not subject a litigation advocate to judicial sanctions. Lawyers should not be afraid of someone else second-guessing them if they make a judgment call on a disputed issue of law, provided they fully informed their client about the extent of uncertainty and the countervailing arguments. In carrying out these obligations, any lawyer, including a lawyer representing a government agency, should not act directly on what he or she believes to be the public interest. It is for a government client to make the determination of what is in the public interest, just as it is for a private client to decide on the objectives of the representation. Despite loose talk in judicial dicta and some legal scholarship, there is no freestanding obligation for government lawyers to serve the public interest, and courts are extremely reluctant to recognize new public-interest exceptions to doctrines such as the duty of confidentiality.

Taken together, the legal rights and obligations that comprise the law governing lawyers construct what might be called a “service conception” of the lawyer’s role.<sup>314</sup> That obligation of service runs to a client, which in this case is the administration of the President-elect. Government lawyers do not have an open commission to serve the public interest; they are agents who must carry out the lawful instructions of their principal. It cannot be emphasized enough, however, that the lawyer’s role is distinguished from that of any other agent by the addition of an affirmative obligation to ensure that the conduct of the principal complies with the law.<sup>315</sup> While Model Rule 1.2(d) says only that a lawyer must not “counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent,”<sup>316</sup> that rule does not exhaust the law of agency. The Rule also contemplates the lawyer assisting the client in determining the legality of its proposed course of conduct. It provides that the lawyer “may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or

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313. Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1715 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)).

314. Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003).

315. See RESTATEMENT (THIRD) OF AGENCY § 8.09, cmt. c (AM. LAW INST. 2006).

316. PROF'L CONDUCT r. 1.2(d).

application of the law.”<sup>317</sup> That makes sense. One of the important insights at the intersection of clinical legal education and professional responsibility scholarship is that clients do not come to lawyers with a set of goals and interests that are neatly prepackaged, ready to be analyzed by the lawyer for their lawfulness; rather, the client’s ends often emerge through a process of dialogue with the lawyer.<sup>318</sup> Rule 1.2(d) recognizes that the agency relationship includes counseling the client to determine the limits of the law, and Rule 2.1 permits the lawyer also to counsel the client on and a prohibition on “other considerations such as moral, economic, social and political factors.”<sup>319</sup> But when it comes to actually providing *assistance* to the client, which for a government lawyer may include providing the crucial legal sign-off on the program, the lawyer’s power ends where the client’s legal right ends. The client may decide not to comply with the law, but the lawyer may not assist the client’s course of conduct unless it is legally permitted.<sup>320</sup>

This obligation runs smack into the problem of legal realism.<sup>321</sup> As David Wilkins observed a quarter century ago, in what is still one of the best treatments of the relationship between legal ethics and general jurisprudence:

Lawyers should help clients obtain “lawful” objectives only by “legally permissible means,” with “lawful” referring both to the limitations generally applicable to all citizens and to the special obligations imposed on lawyers by the rules of professional responsibility.<sup>322</sup>

This conception of the lawyer’s ethical role is only plausible if the boundaries of the law are identifiable independent of the lawyer’s own moral and political commitments, and flow from democratically accountable sources of power—such as, positive law.<sup>323</sup> Wilkins clearly identifies the problem:

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317. *Id.*

318. *See, e.g.*, Kruse, *supra* note 137, at 124; William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, 50 MD. L. REV. 213 (1991).

319. PROF’L CONDUCT r. 2.1. Stephen Pepper similarly divides up the lawyer’s role into providing information about the law—access to law, as he calls it—and providing assistance in unlawful conduct. *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995).

320. *See* Douglas R. Richmond, *Lawyer Liability for Aiding and Abetting Clients’ Misconduct Under State Law*, 75 DEF. COUNSEL J. 130 (2008); Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct*, 35 U. MIAMI L. REV. 669, 683 (1981) (concluding, as a matter of agency law, that a lawyer acts improperly by “giving advice that encourages the client to pursue the conduct or indicates how to reduce the risks of detection, or by performing an act that substantially furthers the course of conduct.”).

321. *See, e.g.*, GERALD J. POSTEMA, *LEGAL PHILOSOPHY IN THE TWENTIETH CENTURY: THE COMMON LAW WORLD* 106–22 (2011) (providing overview of legal realist claims).

322. Wilkins, *supra* note 8, at 471.

323. *Id.* at 472–73.

If, as some have argued, it is possible to provide a ‘legal’ justification for virtually any action, it is hard to see how the requirement that zealous advocacy must occur within the bounds of the law meaningfully restrains a lawyer’s decision making.<sup>324</sup>

One need not endorse the strongest CLS-inspired version of this position, i.e., that it is possible to provide a legal justification for virtually any action, and that law is nothing other than ordinary politics plus mystification.<sup>325</sup> The constructive normative vision of lawyering defended here is threatened by even a moderate version of the realist claim. The law in some cases, particularly those involving developing technologies, novel social and political phenomena, or moments of acute crisis, may be relatively indeterminate. In that case, a lawyer may find it difficult to locate the boundaries of the law with much confidence.

Former OLC lawyer Dawn Johnsen has argued against an “advocacy” model of government lawyer advising, in which lawyers should understand their role as putting forward the plausible arguments supporting actions consistent with the President’s preferred policies.<sup>326</sup> Rather than presenting merely plausible positions, government lawyers should provide the “best, most accurate” interpretations of applicable law.<sup>327</sup> This responsibility is particularly important where judicial review of presidential action is unlikely. The legal rights of citizens affected by government actions depend on the advice of government lawyers where secrecy or institutional limitations (such as non-justiciability doctrines) make it unlikely that a court will review the legality of the action.<sup>328</sup> But we are all realists now, right? Every realist can see the objection to Johnsen’s argument from a mile away: How can a “best view of the law” standard be operationalized, either as a conduct rule to guide lawyers in their advising function or as a decision rule to guide courts in disciplining lawyers, when the law itself is fluid, evolving, and susceptible to a plurality of reasonable interpretations? Every lawyer can cite examples of arguments once considered frivolous and now accepted as mainstream positions. In addition to the standard example of the constitutionality of the “separate but equal” principle before *Brown*, Sanford Levinson cites a confident statement from 1965—amusing to me as a torts professor—

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324. *Id.* at 475–76.

325. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 463 (1987) (differentiating strong and weak indeterminacy claims); Dorf, *supra* note 33, at 883 (defining legal indeterminacy as the thesis that, in more than a trivial number of cases, legal norms by themselves do not sufficiently warrant the outcome).

326. Johnsen, *supra* note 11, at 1579–80 (2007); see also Moss, *supra* note 17, at 1309–12 (advocating a “best view of the law” model for government lawyer advising).

327. *Id.* at 1580.

328. *Id.* at 1587–88; see also Morrison, *supra* note 11, at 1710–11 (citing features of OLC opinions, including their practical finality and treatment by other government actors as authoritative, that make the role of lawyers in the Office unique).

as a kind of *reductio ad absurdum* of the view that one can construct anything like a “best view”:

[I]t seems clear that there is no substantial likelihood that any court will act today, as a matter of common law development, to substitute comparative negligence for an existing rule of contributory negligence in the general accident field. Indeed, lawyers will not even consider arguing this possibility to a court.<sup>329</sup>

Not long afterwards, comparative negligence replaced contributory negligence almost everywhere.<sup>330</sup> The confident assertion that comparative negligence is inconceivable looks silly in hindsight, even if it appeared at the time to be the best view of the law. This illustrates the problem with indeterminacy: The possibility of a lawyer being subject to discipline for giving legal advice that turns out to be wrong in hindsight.

Now imagine a lawyer trying to ascertain the “best view” of the law to help the President carry out his policy objectives, but facing intense pressure from high-level politically appointed officials.<sup>331</sup> This is exactly the atmosphere lawyers in the Bush Administration faced as they searched for limits on the government’s lawful powers in response to the threat of terrorism. Michael Hayden, the Director of the National Security Agency and later head of the CIA, was widely reported to have urged a specific interpretive attitude on government lawyers: “My spikes will have chalk on them. . . . As a professional, I’m troubled if I’m not using the full authority allowed by law.”<sup>332</sup> This was a bipartisan stance in the aftermath of the 9/11 attacks. Democratic Senator Bob Graham expressed his displeasure, at a confirmation hearing for the CIA’s General Counsel, with “cautious lawyering” and “risk aversion” in advice given by lawyers for the CIA. “We need excellent, aggressive lawyers who give sound, accurate legal advice, not lawyers who say no to an otherwise legal operation just because it is easier to put on the brakes.”<sup>333</sup> Another watchword for the type of legal advice sought was “forward-leaning,” meaning aggressive and willing to take risks.<sup>334</sup> If the law is indeterminate, or at least relatively under-determined, as legal realists claim, how can lawyers resist as they hear bloodcurdling intelligence briefings and are told to get with the program?

There is a pragmatic problem here, too. Government lawyers worry their conduct will be judged in hindsight using legal standards that were not clear *ex ante*. For example, in the proceedings that followed the

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329. Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything At All?*, 24 OSGOODE HALL L.J. 353, 372 (1986) (quoting P. MISHKIN & C. MORRIS, *ON LAW IN COURTS* 256 (1965)).

330. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 67, at 468–69 (5th ed. 1984).

331. See ACKERMAN, *supra* note 206, at 18–19 (noting the pressure on government lawyers created by “telephone calls and other importuning from the White House.”).

332. MAYER, *supra* note 24, at 69; GOLDSMITH, *supra* note 11, at 78.

333. GOLDSMITH, *supra* note 11, at 92.

334. See Tim Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

revelation of the memos on interrogation techniques, several OLC lawyers expressed their concern that if Yoo and Bybee were disciplined for the advice they gave in the torture memos, it would have an *in terrorem* effect on lawyers giving potentially unpopular advice.<sup>335</sup> Former OLC head Timothy Flanigan, for example, stated:

I believe that adverse action by OPR against Judge Bybee or Professor Yoo would have a long-term chilling effect on the willingness of OLC attorneys to render opinions on difficult and sensitive areas of law. Such an action will be seen as a strong signal to OLC attorneys to avoid any legal conclusions or analysis that, **although a reasonable application of relevant authority**, may be controversial. This, in turn, will tend to artificially limit the range of legal opinions available to the President.<sup>336</sup>

The bolded language in Flanigan's statement is central to the analysis. Merely saying the magic words "chilling effect" is not a sufficient argument for limiting sanctions. If a lawyer had a reasonable legal basis in relevant authority to advise the President that a certain course of action was permissible, then it would be a bad thing if the lawyer were deterred from giving that advice by the threat of ex post disciplinary exposure. If, on the other hand, a lawyer was deterred from giving advice for which there was not sufficient support in applicable law, then the possibility of punishment has had its desired effect. It all comes down to whether there is sufficient content in the idea of "reasonable application of relevant authority" that a regulator can distinguish between adequately supported advice and that which violates the requirement of providing candid, independent advice.

I am focusing on this passage, which did not even appear in the final Margolis Memo, because it points to the solution to the problem of legal realism and indeterminacy. The solution is grounded in the political value of legality, or the ideal of the rule of law. The rule of law is a highly contested concept.<sup>337</sup> It is sometimes used loosely to refer a good government under law, such as one characterized by the existence of strong property rights and investor protections, which may correlate with the size of a country's capital markets,<sup>338</sup> or protection for human dignity and human rights.<sup>339</sup> The rule of law or legality may also refer to formal features a legal system ought to have, such as laws that are publicly promulgated, clear and understandable, openly and impartially

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335. See Bybee Response, *supra* note 34, at 149 (quoting former OLC lawyers Jack Goldsmith and Timothy Flanigan, and former Attorney General Michael Mukasey).

336. *Id.* (emphasis added).

337. See Andrei Marmor, *The Rule of Law and Its Limits*, 23 L & PHIL. 1 (2004).

338. See, e.g., Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1131-32 (1997).

339. See, e.g., TOM BINGHAM, *THE RULE OF LAW* 49-50 (2010).

administered, and at the very least capable of being obeyed.<sup>340</sup> In the British Commonwealth, it is often associated with Dicey's critique of official discretion.<sup>341</sup> Dicey's focus on discretion shows up in modern jurisprudential thinking as the long-running debate over whether legal reasoning must be formal, neutral, or even mechanical, in some way,<sup>342</sup> or whether—to borrow the title of a classic article by then—Professor Scalia—the rule of law must be understood as a law of rules, as opposed to equitable norms, standards, or principles.<sup>343</sup> Libertarians like to cite Friedrich Hayek's conception of the rule of law, which emphasized ex ante certainty and predictability as the key to reconciling freedom with the necessity of having laws that limit the liberty of individuals.<sup>344</sup> How can the ideal of the rule of law do any normative work in legal theory if it seems that theorists cannot agree on its content? Is “rule of law” just a “general stand-in for everything nice one could ever want to say about a political system”?<sup>345</sup> The normative conception of lawyer professionalism defended in this Article rests on two presuppositions: First, that the concept of the rule of law is meaningful, notwithstanding the diversity of conceptions in which it may be expressed; second, that the regulative ideal of legality has nothing to do with legal determinacy, but depends instead on a “culture of argument”—a system for reasoned analysis through which norms can be contested and established.<sup>346</sup>

The rule of law, properly understood, is concerned with the types of reasons that are given, or in a hypothetical analysis may be given, in justification of any action. What other conceptions of the rule of law, with

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340. See, e.g., JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW* 210 (1979); LON L. FULLER, *THE MORALITY OF LAW* (2d ed. 1964).

341. See A. V. DICEY, *LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION* 215 (London, Macmillan 1885).

342. See, e.g., Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509 (1988) (reviewing conceptions of formalism emphasizing the limitation on the decisionmaker's freedom of choice); Owen Fiss, *The Death of the Law*, 72 *CORNELL L. REV.* 1, 1–2 (1986) (distinguishing politics, which is about “mere” preferences, from adjudication, which is aimed at applying, or even creating, public values); ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 66–67 (1975) (criticizing legal liberalism for being unable to solve the problem of arbitrariness, in the sense that any legal restriction placed on the ability of one person to satisfy her desires will necessarily benefit some individuals more than others).

343. See Antonin J. Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175 (1989). The literature on rules and standards is immense. See, e.g., LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* (2001); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Cass R. Sunstein, *Problems with Rules*, 83 *CALIF. L. REV.* 953 (1995); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *DUKE L.J.* 557 (1992); Kathleen Sullivan, *The Justice of Rules and of Standards*, 106 *HARV. L. REV.* 22 (1992); Frederick Schauer, *Rules and the Rule of Law*, 14 *HARV. J.L. & PUB. POL'Y* 645 (1991); Pierre J. Schlag, *Rules and Standards*, 33 *UCLA L. REV.* 379 (1985); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976).

344. F.A. HAYEK, *THE ROAD TO SERFDOM* 80–84 (50th Anniversary ed. 1994).

345. Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 *L. & PHIL.* 137, 139 (2002).

346. Woolley, *supra* note 121, at 768.

their laundry lists of precepts, are all getting at is this basic idea: There is a difference between governing a political community lawfully and doing so by other means, such as issuing orders and directives—managerial direction, as Lon Fuller calls it.<sup>347</sup> There is also a difference between acting lawfully, as opposed to exercising the naked power to act and not suffer adverse consequences. When one claims to act or command lawfully, one is claiming to do so as a matter of right. In turn, there is an implicit claim that the right has been established in the name of the political community. The justification of an action or command thus proceeds based on reasons that affected persons can grasp and, in principle, accept. By demanding reasons in justification for directives or actions, the idea of the rule of law embodies an understanding of citizens of a liberal democratic political community as equal bearers of rights, and as moral agents. Legal systems, as opposed to other systems of norms, commands, or managerial directives:

Operate by using, rather than suppressing and short-circuiting, the responsible agency of ordinary human individuals. Ruling by law is quite different from herding cows with a cattle prod or directing a flock of sheep with a dog. . . . The publicity and generality of law look to what Henry Hart and Albert Sacks called “self-application,” that is, to people’s capacities for practical understanding, for self-control, and for the self-monitoring and modulation of their own behavior, in relation to norms that they can grasp and understand.<sup>348</sup>

Nothing in this way of understanding the rule of law requires that the conduct of those subject to it be regulated by clear rules promulgated in advance, and not admitting of any discretion in their application, either by subjects or officials. Nor does it require that the law give only one right answer to a question one might ask about whether an action is lawful. What is essential, however, is that an action be justified by reasons that can, in principle, be endorsed as being *our* reasons—that is, grounded upon political decisions made by the community concerning the allocation of rights and duties.

Trying to obtain a legal justification for an action is a form of voluntary self-restraint by political officials. It recognizes the limits of the rightful exercise of power. In the controversy over the NSA wiretapping program, which James Comey refused to authorize, the administration had the option to go ahead with it anyway. The CIA and military interrogators could have chosen to torture detainees at “black sites” in allied countries without obtaining legal approval. In both of these cases, however, high-level political officials sought legal authorization. One reason was obviously pragmatic. As Jack Goldsmith reports, CIA

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347. See David Luban, *Natural Law as Professional Ethics: A Reading of Fuller*, in *LEGAL ETHICS AND HUMAN DIGNITY* 99, 109–10 (2007).

348. Waldron, *supra* note 9, at 26–27.



interrogators and their supervisors were looking for a “golden shield”<sup>349</sup> in the form of an opinion from the Office of Legal Counsel, which would serve as a kind of advance pardon for actions that might subsequently be regarded as at the limits of the law.<sup>350</sup> But there are also noninstrumental reasons for seeking legal authorization for government action. United States Navy General Counsel Alberto Mora, who became one of the internal critics of the Bush Administration’s interrogation policies, strongly believed the use of power was illegitimate if not exercised in the service of the principles and values embodied in the Constitution.<sup>351</sup> Mora, the child of Cuban and Hungarian immigrants who fled Communist regimes, was raised “to have very strong views about the rule of law, totalitarianism, and America.”<sup>352</sup>

The challenge is to translate these high-minded ideals into practical ethical guidance for lawyers serving as advisors to government officials.<sup>353</sup> Some of the statements made by President-elect Trump during the campaign suggest an attitude of outright defiance of unambiguous law. No prosecutor could hope to obtain a conviction against someone for burning a flag, for example, no matter how strongly the President feels about the matter.<sup>354</sup> Trump’s repeated statements of contempt toward legal limitations on his power are more worrisome when considered in light of the problem of legal realism. The law in most cases is not as clear as the constitutionality of flag burning. Making the task of ethical guidance more complex is the permission built into the lawyer’s role to work with the client to achieve the client’s objectives through lawful means. A lawyer is not limited to giving disinterested yes-or-no advice. She may consider the client’s goals, analyze the applicable legal authorities, and suggest means to accomplish the client’s ends

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349. GOLDSMITH, *supra* note 11, at 144.

350. *Id.* at 96 (quoting a senior Justice Department prosecutor saying that “[i]t is practically impossible to prosecute someone who relied in good faith on an OLC opinion, even if the opinion turned out to be wrong.”).

351. See MAYER, *supra* note 24, at 214.

352. *Id.* at 217.

353. See Woolley, *supra* note 121, at 775 (“the abstract identification of the lawyer’s duties when advising a client does not necessarily translate clearly into rules governing how a lawyer ought to practice.”).

354. Soon after the election Trump tweeted, “Nobody should be allowed to burn the American flag—if they do, there must be consequences—perhaps loss of citizenship or a year in jail!” See George Leef, Opinion, *Oh, Oh – Trump Thinks That Flag Burning Should Be Criminalized*, *Forbes* (Dec. 5, 2006, 10:00 AM), <https://www.forbes.com/sites/georgeleef/2016/12/05/oh-oh-trump-thinks-that-flag-burning-should-be-criminalized>. Under *Texas v. Jonson*, 491 U.S. 397 (1989), it is settled that burning the American flag as a protest is protected speech under the First Amendment, and *United States v. Eichman*, 496 U.S. 310 (1990), established that a federal statute banning flag burning would be unconstitutional. It would take a constitutional amendment to actually criminalize flag burning, and the last such passage was attempted in 2006. See Carl Hulse & John Holusha, *Amendment on Flag Burning Fails by One Vote in Senate*, *N.Y. TIMES* (July 27, 2006), <http://www.nytimes.com/2006/06/27/washington/27cnd-flag.html>.

within the limits of the law.<sup>355</sup> Some of this complexity is helpful because it shifts the focus from the content of the lawyer's *conclusion* about the law to the *process* by which the conclusion was reached.

Picking up on suggestions from Fuller, Luban, and Waldron,<sup>356</sup> I contend that the rule of law serves as a regulative ideal for an activity, not a truth-functional proposition about the content of the law.<sup>357</sup> Going back to the highlighted passage above from a former OLC lawyer, the ethical analysis of lawyers in an advisory role should focus on whether the advice represents a reasonable application of relevant authority. The term "reasonable application" should be understood as a criterion for how well a practical activity is carried out, not a standard for the accuracy of the

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355. On this point I disagree with David Luban's heuristic that a candid, independent legal opinion would be one that would be more or less the same as it would have been if the client had wanted the opposite result. See Luban, *supra* note 347, at 198. It could very well be the case that the state of the law is such that a persuasive argument could be given in good faith that the same conduct is either permitted or not. Consider, as an example, the state of play as of January 15, 2017, of the legal permissibility of a lawyer assisting an individual or corporation in starting up a recreational marijuana dispensary in a state in which the sale and possession of small quantities of marijuana for recreational use is permitted under state law. Such possession and sale remains a crime under federal law, even though the Justice Department had announced a policy of nonenforcement. States such as Washington and Colorado in which recreational cannabis use is legal have a version of the rule of professional conduct which provides, "[a] lawyer shall not . . . assist a client in conduct that the lawyer knows is criminal." MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2003). Is it permissible to provide assistance to a dispensary that is committing a violation of federal law? State ethics opinions are all over the map, with Maine and North Dakota prohibiting such assistance, Arizona saying it is fine as long as there is no change in federal enforcement policy, Washington State permitting it only because of an amendment to the comments to the Washington rule; the San Francisco Bar permitting lawyer assistance in activity that is unlawful under federal law on the ground (which I think is pure sophistry) that "[a]ssisting the client who wants to comply with state and local laws is not the same as advising the client to violate federal laws." See Wash. St. Bar Ass'n Op. 2015-01; Bar Ass'n of San Francisco Legal Ethics Comm., Op. 2015-1; North Dakota Op. 14-02 (2014); Arizona Op. 11-01 (2011); Maine Bar Op. 199 (2010). The point simply being that if I was ethics counsel to a state bar association, I believe it would be possible to provide a legal opinion in good faith that *either* a lawyer may provide this assistance or not. If asked for the best view of the law, I would lean toward the prohibition, since nonenforcement is not the same as legal authorization. However, I can see where the "permission" states are coming from. Of course, most lawyers are not counsel to lawyer regulators, but the observation may be generalized. If two or more interpretations of applicable law can be given in good faith, a lawyer may advise the client based on an interpretation that aligns with the client's objectives. See Woolley, *supra* note 121, at 778 ("A lawyer may frame his or her advice to accomplish the client's goals, including adopting interpretations of the law that are favourable to the client (provided those interpretations remain reasonable.")). The advice must reflect weaknesses in the client's position, but it can nonetheless seek to accomplish the client's goals, not merely to provide a disinterested assessment of them.").

356. See Luban, *supra* note 347, at 103 ("Fuller characterizes natural law as a way of conducting a practical activity . . . rather than as a philosophical thesis about the truth conditions of a proposition of law"); Waldron, *supra* note 9, at 4 ("Law is an exceedingly demanding discipline intellectually, and the idea that it consists or could consist in the thoughtless administration of a set of operationalized rules with determinate meanings and clear fields of application is of course a travesty.").

357. See Luban, *supra* note 347, at 103 (noting that for Fuller, "there is a characteristic morality associated with the 'law job'" and this represents a categorically different approach to the relationship between law and morality).

conclusion. Legal realism and the relative indeterminacy of law should not give lawyers cause for alarm. Their conduct will not be evaluated *ex post* based on a determination that they got the law wrong. They need worry only that they be judged subsequently to have given insufficient attention and care to the process of reaching a good faith determination concerning the lawfulness of the client's proposed course of action.

I argued previously that the assessment of legal interpretation requires engagement with the craft values that inform good lawyering.<sup>358</sup> Criteria for excellent or even adequate performance are internal to the craft; they are given by the ends for which it is constituted.<sup>359</sup> The constructive normative conception of the ethics of legal advising, as developed through the analysis of the law governing lawyers in Part II, maintains that the lawyer's role as an advisor is to ensure the client has accurate information about what the law permits or requires. By implication, then, the reasonableness of a lawyer's application of relevant authority can be assessed by considering evidence tending to show either that the lawyer tried to get the law right, or not. This evidence will likely include facts about the lawyer's handling of adverse authority and counterarguments, consideration of the interpretive community's assessment of the argument (since the exercise of judgment is by its nature a community-bound process that it makes reference to intersubjective criteria for the exercise and regulation of judgment),<sup>360</sup> and the completeness of the set of information provided to the client about the applicable law. Scholars who have thought carefully about the ethics of legal advising have largely converged on these criteria for the evaluation of lawyers' interpretive judgment, which are procedural rather than substantive.<sup>361</sup>

A process-centered ethics of advising carries with it some risk that a government lawyer's conduct will be judged negatively in hindsight, perhaps by a disciplinary authority. To the extent one worries about legal determinacy, however, this approach holds less risk than an alternative that focuses on the accuracy of legal advice. Objective standards of reasonable conduct in torts also focus on conduct, not outcomes,

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358. See WENDEL, *supra* note 7; W. Bradley Wendel, *The Craft of Legal Interpretation*, in *INTERPRETATION OF LAW IN THE AGE OF ENLIGHTENMENT: FROM THE RULE OF THE KING TO THE RULE OF LAW* 153 (Yasutomo Morigiwa et al. eds., 2011); see also Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982). For a critique, see ALLAN C. HUTCHINSON, *FIGHTING FAIR: LEGAL ETHICS FOR AN ADVERSARIAL AGE* 30–34 (2015).

359. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 187–91 (2d ed. 1984) (noting that any practice is goal-directed and therefore it would be incoherent to claim to be engaging in an activity without caring about the characteristic goods that are internal to that form of activity).

360. See Fiss, *supra* note 358; Gerald J. Postema, "Protestant" *Interpretation and Social Practices*, 6 *L. & PHIL.* 283 (1987); KARL LLEWELLYN, *THE COMMON LAW TRADITION* (1960) (discussing "steadying factors" that retain arbitrary decisionmaking).

361. See, e.g., Luban, *supra* note 347, at 198–99; Woolley, *supra* note 121, at 778–79.

including in the closely-related field of professional malpractice law. A patient may experience side effects from a surgical procedure, but if the surgeon performed with the requisite level of skill, she would not be liable for malpractice. Social scientists have demonstrated that judgments about risk are strongly influenced by outcomes,<sup>362</sup> so the fact that a plaintiff suffered an adverse outcome will influence a judge or jury evaluating whether the defendant used reasonable care. This may have the effect of converting a negligence rule into strict liability.<sup>363</sup> It is not necessarily unreasonable for lawyers to be nervous about having their advice evaluated after the fact. However, disciplinary proceedings already employ safeguards to guard against hindsight bias in judgments concerning the reasonableness of lawyers' advising. For one thing, the standard of proof is quite high.<sup>364</sup> The standard for discipline for lawyers in the Department of Justice is whether the lawyer intentionally or recklessly disregarded a legal obligation.<sup>365</sup> This *ex post* evaluative criterion does not alter the quantum of proof needed to establish a violation, but by changing the *mens rea* standard from negligence to at least recklessness, it makes it less likely that a lawyer will be subject to discipline for a close call. Allowing evidence of compliance with *ex ante* norms, such as professional custom, is also a way of avoiding hindsight bias.<sup>366</sup> Disciplinary proceedings are likely to involve expert testimony on professional custom, and experts have their own reputational incentives and ethical standards to provide a check on biased judgment.<sup>367</sup> These checks ensure that scholars and other experts who disagree with the policy goals of a lawyer's client will nevertheless be able to conclude that the lawyer's advice complied with applicable ethical standards.

The Article up to this point has offered both a constructive doctrinal (Part II) and a theoretical (Part III) account of the duties of government lawyers. The question remains whether this conception of ethical lawyering provides a useful critical standpoint both prospectively and retrospectively—such that, to guide lawyers in their conduct and to serve as a framework for evaluation of misconduct by courts and disciplinary agencies. The following Part considers an episode from the early weeks of the Trump administration that posed a challenge for lawyers within the government.

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362. See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

363. *Id.* at 573.

364. See *id.* at 606–07 (arguing that raising the standard of proof from preponderance of evidence to clear and convincing would likely undo the effect of hindsight bias).

365. See OPR ANALYTICAL FRAMEWORK, *supra* note 191.

366. Rachlinski, *supra* note 362, at 612–13.

367. See, e.g., Carl M. Selinger, *The Problematical Role of the Legal Ethics Expert Witness*, 13 GEO. J. LEGAL ETHICS 405 (2000); Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465 (1999).

## IV. CASE STUDY—TRUMP’S MUSLIM BAN ORDER

During the campaign, Trump promised on numerous occasions to enact at least a temporary pause, if not a permanent ban, on entry into the United States either of Muslims or people from regions with a known history of supporting terrorism.<sup>368</sup> After the election, Trump continued to maintain his support for the ban or a registry of Muslims already living in the United States. After an attack on a Christmas market in Berlin that killed twelve people, Trump was asked if he still supported his proposed ban or registry, and he replied, “[y]ou know my plans . . . All along, I’ve been proven to be right, 100 percent correct.”<sup>369</sup> Early in the campaign Trump also alluded to establishing a database or registry to track Muslims in the United States.<sup>370</sup> Trump advisor Rudy Giuliani stated in an interview that Trump had asked him how to implement a Muslim ban lawfully.<sup>371</sup>

In his first week in office, President Trump issued an executive order immediately blocking the entry into the United States of all refugees and all citizens of seven majority-Muslim countries, even those with lawful permanent residence in the United States.<sup>372</sup> The ban on Syrian refugees

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368. See, e.g., Jenna Johnson, *Donald Trump is Expanding His Muslim Ban, Not Rolling It Back*, WASH. POST (July 24, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back> (quoting Trump saying, in his acceptance speech at the Republican National Convention, that the country “must immediately suspend immigration from any nation that has been compromised by terrorism until such time it’s proven that vetting mechanisms have been put in place”); Jenna Johnson, *No, Donald Trump Has Not Softened His Stance on Banning Muslims*, WASH. POST (May 12, 2016), <https://www.washingtonpost.com/politics/no-donald-trump-has-not-softened-his-stance-on-banning-muslims/2016/05/12>. Trump’s first statement on the issue was a call for a “total and complete” ban on Muslims entering the United States. See Jenna Johnson & David Weigel, *Donald Trump Calls for ‘Total’ Ban on Muslims Entering United States*, WASH. POST (Dec. 8, 2015), <https://www.washingtonpost.com/politics/2015/12/07>.

369. See Madeline Conway, *Trump Stokes Fears He’ll Pursue Muslim Ban*, POLITICO (Dec. 22, 2016), <http://www.politico.com/story/2016/12/trump-muslim-ban-kellyanne-conway-232912>; see also Abby Phillip & Abigail Hauslohner, *Trump on the Future of Proposed Muslim Ban, Registry: ‘You Know My Plans,’* WASH. POST (Dec. 22, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans>.

370. See Vaughn Hillyard, *Donald Trump’s Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC NEWS (Nov. 20, 2015), <https://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716>.

371. See Rebecca Savransky, *Giuliani: Trump Asked Me How to Do a Muslim Ban ‘Legally,’* THE HILL (Jan. 29, 2017, 8:48 AM), <http://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally>.

372. See, e.g., Michael D. Shear et al., *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html>. Homeland Security Secretary John Kelly subsequently issued a statement deeming the entry of lawful permanent residents—such as, green card holders—to be in the national interest and thus permitted notwithstanding the executive order. See Statement by Secretary John Kelly on the Entry of Lawful Permanent Residents into the United States (Jan. 29, 2017), <https://www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entry-lawful-permanent-residents-united-states>.

was permanent, while the entry ban on other nationals was intended to be temporary, supposedly to provide time for the government to review its procedures for granting visas. For the purposes of analyzing the ethical obligations of government lawyers, however, we can turn this news story into a hypothetical. The order was drafted during the transition period by advisors to Trump, presumably including Rudy Giuliani and White House strategist Steven Bannon.<sup>373</sup> Assume for the sake of discussion that, during the transition, the task of legal analysis of the proposed executive order was shared between a lawyer advising the presidential transition team and a career attorney in the Homeland Security Department's Office of General Counsel, Regulatory Affairs Law Division.<sup>374</sup>

This attorney realized the President has broad statutory authorization to suspend "the entry of any aliens or of any class of aliens into the United States," if the President determines that entry "would be detrimental to the interests of the United States."<sup>375</sup> However, the attorney is concerned about the possibility of challenges to the executive order on the ground of discriminatory enforcement, given Trump's campaign statements.<sup>376</sup> The Supreme Court has generally followed a deferential approach with respect to the Executive when noncitizens have alleged discriminatory enforcement of immigration laws. In a case involving a Marxist academic who was barred from entering the United States to deliver lectures at universities, the Supreme Court said that it would not look behind a "facially legitimate and bona fide" reason for denying entry into the United States.<sup>377</sup> The Court reaffirmed the "facially legitimate and bona fide" standard quite recently, in *Kerry v. Din*.<sup>378</sup>

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373. See Shear *supra* note 373 ("A senior administration official said that the order was drafted in cooperation with some immigration experts on Capitol Hill and members of the 'beachhead teams'—small groups of political appointees sent by the new White House to be liaisons and begin work at the agencies.").

374. See *Office of the General Counsel*, DEP'T OF HOMELAND SECURITY (Jan. 25, 2017), <https://www.dhs.gov/office-general-counsel> ("[T]he General Counsel is ultimately responsible for all of the Department's legal determinations . . . . The Office of the General Counsel's central tasks include . . . providing complete, accurate, and timely legal advice on possible courses of action for the Department.").

375. 8 U.S.C. § 1182(f) (2006).

376. While this evidence cannot be taken into account in the hypothetical, considering the constitutionality of the order from an *ex ante* point of view, it is noteworthy that in the actual case, Trump promised that once the new "extreme vetting" procedures were in place, his administration would give priority for admission to Christians. See Carol Morello, *Trump Signs Order Temporarily Halting Admission of Refugees, Promises Priority for Christians*, WASH. POST (Jan. 27, 2017), [https://www.washingtonpost.com/world/national-security/trump-approves-extreme-vetting-of-refugees-promises-priority-for-christians/2017/01/27/007021a2-e4c7-11e6-a547-5fb9411d332c\\_story.html](https://www.washingtonpost.com/world/national-security/trump-approves-extreme-vetting-of-refugees-promises-priority-for-christians/2017/01/27/007021a2-e4c7-11e6-a547-5fb9411d332c_story.html).

377. *Kleindiest v. Mandel*, 408 U.S. 753, 770 (1972).

378. *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring).

Justice Kennedy's concurrence, which is the controlling opinion in that case, stated that:

Once this standard [from *Kleindienst*] is met, courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the constitutional interests of citizens the visa denial might implicate. This reasoning has particular force in the area of national security, for which Congress has provided specific statutory directions pertaining to visa applications by noncitizens who seek entry to this country.<sup>379</sup>

The *Kleindienst* test works in conjunction with the general principle that courts should not engage in “judicial psychoanalysis” to determine the “real” motivations behind a government official's actions.<sup>380</sup> In the context of a selective prosecution claim brought by members of a politically unpopular group, the Court demonstrated reluctance to delve into the motivation of officials who sought to deport the petitioners:

The Executive should not have to disclose its “real” reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.<sup>381</sup>

Here, the DHS attorney was nevertheless concerned, because the draft executive order appeared to be both under-inclusive and over-inclusive, relative to the goal of preventing the entry into the United States of potential jihadi terrorists. On the one hand, it keeps out refugees who are fleeing violence in their home country and, in the case of Syrian refugees, ends the existing application process which included an extensive background investigation. On the other, it makes no effort to increase scrutiny of entrants from countries presenting a real and present terrorist threat. The attorney therefore worries that, notwithstanding the broad executive authority to regulate immigration, and despite the usual deference exhibited by courts in immigration matters, the draft order may be unconstitutional as an instance of prohibited religious discrimination. Although facially neutral as between Muslim and non-Muslim citizens of the seven covered nations, a court may conclude, based on Trump's expressions of support for a Muslim ban, and Giuliani's statement that he was asked for assistance in designing a Muslim ban, that the order was “motivated by discriminatory animus and its application results in a discriminatory effect.”<sup>382</sup> Under the *Arlington*

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379. *Id.* at 2140 (Kennedy, J., concurring) (internal quotations and citations omitted).

380. *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005).

381. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

382. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264–65 (1977). I am grateful to Steve Shiffrin for conversations about the background constitutional standards applicable to the order.

*Heights* factors, to determine whether a government action is motivated by discriminatory animus, a court would consider the impact of the official action, whether there has been a clear pattern unexplainable on grounds besides discrimination, the historical background of the decision, the specific sequence of events leading up to the challenged decision, and departures from the normal procedural sequence.<sup>383</sup>

What should the attorney do? The first thing to notice is the subtle differences in framing between these two questions:

Might a court enjoin enforcement of the President's draft executive order on the ground of discriminatory purpose?

Is the President's draft executive order unconstitutional as a product of prohibited discriminatory purpose?

The first question implicitly adopts a litigator's mindset. The question is not whether the proposed order is constitutional, but whether a court is likely to find it is constitutional. Competent lawyers should advise their clients of the likelihood that a court will prohibit an action, but it is important not to conflate the second question—is the order lawful—with a prediction of what a court might decide if presented with the question. Law is not a prediction of what officials might do. This is the famous, or notorious, Holmesian bad man interpretive attitude, building on Oliver Wendell Holmes's dictum that "[i]f you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict."<sup>384</sup> The law-as-prediction theory has been demolished repeatedly by philosophers more careful than Holmes did while delivering a lecture to law students. As H. L. A. Hart showed, the Holmesian bad man point of view is blind to the role of the law in providing guidance for a citizen—Hart calls him the "puzzled man"—who wishes to know what legal rights and duties he actually has.<sup>385</sup> The Holmesian bad man perspective cannot incorporate the distinctive feature of any rules, whether legal, social, or the rules of a sport like cricket, which is that they provide guidance for officials imposing sanctions as well as for those subject to the rules.<sup>386</sup> The function of law is to guide action, and the function of rules is to provide a justification for acting, refraining from acting, or punishing others. Doing something out of the fear of being punished is not the same as doing something because it is one's duty or obligation to do so. Holmes usefully reminded students not to confuse moral and legal obligations, but it is a gross misreading of

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383. See, e.g., *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016) (citing *Arlington Heights*, 429 U.S. at 266–67).

384. Holmes, *supra* note 10, at 459.

385. H. L. A. HART, *THE CONCEPT OF LAW* 40 (2d ed. 1994).

386. *Id.* at 41, 82–86.



his lecture to conclude that the law, by its nature, is reducible to predictions concerning the imposition of sanctions.<sup>387</sup>

The attorney's question is therefore the second one: Is the President's proposed order unconstitutional, quite apart from what a court may decide. Of course, all lawyers engage in prediction as a heuristic. Ever since law school we have been accustomed to thinking in litigators' terms, about what a court would do in response to the plaintiff's or defendant's argument. An attorney's judgment concerning the plausibility of a legal position may find its natural expression as a prediction of how the argument would fare if presented to a court. Legal judgments are seldom binary. Lawyers express conclusions in probabilistic terms. But this is a heuristic only, and the attorney is advising the President on what the law actually permits or requires, with an additional term expressing the attorney's confidence in the judgment. The attorney may conclude, for example, that the order is likely constitutional, in view of the traditional deference by courts to the Executive with respect to immigration matters, but that there is some likelihood that a reviewing court may find, on the *Arlington Heights* factors, that the order was motivated by invidious discrimination. Judges of course vary, and will differ in their receptiveness to claims of discrimination, in their willingness to assume good faith on the part of government actors, in the attitude they take toward multifactor tests like *Arlington Heights*, and in general human qualities such as optimism versus cynicism about the motivations of others. To some extent, luck is an ineliminable element of positive law,<sup>388</sup> and therefore even the most experienced lawyer cannot eliminate the qualification at the end of her advice. "This is probably okay but there's always a chance" is the kind of lawyerly double-talk that can be irritating to clients, but it does express the hard-won knowledge that few things are certain when it comes to the application of law. Still, there is a difference between predicting a result and reaching a judgment about the content of applicable law, even if the latter is hedged with a warning about what a court might do.

An attorney may be making a judgment, but it does not follow that the attorney must adopt the interpretive attitude of a "neutral expositor" or provide her best view of the law.<sup>389</sup> As argued above, an attorney advising a government agency, or the Executive Branch of government, may exercise creativity to find a lawful way for the agency or the President to accomplish its objectives. A little bit of partisanship is all right, as long as the lawyer retains the ability to judge when a position has insufficient legal support to represent a good faith conclusion of law, as opposed to

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387. See DAVID LYONS, *ETHICS AND THE RULE OF LAW* 68–71 (1984).

388. See Jeremy Waldron, *Lucky in Your Judge*, 9 *THEORETICAL INQ. L.* 185 (2007).

389. Compare Moss, *supra* note 17, with Johnsen, *supra* note 11.

merely something that can be asserted in litigation without fear of sanctions. A legal advisor operates “between the roles of politically neutral judge and avowedly partisan advocate.”<sup>390</sup>

What if the attorney disagrees in moral terms with the proposed executive order? Ironically, given the term “legal ethics,” scholars debate the extent to which lawyers may account for ethical considerations that are not embodied in positive law. My view is that the attorney’s obligation is to advise the President on the legality of the proposed executive order and to take care not to allow her judgments concerning its legality to be influenced by political or ethical disagreement with its objectives. True, Rule 2.1 permits the attorney to “refer not only to law but to . . . moral, economic, social, and political factors” that may bear on the client’s decision.<sup>391</sup> The attorney may give this advice, but should not be surprised when it is ignored. The President has other advisors to consider social and political factors, and the President is a moral agent who is responsible for the decisions he makes. If the order turns out to be a catastrophe, blame properly belongs to the President. This is not a feature only of the role of government legal advisor; in any attorney-client relationship there is a moral division of labor between the client, who establishes the objectives of the representation, and the lawyer who provides technical assistance and is responsible for the means by which the representation is carried out.<sup>392</sup> If the attorney’s moral disagreement with the President’s objectives can be characterized as fundamental, the attorney may resign.<sup>393</sup> If there is a delegation of authority to an attorney to exercise discretion, moral considerations may come into play. For example, the Attorney General may make discretionary decisions concerning enforcement priorities. However, the Attorney General is also subject to the direction of the President, and if the President insists on pursuing some objective, the Attorney General should determine whether that objective is lawful, and if so, provide assistance to the President in carrying it out.

In the actual events upon which this case study is based, Acting Attorney General Sally Yates (a hold-over from the Obama Administration) wrote a letter to Justice Department officials stating her refusal to enforce the President’s executive order.<sup>394</sup> She stated that the Office of Legal Counsel had reviewed the order for form and legality, but that OLC did not consider “whether any policy choice embodied in an Executive Order is wise or just.” She stated that her responsibility was to

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390. Morrison, *supra* note 11, at 1715.

391. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2003).

392. *Id.* at r. 1.2(a).

393. *Id.* at r. 1.16(b)(4).

394. See Letter from Sally Yates, Acting Attorney General, <https://assets.documentcloud.org/documents/3438879/Letter-From-Sally-Yates.pdf>.

“ensure that the position of the Department of Justice is not only legally defensible, but is informed by our best view of what the law is after consideration of all the facts” and complies with the Attorney General’s “solemn obligation to always seek justice and stand for what is right.”<sup>395</sup> The President fired her immediately.<sup>396</sup> Leaving aside the political repercussions for Trump of escalating a crisis in the early weeks of a new administration and evoking Nixon’s Saturday Night Massacre in the process, in my judgment Acting Attorney General Yates got two important features of the role of government legal advisor wrong.

First, the Justice Department does have an obligation to seek justice and stand for what is right, but the content of those values is not self-evident. One may believe, for example, that American values require opening the door to refugees from war-ravaged countries, where Muslims are disproportionately victimized by terrorism. But others disagree and, importantly, this disagreement is often reasonable. One of the inescapable conditions of modern society is a plurality of reasonable moral and religious beliefs, as well as uncertainty about the facts bearing on moral decision-making. What Rawls calls the burdens of judgment lay heavy on political officials who act in the name of the community and in pursuit of its common good.<sup>397</sup> There are plenty of members of our political community who believe the United States has been too permissive in its refugee policy, who point to recent terror attacks in France and Germany as evidence that liberals are blind to the danger of infiltration by radicalized jihadis, and that the first obligation of anyone entrusted with the community’s safety is to secure the nation’s borders. Unelected government officials and their legal advisors should not act directly on their conception of the public interest; that is exactly what is contested in, and resolved by, elections.<sup>398</sup> Acting Attorney General Yates has her views on what is in the public interest; President Trump and his political advisor Steven Bannon have another. In the moral division of labor that characterizes the service conception of attorney-client relationship, it is for elected political officials to make the judgment call concerning issues of justice and what is right. If Yates’s letter stated that she refused to enforce the order because it was unlawful because it was motivated by invidious discrimination,<sup>399</sup> her stance would have been

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395. *Id.*

396. See Michael D. Shear et al., *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html?mcubz=3>.

397. See JOHN RAWLS, *POLITICAL LIBERALISM* 54–58 (1993).

398. See Miller, *supra* note 15, at 1294–95.

399. It was reported that Yates’s concerns were in fact premised on the statements by Trump and Giuliani that suggested the order was a Muslim ban with a veneer of neutrality. See Alan Blinder & Matt Apuzzo, *Trump’s Talk About Muslims Led Acting Attorney General to Defy Ban*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/sally-yates-trump-immigration->

ethically proper, and her firing by Trump would have more closely resembled the firing of Archibald Cox in the Saturday Night Massacre. But she chose in her letter to attack the order as unjust, not to question its legality. This is not semantic nor a mere difference in emphasis in drafting; it misstates the central professional obligation of a government legal advisor.

Second, a government attorney, even acting in a non-litigation capacity, does not have an obligation to seek the *best* view of the law unless her client asks for this advice. Instead, the attorney's ethical responsibility is to ensure that a proposed course of action is legally permissible. There may be a gap between something that is permitted and the best view of the law. In this case the executive order may even be approaching the line of unlawfulness. President Trump cannot un-ring the bell of Islamophobia he so vigorously sounded during the campaign, and statements by advisors like Rudy Giuliani and Michael Flynn have heightened suspicion that the facially neutral executive order is motivated by discriminatory animus. If Yates believed the history of the executive order would render it unlawful, she should have given that advice. It appeared from her letter, however, that she believed the order to be lawful—perhaps only barely so—but inconsistent with her best view (or the Department's best view) of the law. The word "best" is ambiguous here. Is Yates invoking something like the interpretation that is most likely to be sustained if challenged in court? That seems unlikely since her letter is focused on the Department's purported obligation to do what is right and just. That suggests she intends "best" to refer to something like a Dworkinian constructive interpretation, which shows the community's law in its best light as determined by considerations of political morality.<sup>400</sup> But Dworkinian interpretation relies on an implausible degree of consensus regarding what is "best" by the standards of political morality. Dworkin does acknowledge that a judge may face a choice between two competing interpretations of law, both of which pass the threshold test of fit, and in the end must simply decide that one vision of the community's political morality is more powerful than the other.<sup>401</sup> As a theory of adjudication, that makes a certain amount of sense; after all, what else is a judge to do? However, it is less satisfying in the realm of legal ethics. In adjudication, there is nothing comparable to the moral division of labor in the attorney-client relationship. As a matter of agency law and the rules of professional conduct, where there are two competing visions of the public good

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ban.html?mcubz=3.

400. See RONALD DWORKIN, *LAW'S EMPIRE* 263 (1986) (arguing that a judge ought to choose an interpretation that the judge believes "best from the standpoint of political morality" and should seek "the best common principles politics can find.").

401. *Id.* at 268–71.

available to a lawyer, the responsibility for selecting between them is the client's. If the proposed course of action is lawful, the lawyer's duty as an advisor is complete, and the client may go ahead and execute on the planned action.

Much of this Article has been organized around the theme of legal determinacy and the rule of law. The most important obligation of an attorney acting as a legal advisor, to a government or private client equally, is to provide competent, independent advice on the legality of the client's actions. As is so frequently the case, there is not a clear answer to the question, "is the executive order unconstitutional?" But this should not be taken to entail that a legal advisor should not raise concerns about its legality, because the law is indeterminate. A conception of ethical lawyering that is properly informed by the value of the rule of law requires the legal advisor to consider legal reasons for and against the client's intended action. As discussed in Part III, *legal* reasons can be distinguished from policy, moral, or political reasons by properties such as their generality, rational intelligibility, and foundation in past political acts of the community in relevantly similar situations. A process-based approach to the rule of law emphasizes the continuity of a reasoning process that manifests respect for all citizens affected by government action, including those whose views were ultimately subordinated to others. In the case of the executive order, a lawyer should consider both the traditional deference of courts to the Executive in matters pertaining to immigration and border security, as well as the constitutional principle that disfavored groups should not be singled out for harsh treatment on the basis of religion or nationality. Reasonable lawyers may disagree on the weight and priority of these considerations, but to the extent humanly possible—and of course it is difficult to set aside one's strongly held commitments—the balancing process ought to be responsive to the relative importance of these values throughout the law generally, and specifically with respect to immigration matters. In my judgment, the post 9/11 history of restrictions on immigration shows that the equal protection component of the Due Process Clause does not prohibit the President from implementing the proposed order. In my judgment, a government legal advisor may seek to dissuade the President, for moral or political reasons, but on the question of legality, would be ethically required to approve the order. But it is a close call, and a reasonable lawyer may conclude otherwise. As long as she is prepared to give legal reasons for that conclusion, her conduct should also be regarded as in compliance with the ethical obligations of legal advisors.

#### CONCLUSION

At the time of writing this Article, in the weeks before and the months following Inauguration Day 2017, we obviously know very little

about the conduct of most lawyers within the Trump Administration. It is entirely possible that no Executive Branch lawyer will have engaged in conduct that runs contrary to the value of the rule of law. Even if government lawyers do engage in misconduct, it may be a while before it is detected, investigated, and made public. Perhaps it will never become known. This Article is therefore offered in an optimistic spirit, for government lawyers who are looking for guidance on the law of lawyering in all its complexity and subtlety. The law of lawyering embodies a substantive ethical conception of professionalism as ensuring respect for the rule of law. But there is also a monitory subtext, reminding lawyers that they are subject to regulation and discipline by state courts for assisting government actors in unlawful conduct. If such a disciplinary proceeding is commenced, the predictable response from supporters of the Administration will be that professional discipline is being weaponized in a partisan political conflict. The detailed doctrinal engagement with the law of lawyering is intended to fortify regulators who appropriately seek to hold all lawyers, including those working for the federal government, to professional ethical standards. These norms are not political in the Red State vs. Blue State sense, but represent the profession's own effort to conform the conduct of lawyers to the ideal of legality. The post-Watergate experience with lawyer regulation, including the battles over the Bush Administration's aggressive assertions of power, has established legal precedent and interpretive practices that do stand apart from political ideology.

This Administration may do many things with which I disagree as a policy matter, and that is its prerogative. We live in a democracy, and have to live with the results of elections. But the boundaries on what the Administration may *lawfully* do are enforced by government legal advisors, who have duties both of loyal service to their client and also expressing fidelity to law. The legal profession has traditionally seen itself as playing a stabilizing role in society. Tocqueville famously referred to the legal profession as an American aristocracy—"the strongest barriers against the faults of democracy."<sup>402</sup> Tocqueville's observation has become a self-congratulatory cliché for American lawyers, but if the 2016 presidential campaign and the early months of the Trump presidency are any indication, it will not be long before government lawyers are forced to choose between acquiescing in the exercise of raw power and fulfilling the core ethical obligation of refusing to assist a client in unlawful conduct.

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402. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 263 (George Lawrence trans., J.P. Mayer ed., 1969).