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## A Typology of Justice Department Lawyers' Roles and Responsibilities

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# A TYPOLOGY OF JUSTICE DEPARTMENT LAWYERS' ROLES AND RESPONSIBILITIES\*

REBECCA ROIPHE\*\*

*President Trump's administration has persistently challenged the legitimacy of the Department of Justice ("DOJ"). In the past, DOJ, like other governmental institutions, has been fairly resilient. Informal norms and practices have served to preserve its proper functioning, even under pressure. The strain of the past three years, however, has been different in kind and scale. This Article offers a typology of different roles for DOJ lawyers and argues that over time the institution has evolved by allocating different functions and responsibilities to different positions within DOJ. By doing so, it has for the most part maintained the proper balance between independence and responsiveness to the administration. By explaining these roles and responsibilities, this Article both describes the different DOJ lawyer roles and seeks to strengthen the institution by making the informal norms that preserve and protect its mission more explicit. The Article concludes that, as DOJ expanded, it evolved to allow the Attorney General to balance the political and legal responsibilities of his office. He does so by advising and implementing administration policies while preventing impermissible political considerations from influencing those DOJ officials who are charged with the neutral interpretation and enforcement of the law.*

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## INTRODUCTION

President Trump's unwillingness to abide by presidential and democratic norms has led to an increased concern about the resilience of American democracy and its institutions.<sup>1</sup> His refusal to play by the rules has highlighted how much of our system is built on informal traditions that guide presidential conduct.<sup>2</sup> Like the presidency, other American democratic institutions are fluid and imprecise. The work they do is discretionary and, in turn, depends on traditions, practices, and the judgment of the individuals who work within them. These informal norms and institutional practices have worked fairly well up until now. Of course, there have been moments of stress and even failure, but for the most part institutional practices have been sufficient to sustain fundamental aspects of American democracy. As the President defies these norms, however, it becomes increasingly critical to acknowledge and sustain them.

One of the President's unconventional tactics is accusing institutions and individuals that hold government actors accountable of being purely partisan players. Unsurprisingly, one of the main targets of his accusations has been the

1. See, e.g., David Frum, *How To Build an Autocracy*, ATLANTIC (Mar. 2017), <https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872/> [<https://perma.cc/8A3J-CA96> (dark archive)].

2. See generally Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018) [hereinafter Renan, *Presidential Norms*] (describing the norms that augment and constrain the presidential power).

Department of Justice (“DOJ”).<sup>3</sup> The professional, nonpartisan norms and the practices designed to promote those norms within the DOJ are fundamental to the rule of law.<sup>4</sup> The purpose of this Article is to strengthen these informal norms and traditions by giving them greater definition and clarity.

Since President Trump’s inauguration, journalists and scholars have paid increased attention to government lawyers’ conduct.<sup>5</sup> Are lawyers employed to help the administration avoid obstacles to its ends? Are they there to protect the American public? Do they constitute a check on power or another tool in its exercise? The answer to these questions depends on the position that the lawyer holds and the work that the lawyer is doing. As a whole, the Department of Justice ought to strike a proper balance between responsiveness and independence, ensuring effectiveness and accountability while maintaining enough independence from the President to guarantee the orderly development of the law and its fair application.

DOJ as a whole ought to be fair in interpreting the meaning of the law and independent from political influence in enforcing it in individual cases. But it should not be so separate and unaccountable that it fails to give effect to the administration’s policies and priorities. This Article argues that the roles of the different lawyers within DOJ ought to be defined to advance these twin goals.<sup>6</sup>

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3. Recently, Trump called the FBI “scum” at a rally in Pennsylvania. Tom Porter, *Trump Called the FBI ‘Scum’ and Hit Out at the Report that Discredited His Theory the Russia Probe Was a Deep-State Plot at a Wild Pennsylvania Rally*, BUS. INSIDER (Dec. 11, 2019), <https://www.businessinsider.com/trump-called-the-fbi-scum-at-a-pennsylvania-rally-2019-12> [<https://perma.cc/H4HE-P2P6>].

4. The rule of law is hard to define precisely and many have offered requirements. Aristotle articulated an important conception of the rule of law in Book III of his *Politics*: “[I]t is as much a man’s duty to submit to command as to assume it . . . for this is law, for order is law; and it is more proper that law should govern than any one of the citizens . . .” ARISTOTLE, *POLITICS* bk. III, at 117 (William Ellis trans., London, George Routledge & Sons Ltd. 1895) (c. 384 B.C.E.). John Adams famously repeated this sentiment when he drafted the Constitution of the Commonwealth of Massachusetts, writing that the rule of law requires a “government of laws and not of men.” MASS. CONST. art. XXX. For my purposes, I will assume that the rule of law requires at least the fair and equal application of known and clear laws to all people, including government officials, and that the processes for enacting and enforcing the laws are fair and efficient. See generally Robert A. Stein, *What Exactly Is the Rule of Law?*, 57 HOUS. L. REV. 185, 187–98 (2019) (offering an overview of historical definitions of the term and distilling critical principles of the rule of law from them).

5. See, e.g., W. Bradley Wendel, *Sally Yates, Ronald Dworkin, and the Best View of the Law*, 115 MICH. L. REV. ONLINE 78, 87–90 (2017) (criticizing then-Acting Attorney General Sally Yates’s decision not to defend the President’s travel ban); James Hohmann, *The Daily 202: All the President’s Lawyers. Four Government Attorneys Find Themselves Embroiled in Trump’s Ukraine Mess*, WASH. POST (Sept. 26, 2019), <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2019/09/26/daily-202-all-the-president-s-lawyers-four-government-attorneys-find-themselves-embroiled-in-trump-s-ukraine-mess/5d8c53eb88e0fa4b0ec2463e/> [<https://perma.cc/8WNR-9QBS> (dark archive)] (discussing the involvement of attorneys in limiting the President’s exposure for withholding funds to Ukraine).

6. There is evidence that the effort to preserve independence already animates DOJ policy in many ways. For example, the *Justice Manual* authorizes only some positions within DOJ to communicate with the legislature. U.S. DEP’T OF JUSTICE, *JUSTICE MANUAL* §§ 1-8.100–200 (Dec.

With this principle in mind, the Article describes the different roles of Department of Justice lawyers and lays out the ethical obligations that ought to accompany those roles.<sup>7</sup> In order to prescribe how government lawyers should act, it is critical to understand what it is they do. The same lawyer may play more than one role, in which case her obligations may vary. The reason for the complexity is that government lawyers use the law in different ways. At times, the law is a constraint on power. At others, it is a mechanism for resolving disputes. And in other instances, it is an appropriate tool in the exercise of the state's coercive power. The goal is to maintain the neutrality of law and its evenhanded application to objectively determined facts, so that the Department of Justice can remain a constraint on power while not unnecessarily hobbling the elected officials in their ability to implement policy.

This Article argues that the Department of Justice has, over the course of the last century and a half, stumbled toward the proper roles and responsibilities for different lawyers. It has, in essence, achieved a fairly good balance between the need for responsiveness and independence. The main purpose of the Article, then, is to clarify these roles, how they have developed, and why. To be sure, not all scholars agree on the proper role of different government attorneys, and so the aim of the Article is not merely descriptive.<sup>8</sup> At times, it weighs in on these debates to offer a normative suggestion based on the need to ensure an effective yet independent Justice Department.

There is value in using examples from the Trump administration to illustrate the different roles of government lawyers, because the President's repeated assaults on legal institutions has highlighted how central lawyers' ethical obligations are to the rule of law. He has, in essence, exposed the fault lines. Without a neutral mechanism to apply and interpret the law, this vital aspect of American democracy is in jeopardy. In some respects, the rule of law is a game of trust. If the public loses faith in the institutions that implement the

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2019) [hereinafter JUSTICE MANUAL], <https://www.justice.gov/jm/jm-1-8000-congressional-relations#1-8.100> [<https://perma.cc/L4WR-RS8J>]. Many scholars have noted the dual responsibility of the Attorney General to the law and political actors. See, e.g., DANIEL J. MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 26 (1980); Robert E. Palmer, Comment, *The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General*, 11 PEPP. L. REV. 331, 349 (1984).

7. There are several offices within DOJ that this Article does not cover: the Civil Rights Division, the Antitrust Division, and the Executive Office for Immigration Review, to name a few. Obviously, books can be, and have been, written on each of these positions and offices, and this Article's purpose of giving a broad overview can only be achieved by being selective.

8. Compare Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 243–48 (2000) [hereinafter Green, *Must Government Lawyers*] (arguing that civil division DOJ attorneys have a duty to do justice beyond the dictates of agency heads), with Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294, 1298 (1987) (arguing that civil division DOJ lawyers owe an obligation to the agency heads rather than a direct duty to do justice on behalf of the public).

law, then the group with the greatest power to enforce its will always wins. The President's statements, on Twitter and elsewhere, have the power to undermine this trust. When the President criticizes the Federal Bureau of Investigation ("FBI"),<sup>9</sup> DOJ,<sup>10</sup> or Special Counsel Robert Mueller's investigation,<sup>11</sup> he undermines the law as a serious constraint on power. When he accuses courts of being captive to one party or another, once again he threatens to collapse law into power.<sup>12</sup> When he orders the investigation and prosecution of political enemies, he tramples on an essential democratic principle.<sup>13</sup> When President Trump mischaracterizes facts, like the content of the Mueller Report,<sup>14</sup> he destabilizes the law itself, which is dependent on faith in a discernible reality. In politics, discernible reality itself is based on a basic faith in the institutions whose job is to ascertain that reality.<sup>15</sup>

The premise for my argument about each type of government lawyer is that government lawyers ought to approach their job in a way that supports an

9. See, e.g., Nicholas Fandos & Michael S. Schmidt, *Trump Tweets Lengthy Attack on F.B.I. over Inquiry into Possible Aid to Russia*, N.Y. TIMES (Jan. 12, 2019), <https://www.nytimes.com/2019/01/12/us/politics/trump-fbi-counterintelligence-investigation.html> [https://perma.cc/N74A-VUBQ (dark archive)].

10. See, e.g., Katie Benner & Adam Goldman, *A Darker Portrait Emerges of Trump's Attacks on the Justice Department*, N.Y. TIMES (Apr. 19, 2019), <https://www.nytimes.com/2019/04/19/us/politics/justice-department-trump-attack-mueller.html> [https://perma.cc/GNY8-DEH8 (dark archive)].

11. See, e.g., Larry Buchanan & Karen Yourish, *Trump Has Publicly Attacked the Russia Investigation More than 1,100 Times*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/interactive/2019/02/19/us/politics/trump-attacks-obstruction-investigation.html> [https://perma.cc/F3FS-CNF8 (dark archive)].

12. See, e.g., Robert Barnes, *Rebuking Trump's Criticism of 'Obama Judge,' Chief Justice Roberts Defends Judiciary as 'Independent,'* WASH. POST (Nov. 21, 2018), [https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-ed7-11e8-96d4-0d23f2aad09\\_story.html](https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-ed7-11e8-96d4-0d23f2aad09_story.html) [https://perma.cc/Y2ZD-MXMC (dark archive)]; Allyson Chiu, *Trump Attacks Federal Judge, Prosecutors in Twitter Tirade Defending Roger Stone*, WASH. POST (Feb. 12, 2020), <https://www.washingtonpost.com/nation/2020/02/12/trump-stone-judge/> [https://perma.cc/LJ4Q-NZKW (dark archive)]. President Trump has not only accused courts of partisan bias, he has also suggested that a juror in the Roger Stone case was similarly motivated. See Spencer S. Hsu & John Wagner, *Roger Stone Asks for New Trial in Sealed Motion, One Day After Trump Accused Jury Forewoman of Bias*, WASH. POST (Feb. 14, 2020), [https://www.washingtonpost.com/local/legal-issues/roger-stone-asks-for-new-trial-in-sealed-motion-one-day-after-trump-accused-jury-forewoman-of-bias/2020/02/14/1e36e412-4f65-11ea-9b5c-eac5b16dafa\\_story.html](https://www.washingtonpost.com/local/legal-issues/roger-stone-asks-for-new-trial-in-sealed-motion-one-day-after-trump-accused-jury-forewoman-of-bias/2020/02/14/1e36e412-4f65-11ea-9b5c-eac5b16dafa_story.html) [https://perma.cc/NLW3-GAYU (dark archive)].

13. See, e.g., Michael S. Schmidt & Maggie Haberman, *Trump Wanted To Order Justice Dept. To Prosecute Comey and Clinton*, N.Y. TIMES (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/politics/president-trump-justice-department.html> [https://perma.cc/SLV6-E9YJ (dark archive)].

14. See, e.g., Jordan Fabian, *Trump on Mueller Report: 'Complete and Total Exoneration,'* HILL (Mar. 24, 2019), <https://thehill.com/homenews/administration/435533-trump-on-mueller-report-complete-and-total-exoneration> [https://perma.cc/NJ9G-KANN].

15. This is not to say that institutions like DOJ are perfect or incorruptible, a claim that is easily belied by history. Checks and balances, supervision, and oversight are indispensable. But those ought to be layered over a basic faith that, unless there is some proof that things have gone awry, these institutions operate fairly and without political bias.

institution designed to implement and interpret the law in an evenhanded way, in light of administration priorities. While seemingly simple, the assertion of presidential priorities can, at times, impede the fair interpretation and evenhanded enforcement of the law. The government should define lawyers' roles so as to preserve the law as a neutral and legitimate mechanism for resolving disputes and as a real check on power without undermining the ability of elected officials to articulate and implement the administration's policy objectives. Interpreting government lawyers' obligations with this larger goal in mind leads to a view of government lawyers' ethics that varies given the role the particular lawyer plays.

Before laying out the respective roles of DOJ lawyers in Part II, Part I provides a brief overview of the history of the Attorney General's office and the DOJ. This history supports the premise of the Article that DOJ ought to be designed to promote independence without sacrificing appropriate responsiveness to administration priorities. It also shows the evolution of the law department as the nature and scope of the law and government changed. While not perfect, the delegation and delineation of different roles within DOJ reflects an effort to preserve the independence and effectiveness of the law department as a whole. Part III uses the outline developed in the earlier parts to assess the conduct of certain DOJ lawyers during the Trump administration. The Article concludes by cautioning observers to pay attention to context in analyzing and criticizing government lawyer conduct. It revisits the premise that government lawyers play different roles and together all of them preserve the proper functioning of government by serving as neutral arbiters of disputes, expositors and evenhanded enforcers of law, as well as a real constraint on power when appropriate.

As the federal government and DOJ grew larger and more complex, the Attorney General's job developed as a hybrid political and legal position. Other positions such as the Solicitor General, the Office of Legal Counsel, and United States Attorneys took up the legal work, freeing the Attorney General to serve as a political advisor to the President. In this role, the Attorney General is a critical cabinet member responsible for devising and implementing administration goals. But he retains responsibility for protecting those DOJ lawyers charged with enforcing the law from political pressure. Thus, DOJ evolved to allow the Attorney General to serve as a political adviser helping the administration develop a legal strategy to implement and advance its policy goals while simultaneously ensuring that the law is developed and enforced in an evenhanded and fair way.

## I. HISTORICAL BACKGROUND

A. *The Early Government Lawyers: Before 1870*

The Department of Justice was not created until 1870.<sup>16</sup> Congress formed the position of the Attorney General when it passed the Judiciary Act of 1789.<sup>17</sup> This legislation provided for district courts in each state and three circuit courts.<sup>18</sup> These courts settled disputes between private parties, but they also heard cases in which the government had a stake.<sup>19</sup> Thus, the Act provided for

a meet person, learned in the law, to act as attorney-general for the United States . . . to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.<sup>20</sup>

The legislation also provided that there be appointed “in each district a meet person learned in the law to act as attorney for the United States . . . and all civil actions in which the United States shall be concerned.”<sup>21</sup> At the time, much prosecution was initiated by private parties,<sup>22</sup> and the Attorney General’s central purpose was interpreting, not enforcing, the law.<sup>23</sup> The job of law enforcement was decentralized, delegated to district attorneys over whom the Attorney General had little control.<sup>24</sup>

The original draft of the Judiciary Act explicitly gave courts the responsibility to appoint the government attorney who would appear before them. According to the discarded draft, the Supreme Court would have been responsible for appointing the Attorney General, and the district courts would have each appointed their own government attorneys.<sup>25</sup> This early draft could be seen as endorsing a view, extant at the time, that prosecutors were quasi-judicial officers. By changing this language, Congress implicitly gave the President the responsibility of appointing the Attorney General under the

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16. Act of June 22, 1870, ch. 150, 16 Stat. 162.

17. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

18. *Id.* §§ 3–4, 1 Stat. at 73–75.

19. *Id.* §§ 9–12, 1 Stat. at 76–80.

20. *Id.* § 35, 1 Stat. at 93.

21. *Id.* at 92.

22. See HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 15 (1937).

23. LUTHER A. HUSTON, THE DEPARTMENT OF JUSTICE 6 (1967).

24. Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 41 (2018) [hereinafter Green & Roiphe, *Can the President Control*].

25. *Id.*



Appointments Clause of the Constitution.<sup>26</sup> It is not clear that this was a well-theorized change, but it could be seen as ensuring that the Attorney General would be more responsive to administration needs. The Act was silent on the question of removal, and Congress did not assign the role to the President—as it had with the Secretaries of War and Treasury—though the President gradually assumed the responsibility.<sup>27</sup> Perhaps less concerned with the President’s ability to control the Attorney General, Congress likely assumed that the Attorney General would be a relatively weak position and take direction from both Congress and the President in representing the interests of the country as a whole.<sup>28</sup>

The Attorney General was not initially a cabinet position. To the contrary, it was a part-time and poorly paid job without an office or resources.<sup>29</sup> The diminished role likely reflected Congress’s concern about a strong federal judiciary and robust federal law enforcement powers. From early in his administration, however, President George Washington found that important matters involved so many legal questions that it was useful to have the chief law officer at cabinet meetings.<sup>30</sup> From 1792 on, the Attorney General was recognized as a cabinet post.<sup>31</sup>

Congress did not centralize federal legal power before the creation of DOJ in part because at least some feared the power of federal government relative to that of the states. Concerned about the threat of a distant federal government, any such centralization might jeopardize the relative power of the states as well as individual liberty.<sup>32</sup> In addition, as the early drafts of the Judiciary Act reflect, the Attorney General was seen by at least some as a quasi-judicial role.<sup>33</sup> Despite periodic efforts and calls by both Presidents and Attorneys General to consolidate the legal arm of government, Congress continued to disperse legal power throughout the federal government.<sup>34</sup> For instance, in 1820 it created the Comptroller of the Treasury, which was responsible for recovering debts owed to the government,<sup>35</sup> and ten years later it created the Solicitor of the Treasury,

26. U.S. CONST., art. II, § 2, cl. 2.

27. Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 579–80.

28. *See id.* at 580–81.

29. *See* NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789–1990*, at 55–56 (1992).

30. *See* HUSTON, *supra* note 23, at 51.

31. *See* BAKER, *supra* note 29, at 53.

32. HUSTON, *supra* note 23, at 7.

33. *See* BAKER, *supra* note 29, at 47.

34. *See, e.g.*, Green & Roiphe, *Can the President Control*, *supra* note 24, at 47; Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 133 (2014).

35. Act of May 15, 1820, ch. 107, § 1, 3 Stat. 592, 592.

which exercised control over the local United States Attorneys.<sup>36</sup> Over the next decades, with an expanding role for federal agencies, Congress created legal positions within agencies that were authorized to represent the United States in court, which increasingly scattered authority across the federal government.<sup>37</sup>

Through the first few decades of the nineteenth century, Attorneys General spent most of their time providing Congress opinions on the constitutionality of laws and reporting on the nature of the judiciary.<sup>38</sup> In 1792, the Attorney General assumed the role of representing the United States' interests in the Supreme Court. Attorney General William Randolph appeared before the Supreme Court to argue for the constitutionality of a statute which required lower courts to certify veterans' applications for pensions.<sup>39</sup> In making his argument, Randolph argued that it was part of his role to "superintend the decisions of the inferior courts, and if to him they appeared improper, to move the supreme court for a revision."<sup>40</sup> In other words, the Attorney General served the administration by making sure the laws were faithfully executed.

The role of Attorney General grew in importance. In 1817, when William Wirt took the position, he rationalized the activities of the office and sought to ensure that opinions were written down so that they would remain consistent and develop rationally over time.<sup>41</sup> He also limited the legal advice to those named in the Judiciary Act—the President and department heads.<sup>42</sup> He ultimately refused to give legal opinions to private parties and to Congress.<sup>43</sup> Opinions grew to have the force of law until withdrawn by a successor or overruled by courts.<sup>44</sup> Wirt conceived his role as nonpartisan and judicial:

I do not consider myself an advocate of the government, . . . but as a judge, called to decide a question of law with the impartiality and integrity which characterizes the judician. I should consider myself as dishonoring the high-minded government, whose officer I am, in permitting my judgment to be warped in deciding any question officially by the one sided artifice of the professional advocate.<sup>45</sup>

He considered himself an adviser to the executive branch, but also bound to a neutral reading of the law.

36. Act of May 29, 1830, ch. 153, §§ 1, 5, 4 Stat. 414, 414–15.

37. See CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 23–24 (1992).

38. See CUMMINGS & MCFARLAND, *supra* note 22, at 24–26.

39. See *id.* at 27.

40. *Id.*

41. See *id.* at 79–80; HUSTON, *supra* note 23, at 19–21.

42. See BAKER, *supra* note 29, at 15–16.

43. See *id.*; CUMMINGS & MCFARLAND, *supra* note 22, at 86.

44. HUSTON, *supra* note 23, at 34.

45. CUMMINGS & MCFARLAND, *supra* note 22, at 90.

In 1854, Caleb Cushing, the Attorney General to President Franklin Pierce, wrote an opinion describing the role of the Attorney General.<sup>46</sup> He explained that the Attorney General was a quasi-judicial position and when asked to give an opinion on the meaning of the law, the response had to be neutral.<sup>47</sup> Reflecting on the Attorney General's opinion-writing function, Cushing explained:

It frequently happens that questions of great importance, submitted to [the Attorney General] for determination, are elaborately argued by counsel; and whether it be so or not, he feels, in the performance of this part of his duty, that he is not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation.<sup>48</sup>

Cushing supported this position by arguing that, for administrative conduct, the Attorney General's opinion is final and relieves public officers of responsibility if they act in accord with his decisions.<sup>49</sup> Legal opinions also affect the rights of private individuals who come before administrative agencies who have no other way to ascertain or challenge the meaning of the rule, law, or practice.<sup>50</sup> But Cushing also called for greater centralization to promote efficiency and uniformity.<sup>51</sup>

#### B. *The Creation of DOJ and Its Development*

Recognizing the increasing need for efficiency and uniformity in federal law, the Joint Committee on Retrenchment and Reform introduced an "Act To Establish the Department of Justice,"<sup>52</sup> which was ultimately passed in 1870.<sup>53</sup> The Act created the role of Solicitor General and two Assistant Attorneys General to whom the Attorney General could delegate.<sup>54</sup> The statute also centralized the legal work of the federal government in one department. It removed lawyers from different agencies and executive branches and relocated them within the DOJ.<sup>55</sup> The point was not to deprive agencies of legal assistance to effectuate their mission but rather to create order and consistency by placing them under the control of the Attorney General.<sup>56</sup>

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46. Office & Duties of Attorney Gen., 6 Op. Att'y Gen. 326, 326 (1854).

47. *Id.* at 333–34.

48. *Id.* at 334.

49. *Id.*

50. *Id.*

51. *See id.*

52. HUSTON, *supra* note 23, at 35–36.

53. Act of June 22, 1870, ch. 150, 16 Stat. 162.

54. *Id.* § 2, 16 Stat. at 162.

55. *Id.* § 3, 16 Stat. at 162.

56. *See* Green & Roiphe, *Can the President Control*, *supra* note 24, at 49.

In addition to addressing waste and inconsistency in federal law enforcement, there was significant concern that political appointees within different agencies would corrupt their lawyers and undermine their independence: Representative Thomas Jenckes, who introduced the bill that created the DOJ, explained that counsel for particular agencies might be

subject to the control of the heads of the Departments, in some instances give advice which seems to have been instigated by the heads of the Department, or at least advice which seems designed to strengthen the resolution to which the head of the Department may have come in a particular instance.<sup>57</sup>

Despite the commitment to consolidating legal work in the DOJ, Congress did not repeal prior laws creating department lawyers, so there remained significant competition for legal work among different federal government lawyers.<sup>58</sup> As the administrative state grew more complex in the early twentieth century, there were an increasing number of lawyers within different agencies.<sup>59</sup> Presidents continuously sought to harmonize and rationalize all legal work within DOJ.<sup>60</sup>

As the legal work of the federal government grew more extensive and complex, some of the Attorney General's functions were delegated to others both within and outside of DOJ. While the role of Solicitor General was created in 1870, other offices emerged over time, each with its own mandate. In part, the delegation of duties was a practical response to the volume of legal work, but it was also a way to manage the complex legal and political position of the Attorney General. Thus, roles developed not only with different obligations but also with different traditions, customs, and practices, ensuring different levels of independence from the Attorney General himself and the political branches.

For instance, the Assistant Attorney General for the Criminal Division was created in 1919 as the federal criminal laws expanded.<sup>61</sup> His unit was assigned all cases arising out of federal criminal law, and he was responsible for supervising all Assistant United States Attorneys.<sup>62</sup> The Civil Division was formed in 1933, consolidating a number of other units under the auspices of one

57. CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870).

58. See BAKER, *supra* note 29, at 63.

59. See MEADOR, *supra* note 6, at 11.

60. During World War I, President Woodrow Wilson issued an executive order consolidating legal work under DOJ. BAKER, *supra* note 29, at 63. President Franklin Delano Roosevelt issued a similar order. Exec. Order No. 6166, *reprinted as amended in* 5 U.S.C. § 901 (2018). President Dwight D. Eisenhower's Hoover Commission concluded that the lack of centralization harmed efficiency and that centralization would minimize political influence over legal work. JAMES MICHAEL STRINE, *THE OFFICE OF LEGAL COUNSEL: LEGAL PROFESSIONALS IN A POLITICAL SYSTEM* 71 (1992).

61. See *History*, U.S. DEP'T JUST. (July 25, 2019), <https://www.justice.gov/criminal/history> [https://perma.cc/9TZS-LLK4].

62. See 1919 ATT'Y GEN. ANN. REP. 75.

Assistant Attorney General.<sup>63</sup> The Criminal Division continued to grow, and three subdivisions were created in 1936: the administrative, trial, and appellate sections.<sup>64</sup> In 1957, after the Civil Rights Act was passed,<sup>65</sup> the civil rights work was moved out of the Criminal Division into the newly created Civil Rights Division.<sup>66</sup>

As a matter of practice, lawyers scattered throughout government agencies wrote opinions on the meaning of the law until 1870, when opinion writing, like other legal work, was consolidated in DOJ.<sup>67</sup> In 1933, Congress created the Office of the Assistant to the Solicitor General, a position that would be appointed by the President and confirmed by the Senate.<sup>68</sup> Later that year, President Franklin Delano Roosevelt issued an executive order requiring that all proposed executive orders and proclamations be submitted to the Attorney General for approval.<sup>69</sup> This role of legal opinion writing was moved out from under the Solicitor General's control and then renamed the Office of Legal Counsel twenty years later.<sup>70</sup>

In 1939, six years after the President created the predecessor to the Office of Legal Counsel, Congress passed a reorganization plan which authorized the President to establish the Office of White House Counsel by executive order.<sup>71</sup> While this Article does not analyze the role of White House Counsel—the lawyer to the presidency—since it is not within DOJ, it is significant in discussing the internal structure of DOJ to note that a separate attorney for the presidency could theoretically free the Attorney General to focus on his role as counsel for the United States by ridding him of his direct obligations to the President. In other words, the creation of the White House Counsel would give the President a source of personal legal advice such that he would no longer

63. See *Organization, Mission and Functions Manual: Civil Division*, U.S. DEP'T JUST. (Sept. 9, 2014), <https://www.justice.gov/jmd/organization-mission-and-functions-manual-civil-division> [<https://perma.cc/GX9W-8EFK>]; see also 1933 ATT'Y GEN. ANN. REP. 83–89.

64. *History*, *supra* note 61; see also *Department of Justice Appropriation Bill for 1938: Hearings on H.R. 5779 Before the Subcomm. of the H. Comm. on Appropriations*, 75th Cong. 25 (1937) (statement of Brien McMahon, Assistant Att'y Gen. of the United States).

65. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 26, 42, and 52 U.S.C.).

66. *History*, *supra* note 61.

67. See Act of June 22, 1870, ch. 150, §§ 3, 14, 16 Stat. 162, 162, 164.

68. Fourth Deficiency Act, Fiscal Year 1933, Pub. L. No. 73-78, § 16, 48 Stat. 283, 307–08.

69. See Exec. Order No. 6247 (Aug. 10, 1933), *superseded* by Exec. Order No. 7298, 1 Fed. Reg. 2284 (Feb. 18, 1936).

70. See HUSTON, *supra* note 23, at 61.

71. Reorganization Act of 1939, Pub. L. No. 76-19, § 4, 53 Stat. 561, 562. On April 25, 1939, President Roosevelt submitted Reorganization Plan No. 1, which created the Executive Office. See S.J. Res. 138, 76th Cong., 53 Stat. 813, 813 (1939); Reorganization Plan No. 1, 4 Fed. Reg. 2727, 2727–28 (July 1, 1939). The first White House Counsel was appointed by President Roosevelt in 1943. See Nina Totenberg, 'The Quiet Man': The Powerful Conservative White House Lawyer in the Middle of It All, NPR (June 6, 2017), <https://www.npr.org/2017/06/06/531337749/the-quiet-man-the-powerful-conservative-white-house-lawyer-in-the-middle-of-it-a> [<https://perma.cc/8BBE-CRXS>].

need to rely solely on the Attorney General. In theory, this could reduce the conflicts inherent in serving the President's interests and that of the country as a whole. In 1953, DOJ began codifying its internal policy and procedures for attorneys, to promote consistent enforcement of federal law in accordance with accepted principles.<sup>72</sup>

The Watergate scandal caused Congress to revisit the roles of the Attorney General and the Department of Justice. Moved by the sense that Attorneys General John Mitchell and Richard Kleindienst had succumbed to political pressure from the President, Representative Sam Ervin proposed a bill that would have made DOJ into an independent agency.<sup>73</sup> But others resisted this measure, in part because they viewed the significance of events differently.<sup>74</sup> In what has become known as the Saturday Night Massacre, President Nixon ordered two successive Attorneys General to fire Archibald Cox, the special prosecutor who was investigating him and his administration.<sup>75</sup> When they refused, he fired them. Finally, after being appointed in their stead, Attorney General Robert Bork agreed to get rid of Cox, but Bork ultimately appointed a new special counsel who continued the investigation into Nixon and the Watergate break-in.<sup>76</sup> Many, like Ervin, viewed this as an unprecedented and unacceptable assault on the independence of the DOJ. After extensive hearings involving expert testimony, other congressmen concluded that the Saturday Night Massacre proved the resilience of the DOJ and the integrity of its lawyers. They concluded that there was no need to create an independent agency, because, under significant strain, DOJ held up well, and the cost to political accountability would be too great if the country were to operate with an entirely independent law enforcement agency.<sup>77</sup>

Unsurprisingly, the Attorneys General who followed on the heels of the Watergate scandal tended to be more independent and less clearly political or partisan. But independence came at a cost. They risked losing their seat at the table and were often excluded from important policy decisions. While their independent legal voice was certainly their strength, it was also a liability that left them at times isolated from important policy decisions and debate.<sup>78</sup> President Gerald Ford, for instance, nominated Edward Levi, an academic who

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72. See Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 398 (2009).

73. See Green & Roiphe, *Can the President Control*, *supra* note 24, at 62–64.

74. See *id.* at 64–66.

75. See Ron Elving, *A Brief History of Nixon's 'Saturday Night Massacre'*, NPR (Oct. 21, 2018), <https://www.npr.org/2018/10/21/659279158/a-brief-history-of-nixons-saturday-night-massacre> [<https://perma.cc/64XR-FFBT>].

76. See *id.*

77. See Green & Roiphe, *Can the President Control*, *supra* note 24, at 64–68.

78. Cf. BAKER, *supra* note 29, at 145–46.

had a reputation as a scholar and independent legal mind.<sup>79</sup> But, on important matters, Ford often relied on Philip Buchen, his White House Counsel, instead.<sup>80</sup> President Jimmy Carter's Attorney General, Griffin Bell, similarly promoted his independence from political and partisan influence. Bell explained that the Department of Justice is "the people's law department."<sup>81</sup> But when asked to clarify, he stated: "It is according to what you think about representative government. I think of the Congress and the President as representing the people."<sup>82</sup> He went on to explain that if the President is no longer acting as a faithful fiduciary of the people, Bell would represent the people in a more direct way.<sup>83</sup>

In keeping with his emphasis on independence, Bell sought to implement new policies and structures to minimize political influence on the DOJ. For one, DOJ placed restrictions on communications between the administration and law enforcement officers or federal prosecutors, providing that all such communications should go through the Attorney General or his deputies, essentially tasking them with screening out improper partisan motivation.<sup>84</sup> These restrictions, first drafted by Attorney General Bell, are still in place.<sup>85</sup> In addition to the communication procedures, Congress created both an Inspector General and the Office of Professional Responsibility within DOJ to address potential abuses and reinforce professional norms.<sup>86</sup> These changes reflect a new emphasis on the Attorney General as a filter, who enables proper policy

79. In his confirmation hearing, Levi asserted that DOJ law enforcement decisions would be independent from politics while repudiating the idea of a completely independent law department. *Nomination of Edward H. Levi To Be Attorney General: Hearings Before the S. Comm. on the Judiciary*, 94th Cong. 6 (1975) (statement Edward H. Levi) ("I do not believe that the administration of justice should be a partisan matter in the sense that I do not think, and I assume we all agree, that cases should be brought to reward people or to punish them for partisan reasons. . . . If it is meant that the Department of Justice is to be a separate institution unrelated to the governmental processes which govern the United States, and the relationships between the Executive and the Congress, and this committee, then I do not think it is possible to remove the Department from that kind of relationship, nor would I think in our system of government that it would be desirable."). Griffin Bell made similar assertions at his confirmation hearing. See *The Prospective Nomination of Griffin B. Bell To Be Attorney General: Hearings Before the S. Comm. on the Judiciary*, 95th Cong. 33 (1977) (statement of Griffin B. Bell) [hereinafter *Bell Confirmation Hearing*].

80. See BAKER, *supra* note 29, at 146.

81. *Bell Confirmation Hearing*, *supra* note 79, at 10.

82. *Id.*

83. See *id.* at 11.

84. See Attorney Gen. Griffin B. Bell, Address Before Department of Justice Lawyers 7 (Sept. 6, 1978) [hereinafter Bell, Address Before DOJ Lawyers], <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf> [<https://perma.cc/4G5U-WYRC>].

85. See Memorandum from Donald F. McGahn II, Counsel to the President, to All White House Staff (Jan. 27, 2017), <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000> [<https://perma.cc/CAR8-QX97>].

86. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-156, PROFESSIONAL MISCONDUCT: DOJ COULD STRENGTHEN PROCEDURES FOR DISCIPLINING ITS ATTORNEYS 2, 11 (2014).

priorities to reach United States Attorneys but ensures that their judgment will not be distorted by improper partisan or personal concerns of elected officials.

Over time, the shock of Watergate wore off and subsequent Attorneys General approached their jobs differently, many assuming a more direct role in the cabinet as policy advisers. The DOJ, as a whole, has similarly been accused of playing too politicized a role.<sup>87</sup> What has been consistent, though, is a sense of the need to embody both responsiveness and independence, even if the proper balance has been controversial and elusive.

## II. A TYPOLOGY OF GOVERNMENT LAWYERS

Over time, as Part I illustrates, the Attorney General's job was divided, delegated to different individuals and offices. Each office was assigned a different task. This part offers a fuller description of the contemporary work of each office and argues for distinct ethical obligations based on their respective roles. It describes and analyzes the Attorney General, the Assistant Attorney General for the Civil Division, the Office of Legal Counsel, the Solicitor General, and the Assistant Attorney General for the Criminal Division. Of course, there is overlap in responsibilities of the offices, as this part makes clear, but the object is to derive basic ethical obligations of government lawyers from the work they do in light of the goals of the Constitution. It concludes that there is a continuum, a spectrum in these roles: the Attorney General is the most responsive to the White House and federal prosecutors are the most insulated from political influence. The Attorney General's job is, in critical part, to maintain the proper balance between independence and political responsiveness within DOJ, by screening out improper partisan influence while communicating and implementing the administration's agenda where appropriate.

### A. *The Attorney General*

Government lawyers, academics, and historians have been debating the proper role of the Attorney General in American democracy since its inception.<sup>88</sup> The Attorney General has obligations to the administration and the President but retains responsibilities to the law itself. These obligations are often in tension. This section concludes that the Attorney General is both a political and a legal post. The Attorney General's client is the public, but he is, for the most part, obligated to defer to the President or other duly chosen

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87. See, e.g., Tucker Higgins, *Jeff Sessions Fires Back at Trump: DOJ Won't 'Be Improperly Influenced' by Politics*, CNBC (Aug. 23, 2018), <https://www.cnn.com/2018/08/23/jeff-sessions-pushes-back-against-trump-actions-of-doj-will-not-be-improperly-influenced-by-political-considerations.html> [<https://perma.cc/M9MB-Y9UD>].

88. See BAKER, *supra* note 29, at 2; Bloch, *supra* note 27, at 562.



officials, as representatives of the public.<sup>89</sup> At other times, his obligation to help the administration execute the laws faithfully requires great independence. This section will survey the Attorney General's job broadly and then argue that one way he fulfills this complex role is to serve as a filter allowing proper policy priorities to penetrate the DOJ while screening out improper political or partisan concerns from legal analysis and law enforcement decisions, where they ought to play no part.

### 1. The Role of the Attorney General

The Attorney General has formal responsibility for most of the activities of DOJ, but as discussed above, much of the work has been delegated; and while the Attorney General retains supervisory control, the degree of control remains uncertain.<sup>90</sup> It is clear, however, that the Attorney General helps define policy priorities for DOJ, participates in formulating proposed legislation relating to the justice system, submits budgetary requests, and assists in selecting and screening judicial nominees.<sup>91</sup> The Attorney General is also a member of the cabinet, advising on policy matters that do not directly relate to the administration of justice.<sup>92</sup> In short, the Attorney General is prosecutor, litigator, legal advisor, political advisor, and administrator. But as a matter of practice, the Attorney General is not involved in the direct supervision of much of this work.

Part of the difficulty in defining the role is that the Attorney General has multiple responsibilities, each requiring a different sort of relationship with other officials within the executive branch. The Attorney General is the chief

89. In this respect the Attorney General is like a lawyer for a corporation. His client is the abstract entity, not any individual within that entity. See MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 2019) (explaining the role of corporate lawyers). But as long as the duly authorized representatives are serving a fiduciary role, the Attorney General can defer to their priorities and decisions. The President has the obligation to take care that the laws are faithfully executed, and other administration officials swear to uphold the Constitution. Insofar as any individual betrays his or her obligation, the Attorney General ceases to have such a duty to abide by their decisions. Cf. *id.* r. 1.13(b).

90. See 28 C.F.R. § 0.5(a) (2019); see also 28 U.S.C. § 509 (2018) (noting that with some exceptions all functions of officers of DOJ are vested in the Attorney General); *id.* § 519 (noting that the Attorney General supervises litigation in which the United States is a party and directs United States Attorneys and Assistant United States Attorneys); *id.* § 541 (giving the President power to appoint and remove United States Attorneys); *id.* § 542 (giving the Attorney General the power to appoint and remove Assistant United States Attorneys). For a discussion of the practical independence of United States Attorneys from the Attorney General, despite these provisions, see Ross E. Weiner, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 380–85 (2001).

91. See *Organization, Mission & Functions Manual: Attorney General, Deputy and Associate*, U.S. DEPT JUST. (Sept. 9, 2014), <https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general> [<https://perma.cc/L6K3-J2TU>].

92. See BAKER, *supra* note 29, at 19; see also *The Cabinet*, WHITE HOUSE, <https://www.whitehouse.gov/the-trump-administration/the-cabinet/> [<https://perma.cc/ZN8W-D938>] (listing cabinet members and including Attorney General William Barr).

law enforcer of the United States.<sup>93</sup> In that role, he supervises federal prosecutions.<sup>94</sup> Given his formal control over United States Attorneys in the Criminal Division, the Attorney General possesses the ultimate discretion in prosecution, a vast power.<sup>95</sup> In this role, the Attorney General does not have a typical client but instead represents the United States' interests in court.<sup>96</sup> As a practical matter, the work of criminal prosecution is done by United States Attorneys and their subordinates. The Attorney General also oversees lawyers for agencies in civil cases in which the United States is a party, as well as other civil cases like habeas and civil rights actions.<sup>97</sup>

The Attorney General also appears as amicus in cases in which the country has an interest.<sup>98</sup> A central part of his job is supervising the work of lawyers who give opinions to the administration or other departments on the legality of their actions.<sup>99</sup>

The Attorney General, however, also is a cabinet member and head of a large and important executive branch department.<sup>100</sup> He is appointed by the President, with the advice and approval of the Senate, serves at the President's pleasure, and is removable by the President for any reason.<sup>101</sup> The relationship between the President and the Attorney General is the subject of debate. Proponents of the "unitary executive" theory suggest that the President, as chief law enforcement officer, has full control over the Attorney General and the DOJ, while others argue that the President's control is limited to the powers to hire and fire the Attorney General and other officials within DOJ and to issue pardons.<sup>102</sup>

93. See BAKER, *supra* note 29, at 2.

94. See *Organization, Mission & Functions Manual: Attorney General, Deputy and Associate*, *supra* note 91.

95. The literature on the broad scope of prosecutorial discretion is vast. See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007) (discussing the scope of the American prosecutor's power and the potential for abuse). In reality, the Attorney General delegates a great deal to United States Attorneys, who enjoy a substantial degree of independence. See Beale, *supra* note 72, at 370–72 (arguing for even greater insulation for United States Attorneys from centralized control to preserve prosecutorial neutrality).

96. See 28 U.S.C. §§ 516–18 (2018).

97. See *Organization, Mission & Functions Manual: Attorney General, Deputy and Associate*, *supra* note 91.

98. See Samuel Krislov, *The Role of the Attorney General as Amicus Curiae*, in HUSTON ET AL., *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 71, 76–91 (1968).

99. See *Organization, Mission & Functions Manual: Attorney General, Deputy and Associate*, *supra* note 91.

100. See 28 U.S.C. § 503 (2018) (designating the Attorney General "the head of the Department of Justice").

101. See *id.*; *Myers v. United States*, 272 U.S. 52, 122 (1926) (holding that the President has the sole authority and does not need congressional approval to remove executive branch officials).

102. Compare STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4* (2008) (arguing that the President has full control over the executive branch and can assume or dictate the functions of any institution or officer

## 2. The Ethical Responsibility of the Attorney General

The Attorney General must help the President fulfill his constitutional obligation to “take Care that the Laws be faithfully executed.”<sup>103</sup> To do so, the Attorney General draws on his expertise to help ensure that the people’s will, or the policies of a particular administration, are duly reflected in legal action and opinion, while simultaneously screening out improper partisan or political motivations so they do not affect law enforcement decisions in individual cases or distort legal opinion. As the head of the DOJ, the Attorney General should seek to preserve the legitimacy of the organization so that it can function properly. If the public lacks faith that the law is being applied in a fair and evenhanded way, then the Attorney General has failed in that endeavor.<sup>104</sup>

Different Attorneys General have approached the job differently. Some have been more deeply involved in politics or more intimately connected to the President.<sup>105</sup> Others viewed the office as a nonpartisan professional position. Some Attorneys General have assumed their primary role was political advisor to the President. As discussed above, after Watergate, Attorney General Griffin Bell rejected the political nature of the role, insisting that a close or personal connection to political actors was inappropriate because it would undermine the legitimacy of the DOJ.<sup>106</sup> But as Harold Tyler, former judge and Assistant Attorney General of the United States explained, the Attorney General must be accountable to the President so that the broad policy implications of his office’s work—like civil rights, antitrust, immigration, and criminal enforcement priorities—are responsive to an elected official’s mandate.<sup>107</sup> One historian concluded that the difficult questions concerning the nature of the Attorney General’s responsibilities have plagued the country since its inception.<sup>108</sup>

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within it), *with* Green & Roiphe, *Can the President Control*, *supra* note 24, at 4–5 (arguing that our constitutional and statutory scheme allows the President only to hire and fire the Attorney General, not to control individual prosecutorial decisions).

103. U.S. CONST. art. II, § 3.

104. *Cf.* MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 382 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1964) (“[T]he basis of every system of authority, and correspondingly of every kind of willingness to obey, is a *belief*, a belief by virtue of which persons exercising authority are lent prestige.”).

105. Luther A. Huston, *History of the Office of the Attorney General*, in HUSTON ET AL., *supra* note 98, at 1, 33. For a list of the Attorneys General and an assessment of their partisan or independent nature, see Jed Handelsman Shugerman, *Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as a Case for Structural Independence*, 87 *FORDHAM L. REV.* 1965, 1967–71 (2019).

106. Attorney Gen. Griffin B. Bell, Address Before the Los Angeles County Bar Association 9 (Dec. 7, 1978) [hereinafter Bell, Address Before the L.A. County Bar], <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/12-07-1978b.pdf> [<https://perma.cc/P2YY-4H7G>].

107. Harold R. Tyler, Jr., *The Attorney General of the United States—Counsel to the President or to the Government?*, 45 *ALB. L. REV.* 1, 7 (1980).

108. *See* Bloch, *supra* note 27, at 562.

Part of the difficulty in determining the role of the Attorney General is identifying his client. Many Attorneys General suggest that they represent the United States, the public writ large. At least one has argued that his client is the President. President Carter's Attorney General, Stuart Eizenstat, explained, "The attorney general's client is the president. After giving his advice, the attorney general must support the president's policies. The department should not act as an impartial court but should advocate the legality of the president's decision within the bounds of responsible and honest argument."<sup>109</sup> The variety of views about the role and the nature of the client may be due to the lack of context in many of these broad statements. In other words, the nature of the client and the role itself depend on the particular function the Attorney General exercises. Eizenstat, here, was focused on the Attorney General's role in civil suits, and in this capacity, as I argue below, it is appropriate for the Attorney General, for the most part, to defer to the administration—the agency head or, where appropriate, the President. In order to make appropriate distinctions regarding role, which depend on the function the Attorney General is exercising, it is most useful to define the client as the United States, acting through its duly authorized representative, the President. At times, the President's interest may conflict with the client's interest, and the Attorney General may be required to substitute his own view about the nature of the client's interest for the President's view. In exercising discretion in criminal prosecutions, for instance, the President's political interests are categorically at odds with the obligation to apply the laws in a fair manner, and so the Attorney General ought not defer to the President's wishes. At others, however, especially when policy priorities are critical, the Attorney General ought to defer to the President to define the United States' interest.<sup>110</sup>

President Franklin Delano Roosevelt may have respected the independence of his Attorney General, Robert Jackson, who later served on the Supreme Court, but he was willing to compromise that boundary for political reasons. In 1941, Congress passed the Lend-Lease Act,<sup>111</sup> which allowed the United States to lend war supplies to Britain and other Allied nations.<sup>112</sup> The Act had a provision allowing it to sunset when the two Houses determined it

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109. Stuart E. Eizenstat, *White House and Justice Department After Watergate*, 68 A.B.A. J. 175, 176 (1982). Eizenstat was, however, aware that different units within DOJ ought to be more independent from the political branches, cautioning, "The White House should play no role in the exercise of the attorney general's prosecutorial discretion or conduct of individual cases—whether the target is an obscure bank robber or a significant political figure." *Id.* at 175.

110. Cf. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2019) (noting that the client defines the objectives of representation but the lawyer has discretion to determine the strategy with which to implement those goals); *id.* r. 1.13 (discussing the obligations of lawyers who represent abstract entities).

111. Act to Promote the Defense of the United States, Pub. L. No. 77-11, 55 Stat. 31 (1941).

112. *Id.* § 3(a)–(b), 55 Stat. at 31–32.

was no longer necessary to protect the United States.<sup>113</sup> Roosevelt concluded that this provision unconstitutionally interfered with the process for enacting or repealing legislation. He issued a rare, and possibly even unprecedented, unpublished legal opinion to Jackson explaining that he planned to sign the Act because it was necessary in an emergency situation but simultaneously registering his opinion that the Act itself was unconstitutional.<sup>114</sup> In the same memo, he directed Jackson to reveal his memo concerning the unconstitutionality of the Act at some later date, after it had been implemented.<sup>115</sup> Roosevelt made this request because he worried that the sunset clause would serve as precedent for further unconstitutional diminution of presidential power.<sup>116</sup> He signed the law nonetheless because the sunset provision was required in order to get the vote of some of his political opponents.<sup>117</sup> Thus, the only way to get the bill, which he considered urgent, passed was to agree to what he saw as an unconstitutional requirement.<sup>118</sup> Jackson, who had issued his own opinion approving of the dictum, subsequently explained that he disagreed with Roosevelt's constitutional analysis but took the opinion, filed it, and released it as the President requested just over a decade later.<sup>119</sup> When Jackson explained how unorthodox it was for the President to issue a legal opinion to the Attorney General, FDR, preoccupied by more pressing concerns, shrugged off the challenge.<sup>120</sup>

And of course, when he wished to push the court-packing plan through in 1937, Roosevelt once again turned to the Attorney General to help him do it. Attorney General Homer Cummings developed the plan and met secretly with the President in planning how to implement it.<sup>121</sup>

Roosevelt's relationship with his Attorneys General illustrates the complexity of the Attorney General's role. He is a legal advisor and a cabinet member whose job is to help effectuate administration policy. He is also critical in ensuring that the President fulfills his constitutional obligation to "take Care that the Laws be faithfully executed."<sup>122</sup> He seeks to help the President find a lawful way to implement policy objectives, but he is also a lawyer, trained to

113. *Id.* § 3(c), 55 Stat. at 32.

114. Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1354 (1953).

115. *Id.* at 1359.

116. *See id.* at 1355.

117. *See id.* at 1356–57.

118. *Id.* at 1356.

119. *See id.* at 1355, 1360.

120. *See id.* at 1360.

121. *See* William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 392.

122. U.S. CONST. art. II, § 3; *see also* *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (holding that Attorneys General have broad prosecutorial discretion "because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'").

analyze the law objectively. Attorneys General will, invariably, find themselves in similar situations to Jackson since they are cabinet members who have a policy as well as a legal role. Walling the Attorney General off from the President completely would do the nation a disservice. It would make it such that the President could distance himself from legal conclusions, criticize them, and possibly even ignore them. This, in turn, would leave no elected official fully responsible for often-momentous decisions.<sup>123</sup> But if the Attorney General is to work so closely with the President who appointed him, we can't fully expect a neutral performance of the job.

Given this complexity and the importance of maintaining the proper balance between responsiveness and independence, a central part of the Attorney General's job is to determine when political considerations are appropriate in DOJ work and when to screen them out.<sup>124</sup> As President Trump's Attorney General Bill Barr said at his confirmation hearing, "I'm in a position in life where I can provide the leadership necessary to protect the independence and reputation of the department."<sup>125</sup> The Attorney General is the focus of political pressure from within the executive branch, Congress, and the public, tasked with absorbing that pressure without allowing it to inappropriately affect the work of his office.<sup>126</sup> Barr claimed that his lack of further political aspiration as well as his investment in professional reputation and legacy would ensure that he would live up to this expectation.

While consulting the President on policy and political concerns appropriately aids in setting policy objectives and priorities, the administration's political agenda should not affect the work of lawyers within DOJ in individual enforcement cases nor should it dictate legal interpretations. While supervising the office in its nonpartisan enforcement efforts, for instance, such considerations ought to have no role. As a 1977 memorandum from the Attorney General put it: "His is the difficult task of separating the different factors that might properly be considered in his role as policy adviser from those relevant to his duties as the chief legal officer of the Government."<sup>127</sup>

123. President Trump at times distances himself from DOJ decisions despite his power to hire and fire the Attorney General for any reason. *See, e.g.,* Catherine Lucey, *Trump Blames 'Jeff Sessions Justice Department' for Hurting GOP in Midterms*, USA TODAY (Sept. 3, 2018), <https://www.usatoday.com/story/news/2018/09/03/twitter-trump-attacks-sessions-suggests-doj-hurt-gop-midterms/1187203002/> [<https://perma.cc/HU2W-26Q2>]. This troubling development, which potentially allows him to avoid political accountability, would be worse if DOJ were an independent agency.

124. *See* Role of the Solicitor Gen., 1 Op. O.L.C. 228, 232 (1977).

125. Matt Zapotosky et al., *Barr Fields Questions on Mueller Probe, Independence from Trump at Attorney General Confirmation Hearing*, WASH. POST (Jan. 15, 2019), [https://www.washingtonpost.com/world/national-security/barr-confirmation-hearing-trumps-attorney-general-nominee-likely-to-face-tough-questioning-today-from-senate-panel/2019/01/15/02467a16-15e0-11e9-803c-4ef28312c8b9\\_story.html](https://www.washingtonpost.com/world/national-security/barr-confirmation-hearing-trumps-attorney-general-nominee-likely-to-face-tough-questioning-today-from-senate-panel/2019/01/15/02467a16-15e0-11e9-803c-4ef28312c8b9_story.html) [<https://perma.cc/8ZQ2-49MH> (dark archive)].

126. *See* Role of the Solicitor Gen., 1 Op. O.L.C. at 232–33.

127. *Id.* at 232.

Thus, a central part of the Attorney General's job is to communicate the important policy considerations of the administration to his office and simultaneously shield the DOJ lawyers whose job it is to administer the law impartially from partisan influence.

A critical question is: Who is the Attorney General's client? The Supreme Court in *United States v. Providence Journal Co.*<sup>128</sup> rejected the view that the Attorney General represents the executive branch, explaining, "This suggested interpretation of § 518(a) . . . presumes that there is more than one 'United States' that may appear before this Court, and that the United States is something other than 'the sovereign composed of the three branches . . .'"<sup>129</sup> The Court justified its conclusion:

Among the reasons for reserving litigation in this Court to the Attorney General and the Solicitor General, is the concern that the United States usually should speak with one voice before this Court, and with a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people.<sup>130</sup>

This passage urges the Attorney General or DOJ itself to develop this voice. If it is not the voice of the Executive, speaking through the President, then it seems something closer to the abstract public interest that prosecutors generally serve. It is possibly more accurate to suggest that the Attorney General has different clients depending on which hat he wears. As the Supreme Court held, in representing the United States' interests before the Supreme Court, the client is the government as a whole.<sup>131</sup> As a supervisor to federal prosecutors, the client is clearly also the United States, the public in a broad sense. But in other contexts, like civil litigators serving agency interests, the client is more narrowly defined, as discussed below. It is this complexity that characterizes the Attorney General's job and defines his responsibility. The Attorney General must facilitate appropriate administration priorities reaching all levels of DOJ, while carefully screening partisan or political considerations from individual law enforcement decisions and the orderly development of the law through legal opinions and the representation of the United States' interest in the Supreme Court.

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128. 485 U.S. 693 (1988).

129. *Id.* at 701 (quoting *United States v. Nixon*, 418 U.S. 683, 696 (1974)).

130. *Id.* at 706; *see also* 28 U.S.C. § 518(a) (2018). The contemporary statute was based on and is virtually identical to section 35 of the Judiciary Act. *Compare* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92, *with* 28 U.S.C. § 518(a).

131. *Providence Journal Co.*, 485 U.S. at 701.

### B. *Civil Division Attorneys*

The next level in the continuum from the politically responsive DOJ role to the fully independent government lawyer is civil litigation because the lawyer's role in this context is, in large part, to effectuate agency agendas. While scholars disagree on this point,<sup>132</sup> this section argues that DOJ Civil Division, with a few notable exceptions, is involved in a different sort of government legal work in which independence would compromise rather than advance the overall identity of the DOJ as part of the administration with independent obligations to be fair and evenhanded in its interpretation and enforcement of the law. As stated above, the decision to centralize the legal work in the DOJ was not motivated by a desire to strip agency heads of representation but rather to ensure uniformity and eliminate improper political pressure.<sup>133</sup> Construing civil division attorneys in most cases as advocates for agency heads with the same duty of independence as private civil litigators ensures this end.

#### 1. The Role of Civil Division Attorneys

When the Justice Department was formed in 1870, Congress clarified the role of DOJ lawyers, mandating that they have exclusive power to bring or defend lawsuits on behalf of the government.<sup>134</sup> The goal of the statute was, in large part, to reduce expenses by eliminating outside private counsel and to rationalize and professionalize the legal work of government agencies.<sup>135</sup>

Through a series of regulations, the Attorney General has delegated responsibility for civil cases to the Assistant Attorney General for the Civil Division.<sup>136</sup> The United States Attorneys in the Civil Division field offices conduct most of the litigation on behalf of the government.<sup>137</sup> The DOJ also has

132. Compare Green, *Must Government Lawyers*, *supra* note 8, at 267–68 (arguing that federal civil litigators owe an obligation to the public interest), with Miller, *supra* note 8, at 1294, 1296 n.7 (arguing that federal civil litigators represent the relevant public official, not the public interest writ large).

133. See *supra* notes 52–56 and accompanying text.

134. Act of June 22, 1870, ch. 150, § 5, 16 Stat. 162, 162–63. The contemporary role of DOJ with regard to litigation is codified at 28 U.S.C. §§ 516, 519 (2018), which states that only DOJ lawyers, supervised by the Attorney General, can represent the government in litigation. Courts have elaborated on this exclusive responsibility. See, e.g., *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457–58 (1868) (holding that district attorneys are under the direction of the Attorney General); *Sutherland v. Int'l Ins. Co. of N.Y.*, 43 F.2d 969, 970–71 (2d Cir. 1930) (holding that absent a statute giving explicit authorization, only DOJ lawyers supervised by the Attorney General can bring lawsuits on behalf of the United States).

135. For a history of the formation of DOJ, see Green & Roiphe, *Can the President Control*, *supra* note 24, at 38–55.

136. See 28 C.F.R. § 0.45 (2019); JUSTICE MANUAL, *supra* note 6, § 4-1.200.

137. Essentially, the Assistant Attorney General for the Civil Division has redelegated responsibility for these cases to the United States Attorneys. See JUSTICE MANUAL, *supra* note 6, §§ 4-1.300, 4-1.310, 4-1.511. In most of the cases, the United States Attorneys have full authority to conduct the litigation, including to settle cases, without approval from the Assistant Attorney General for the



specific units for some areas of litigation, namely the Torts Branch, Commercial Litigation Branch, Federal Programs Branch, Office of Immigration Litigation, Office of Consumer Litigation, and the Appellate Staff, each of which is run by a Deputy Assistant Attorney General.<sup>138</sup>

When the federal government is not a party to a case but has an interest in the outcome, the Civil Division may file an *amicus curiae* brief.<sup>139</sup> This arises most frequently when the court, in resolving private parties' claims, will interpret a federal statute or agency regulation.<sup>140</sup> If the constitutionality of an act is in question, the court must certify the issue to the Attorney General,<sup>141</sup> and if a United States Attorney's Office is involved in such a case, it too must notify the Civil Division of DOJ.<sup>142</sup>

While agencies are designated as clients, the Attorney General retains control over the terms of settlement,<sup>143</sup> and only DOJ attorneys are allowed to appear in court.<sup>144</sup> Because the agencies are often in the best position to know and obtain the facts pertaining to litigation, they are responsible for creating litigation holds where appropriate,<sup>145</sup> drafting responses to complaints, and developing reports with relevant information about agency regulations, policies, and other facts that might bear on the litigation.<sup>146</sup> As the trial nears, the agency continues to have responsibilities with regard to facts, such as providing draft responses to interrogatories and other information necessary to comply with the Federal Rules of Civil Procedure.<sup>147</sup> Just as private attorneys have an obligation to communicate with their clients, United States Attorneys in civil litigation are required to keep agencies informed about the cases.<sup>148</sup>

That said, not all civil division work is so clearly the work of advocacy. The Civil Division is also responsible for habeas petitions.<sup>149</sup> While technically a civil proceeding, habeas proceedings are a collateral challenge to criminal convictions and involve constitutional criminal issues. In civil rights claims, the government is serving an enforcement role as it does in prosecution. The

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Civil Division. *Id.* § 4-1.312. The Justice Manual lays out the kinds of cases that may not be delegated to the United States Attorney Offices and must be handled directly by central DOJ. *Id.* § 4-1.313.

138. *Id.* § 4-1.210.

139. *Id.* § 4-1.323.

140. *See id.*

141. 28 U.S.C. § 2403(a) (2018).

142. JUSTICE MANUAL, *supra* note 6, § 4-1.324.

143. *See* FTC v. Guignon, 390 F.2d 323, 324 (8th Cir. 1968).

144. JUSTICE MANUAL, *supra* note 6, § 4-1.420.

145. *Id.* § 4-1.431.

146. *Id.* § 4-1.432.

147. *Id.* § 4-1.433.

148. *Id.* § 4-1.520.

149. *See* Green, *Must Government Lawyers*, *supra* note 8, at 243.

government is acting to enforce its laws rather than as a private party would in litigation.<sup>150</sup>

## 2. The Ethical Responsibility of Civil Division Attorneys

The ethical responsibility of federal civil litigators is controversial. Some argue that, as government lawyers, civil litigators, just like prosecutors, owe responsibility to the public and as such have a duty to do justice.<sup>151</sup> Others insist that DOJ lawyers conducting civil litigation serve the relevant agency through the appointed agency head.<sup>152</sup>

Federal prosecutors, as explained below, have a duty to do justice.<sup>153</sup> They are responsible not only for legal work, but like all public officials, they also define what the public interest is in any given instance without deference to any elected official's view. Private lawyers, on the other hand, represent their clients' interests zealously.<sup>154</sup> Of course, ethical rules make clear that zeal should be tempered by specific obligations to the law and the legal system, but the standard view of lawyering is that private lawyers, unlike prosecutors, seek to carry out their clients' objectives without regard to the justness of the cause.<sup>155</sup> This standard conception of a lawyer's role reasons that private lawyers are not implicated in the morality of their clients' positions because representing a client does not constitute an endorsement of that client's view.<sup>156</sup> The rationale for this standard view of lawyering is that the legal system itself is designed to resolve moral and practical differences and mediate between private interests. As such, lawyers should not impose a particular view on their clients but rather make all reasonable arguments on their behalf.<sup>157</sup> It is the obligation of the judge or other fact finder, and not the lawyer, to determine the just outcome after

150. *See id.* at 246–48.

151. *See id.* at 238–39; *see also* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 789–90 (2000); Catherine J. Lancot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 955 (1991). This view is also the one adopted by the Restatement. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. h (AM. LAW INST. 2000). This position was embraced by Attorney General Griffin Bell in an address to DOJ lawyers in 1978. *See* Bell, *Address Before DOJ Lawyers*, *supra* note 84, at 7.

152. *See* Miller, *supra* note 8, at 1296 n.7; Jeffrey Rosenthal, *Who Is the Client of the Government Lawyer?*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS* 13, 13 (Patricia E. Salkin ed., 1999). The ABA agrees with this interpretation of the government lawyer's role in civil litigation. *See* ABA Comm'n on Ethics & Prof'l Responsibility, *Formal Op.* 94-387 (1994).

153. *See infra* Section II.E.

154. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2019).

155. Some ethics scholars argue that private attorneys have obligations to justice and morality that go beyond the minimal requirements spelled out in the ethical rules. *See* WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 77 (2000); David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 873 (1999).

156. MODEL RULES OF PROF'L CONDUCT r. 1.2(b).

157. *See* W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 26 (2010).

analyzing these arguments. Most adherents of this view of lawyering, however, do not condone endless gamesmanship.<sup>158</sup> A lawyer may only take reasonable positions on behalf of his client and that obligation serves as a real limit on all lawyers' conduct.

The standard view of lawyering is suited, for the most part, to government lawyers who are acting as civil litigators. While some scholars argue that government lawyers represent the sovereignty and therefore owe a duty directly to the public,<sup>159</sup> this vision of lawyering has two problems. First, it is not consistent with the history or statutory role that civil lawyers play, and second, it undermines democratic structures and the role of law as a neutral and legitimate way to resolve disputes.<sup>160</sup>

The history of DOJ and the role of civil litigators suggest that the client is generally the agency.<sup>161</sup> As the Federal Bar Association stated in 1973,

Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations. In contrast, the private practitioner represents the client's personal or private interest. In pointing out that the federally employed lawyer thus is engaged professionally in the furtherance of a particular governmental responsibility we do not suggest, however, that the public is the client as the client concept is usually understood. It is to say that the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part.<sup>162</sup>

To be sure, the client agency does not have as much control over the lawyer's work as a private client would. For instance, a private client decides whether to

158. See, e.g., *id.* at 49.

159. See, e.g., Berenson, *supra* note 151, at 790–802; Green, *Must Government Lawyers*, *supra* note 8, at 265–70.

160. See WENDEL, *supra* note 157, at 49.

161. This is also the position of the Federal Bar Association (“FBA”). In 1973, the FBA offered ethical considerations to supplement the ABA’s *Model Code of Professional Responsibility*, stating that the government lawyer’s client “is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of the public business.” Fed. Bar Ass’n Prof’l Ethics Comm., *Ethics Opinion 73-1: The Government Client and Confidentiality*, 32 FED. B.J. 71, 72 (1973). In an opinion, the FBA elaborated that the immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency. See *id.* Attorney General Griffin Bell also described agencies as clients of DOJ lawyers. See Bell, Address Before the L.A. County Bar, *supra* note 106, at 13. There are times when the private litigation involves significant administration policies and the President might step in to supervise the agency head’s interpretation of national interest. See Eizenstat, *supra* note 109, at 176 (listing litigation concerning the legality of oil import fees and the constitutionality of the legislative veto as two such instances that arose during the Carter administration).

162. Fed. Bar Ass’n Prof’l Ethics Comm., *supra* note 161, at 72.

settle a case,<sup>163</sup> while DOJ lawyers make that determination on behalf of the agency.<sup>164</sup> The reason for this difference, as supported by the history of the law department and government legal work, is not that the government lawyer has a direct obligation to the public but rather to maintain uniformity in the government's approach to legal questions. The division of authority is analogous to private entity clients, where some decisions will be left to the general counsel's office rather than specific departments to create a uniform and rational approach to the corporation's legal work. In other words, the DOJ was not created to deprive agencies of counsel but rather to centralize lawyers in one department in order to maintain uniformity and efficiency in the government's legal representation.

More importantly, the standard view of lawyering for government attorneys is more consistent with the goal to preserve legal institutions as a neutral mechanism to resolve disputes. Assessing the public interest in the abstract is difficult. Allowing government lawyers to do so introduces a risk or at least a legitimate concern that the lawyer is merely drawing on her own political or personal moral view. Of course, the same concern can and has been leveled at federal prosecutors,<sup>165</sup> but at least the DOJ and the bar have sought to develop guidelines, procedures, and limits for prosecutors. The effort to weed partisan political motivation out of prosecutorial decisionmaking is imperative because individual liberty is at stake. The concern is not as great and arguably lacking entirely in civil lawsuits.

While the "public interest" is a vague notion, the Constitution provides a way to approximate it through processes like election, appointment, confirmation, and legislation. For federal prosecutors, none of these mechanisms works entirely, in part because prosecutors are asked to exercise substantial discretion and are required to operate in a disinterested way. They must be insulated both from politicians and the public in order to ensure that they apply the law in a fair and evenhanded way. While all lawyers ought to be, in a sense, independent of their clients to ensure the legality of their clients' actions as well as the propriety of the means of achieving their goals, the need for insulation is not as strong for civil lawyers because life and liberty are not at stake.

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163. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2019).

164. JUSTICE MANUAL, *supra* note 6, § 4-1.312.

165. See generally Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 471 (2017) [hereinafter Green & Roiphe, *Rethinking Prosecutors' Conflicts*] (arguing that the duty to do justice requires impartiality); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837 [hereinafter Green & Zacharias, *Prosecutorial Neutrality*] (explaining the various meanings of prosecutorial neutrality and emphasizing that it involves something other than the personal idiosyncratic view of the individual prosecutor).

Furthermore, the idea that government lawyers ought to seek justice in civil cases fails to situate these lawyers within the structure of democratic government. While pursuing an abstract notion of justice may be suited to criminal cases where the stakes are so high, the Constitution otherwise provides for a system of elected and appointed officials to determine what that interest is when it comes to litigation. The relevant agency assesses what it believes to be in the public interest as defined broadly by the legislature. A private citizen or other plaintiff may challenge that understanding and the court will determine the outcome. A government civil litigator serves the public interest best by advocating for the agency and allowing the judicial system to sort out its meaning.<sup>166</sup>

That said, even in the standard view of lawyering, no lawyer is permitted to make absurd legal arguments in pursuit of his client's goal.<sup>167</sup> If an argument is frivolous, the lawyer is barred from making it.<sup>168</sup> If it is not frivolous but is unreasonable, the lawyer can refuse to make the argument on behalf of the client.<sup>169</sup> Given lawyers' role in preserving the administration of justice, a private lawyer should not make an absurd or unreasonable argument. Nor should a government lawyer do so in pursuing an agency interest in civil litigation.

There are situations in which civil division lawyers are acting more like prosecutors than like private litigators. If they are not litigating a case but are instead acting as law enforcement lawyers would, then they may have an obligation to do justice or to act more generally in the public interest. For instance, when a lawyer is arguing a habeas case or bringing a civil rights law enforcement action, that lawyer may have a more direct obligation to the public than a lawyer who is serving to effect the interest of the public, as defined by a particular agency, in civil litigation.<sup>170</sup> This is so because the lawyer's work looks more like a prosecutor's work, and for the reasons explained below, in making decisions in individual cases like these, prosecutors must be independent from all partisan and political influence.

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166. Some have argued that the government lawyer serves the interest of the government as a whole, not a particular agency. *See, e.g.,* Lanctot, *supra* note 151, at 955. Geoffrey Miller argues against this position by pointing out that the constitutional system of checks and balances requires each branch have a way to protect itself against encroachment of the others and that lawyers serve this role. Miller, *supra* note 8, at 1296. Their ability to do so would be undermined if all government lawyers served all three branches at once. *See id.*

167. *See* MODEL RULES OF PROF'L CONDUCT rr. 1.2(c), 3.1.

168. *Id.* r. 3.1.

169. *See id.* r. 1.2(c); *see also* Jones v. Barnes, 463 U.S. 745, 753–54 (1983) (holding that it is not ineffective assistance of counsel and is in fact good lawyering to refuse to raise all the arguments a client wishes to make).

170. *See* Green, *Must Government Lawyers*, *supra* note 8, at 243–48.

C. *The Solicitor General*

## 1. The Role of the Solicitor General

The office of the Solicitor General was created in 1870 along with the DOJ itself. The statute provided that there should be “an officer learned in the law, to assist the Attorney-General in the performance of his duties, to be called the solicitor-general.”<sup>171</sup> He would also be responsible for arguing any cases in which the government has an interest.<sup>172</sup> It is significant that the 1870 Act used the phrase “learned in the law,” which initially described the office of the Attorney General, to describe the post of the Solicitor General. The Attorney General has delegated several of his duties such that the Solicitor General has responsibility for conducting all Supreme Court cases, determining whether appeals should be taken, advising on the approval of settlements when an appeal would be inappropriate, determining when to intervene and whether to file an amicus curiae brief, and assisting the Attorney General in devising DOJ policy.<sup>173</sup> The use of “learned in the law” to modify the Solicitor General may have reflected a conscious acknowledgement that the Attorney General is, in part, a political position. As the quasi-judicial responsibilities migrated to other lawyers within DOJ, the Attorney General was free to assume a more political role as cabinet member and serve as a filter to ensure that only proper political priorities affect DOJ’s work.

The Solicitor General has historically been seen as a legal position, detached from the political branches. Until 1952, the Solicitor General served as the second ranking official in the DOJ and would serve as acting Attorney General if need be.<sup>174</sup> The Solicitor General has offices in the Supreme Court in addition to the DOJ, and many refer to the role as the “Tenth Justice.”<sup>175</sup> Commentators have interpreted this to mean that the Solicitor General has an obligation to the law, that the normal rules of zealous advocacy and deference to the client’s wishes do not pertain, at least insofar as the client is an elected or appointed official.<sup>176</sup>

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171. Act of June 22, 1870, ch. 150, § 2, 16 Stat. 162, 162.

172. *Id.* § 5, 16 Stat. at 162–63.

173. 28 C.F.R. § 0.20 (2019).

174. HUSTON, *supra* note 23, at 59.

175. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 3 (1987).

176. *See id.*; Kathryn Mickle Werdegar, *The Solicitor General and Administrative Due Process: A Quarter Century of Advocacy*, 36 GEO. WASH. L. REV. 481, 482 (1968). There are some notable dissenters who argue that the Solicitor General’s obligation is to the President, not to the Court. *See, e.g.*, John O. McGinnis, *Principle Versus Politics: The Solicitor General’s Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 802 (1992) (arguing that “the Solicitor General is not independent” of the President but ought to be “wholly independent” of the Court). McGinnis’s account derives from a unitary theory of the Executive and, while compelling if one accepts the premise, is inconsistent with the historical development of the position.

## 2. The Ethical Responsibility of the Solicitor General

The President has the obligation to take care that the laws are faithfully executed and the Attorney General, like all government lawyers, takes an oath to uphold the Constitution. The Solicitor General helps both the President and the Attorney General put the law above policy considerations. Attorney General Francis Biddle wrote that the Solicitor General

determines what cases to appeal, and the client has no say in the matter, he does what his lawyer tells him, the lawyer stands in his client's shoes, for the client is but an abstraction. He is responsible neither to the man who appointed him nor to his immediate superior in the hierarchy of administration. The total responsibility is his, and his guide is only the ethic of his own profession framed in the ambience of his experience and judgment.<sup>177</sup>

The Solicitor General is independent from the administration and agencies for three reasons. First, this independence helps ensure uniformity before the Supreme Court. Different agencies may have different positions and conflicting interests, but the United States needs to speak with one voice once it reaches the highest court.<sup>178</sup> The law needs to develop in an orderly way despite shifts in political and ideological stances in the administration. Second, the Solicitor General is seen as an adjunct of the Court, drawing on professional legal expertise to assist it in its function. As such, he helps ensure the development of the law by choosing when to seek review and when it might be better to allow the lower courts to grapple with an issue.<sup>179</sup> Third, as with prosecutors, independence assures that improper considerations do not affect the Solicitor General's decisions and arguments.<sup>180</sup>

The Solicitor General's role as "tenth justice" perhaps reflects the original conception, articulated in the first draft of the Judiciary Act, of the Attorney General as a judicial role.<sup>181</sup> While the final version abandoned the judiciary's control over the Attorney General, that notion of the government lawyer as a quasi-judicial actor may have migrated from the Attorney General to the Solicitor General when the position was created in 1870. This hypothesis makes sense, especially given that the statute that created DOJ and the Solicitor General described the Solicitor General as "learned in the law," a phrase that had modified the Attorney General in the Judiciary Act.<sup>182</sup>

177. FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1962).

178. See *Role of the Solicitor Gen.*, 1 Op. O.L.C. 228, 230 (1977).

179. See *id.* at 231.

180. See *id.*

181. See *supra* notes 25–28 and accompanying text.

182. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

But the simplicity of the term “tenth justice” is deceiving. Independence does not require or even counsel isolation. Like any lawyer, the Solicitor General needs to be informed, and to do so he has to consult not only with the administration but with any agency involved in the case.<sup>183</sup> At times, a legal issue is so tied up with a policy one that independence must give way. If policy is central to the proper determination of a legal position, then a Solicitor General can and should defer to the administration.<sup>184</sup>

The Solicitor General represents the United States government, not the administration. As Solicitor General Erwin Griswold argued in 1969:

The Solicitor General’s client in a particular case cannot be properly represented before the Supreme Court except from a broad point of view, taking into account all of the factors which affect sound government and the proper formulation and development of the law. In providing for the Solicitor General, subject to the direction of the Attorney General, to attend to the “interests of the United States” in litigation, the statutes have always been understood to mean the long-range interests of the United States, not simply in terms of its fisc, or its success in the particular litigation, but as a government, as a people.<sup>185</sup>

In Griswold and Biddle’s view, the Solicitor General represents the government, not a particular administration. He owes his obligation to the public in the sense that the public has a long-term interest in the orderly development of the law. The President has the obligation to “take Care that the Laws be faithfully executed,”<sup>186</sup> and the Solicitor General is critical to that mission.

Some might frame the Solicitor General’s responsibility as a “duty to do justice” much like prosecutors’.<sup>187</sup> Philip Elman, an Assistant Solicitor General from 1944 to 1961, took this view. Elman, who had been a clerk to Supreme Court Justice Felix Frankfurter, worked on civil rights cases throughout his tenure at DOJ and is known for having written the brief for *Brown v. Board of Education*.<sup>188</sup> He explained, “[W]e took it for granted, without making any big fuss over it or being self-righteous, that our job was to do justice . . . .”<sup>189</sup> In the months leading up to the case, Elman was in constant contact with Justice Frankfurter, who told Elman his views and that of the other justices.<sup>190</sup> While

183. See Role of the Solicitor Gen., 1 Op. O.L.C. at 234.

184. See *id.* at 235.

185. Erwin N. Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 535 (1969).

186. U.S. CONST. art II, § 3.

187. See, e.g., Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 60–65 (1991).

188. 347 U.S. 483 (1954).

189. CAPLAN, *supra* note 175, at 25.

190. See *id.* at 25–26.



Elman acknowledged the potential ethical problems with this collaboration, he defended himself by arguing that he was not really representing a client: “I didn’t consider myself a lawyer for a litigant. I considered it a cause that transcended ordinary notions about propriety in a litigation.”<sup>191</sup> He went on to explain how exceptional *Brown v. Board of Education* was, but it is nonetheless striking that he considered himself a “junior partner, or law clerk emeritus” of the Court, blurring professional and intrabranch roles.<sup>192</sup>

Elman’s vision, derived from a view of the Solicitor General as directly responsible to the abstract notion of justice and not to a client or political actor, is both extreme and dangerous. At the very least, Elman’s cozy relationship with Frankfurter gave him an unfair advantage and deprived the private party of its right to rebut the government’s position.<sup>193</sup> Even a prosecutor’s duty to do justice is constrained by his client more than this particular vision of the Solicitor General’s job.

It would be wiser, perhaps, to take the more modest position that the Solicitor General has a client who is a party to a litigation. He is a lawyer for a client, with a special obligation. The executive branch has an interest and constitutional obligation to take care that the laws are faithfully executed. The Solicitor General represents the public in its abstract and long-term interest in the proper development of the federal law.<sup>194</sup> He carries out this function independently, not because he is an adjunct of the Court but to ensure that the interests of a given administration do not do a disservice to the law.

Erwin Griswold, who was Solicitor General under Lyndon Johnson and Richard Nixon, understood the Solicitor General’s independence in this way. For instance, he privately insisted that the administration was wrong in suing newspapers for printing the Pentagon Papers, the stolen Defense Department study revealing that multiple administrations had lied to the American public about the Vietnam War.<sup>195</sup> But when Griswold drafted his brief in support of the government’s position, he took the administration’s opposite view.<sup>196</sup> In the draft cases, however, Griswold refused to advance the government’s position because he thought it extremely unlikely to prevail given Supreme Court precedent and sensed that he would lose credibility with the Court if he were to argue the case as the administration wished.<sup>197</sup> In the end, the government defended the draft board, but the brief was signed by the Attorney General

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191. *Id.* at 30.

192. *Id.*

193. *See id.*; *see also* MODEL RULES OF PROF’L CONDUCT r. 3.5(b) (AM. BAR ASS’N 2019) (prohibiting lawyers from having ex parte contact with judges unless it is authorized by law).

194. This vision of the Solicitor General’s role draws on fiduciary theories of government. *See, e.g.*, Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 516–17 (2015).

195. CAPLAN, *supra* note 175, at 34.

196. *Id.*

197. *Id.* at 34–35.

instead of Griswold, perhaps signaling to the Court that this was more of a political than a legal stance.<sup>198</sup> Griswold's record reflects a sense of obligation to the public to be faithful to the law but at the same time a deference to the administration when it would not undermine such orderly development of the law.

The Solicitor General's independent role encountered one of its greatest tests when the constitutionality of affirmative action reached the Supreme Court during the Carter administration. In *Regents of the University of California v. Bakke*,<sup>199</sup> a man who had received a relatively high score on the entrance examination was refused admission to medical school and argued that the affirmative action program denied his constitutional right to equal protection.<sup>200</sup> Initially, the federal government took no position because it was not a party to the litigation, but two Assistant Solicitors General who were strongly opposed to affirmative action drafted a brief in favor of Bakke, which was leaked to the *New York Times*.<sup>201</sup> Solicitor General Wade McCree then enlisted the President's support for a brief in support of the affirmative action program.<sup>202</sup> This was seen as a bad test case, because it involved strict racial quotas, but President Carter felt strongly that the brief serve as a pronouncement of the administration's commitment to affirmative action.<sup>203</sup> Carter's personal attorney and chief advisor for domestic policy ended up having a strong say in the tone of the brief. Attorney General Griffin Bell criticized the administration for interfering. According to Bell, instead of taking instruction from the administration, the Solicitor General should have determined what the law allowed and then presented his analysis to the administration.<sup>204</sup>

In 1977, the Office of Legal Counsel published a memorandum, signed by Assistant Attorney General John Harmon, regarding the role of Solicitor General.<sup>205</sup> The memo explained that the Solicitor General enjoys substantial independence both within the DOJ and from political actors. While technically the Solicitor General reports directly to the Attorney General like the Assistant Attorneys General, as a matter of tradition, the Attorney General respects the independence of the office.<sup>206</sup> As the direct link and advisor to the President,

198. See Robert E. Keeton, Book Review, 105 HARV. L. REV. 1386, 1396–97 (1992).

199. 438 U.S. 265 (1978).

200. *Id.* at 269–72.

201. See CAPLAN, *supra* note 175, at 42–43.

202. See GRIFFIN B. BELL WITH RONALD J. OSTROW, TAKING CARE OF THE LAW 29–32 (1982); JOSEPH A. CALIFANO, JR., GOVERNING AMERICA 241 (1981); CAPLAN, *supra* note 175, at 43–47; JOEL DREYFUSS & CHARLES LAWRENCE III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 166–71 (1979).

203. See CAPLAN, *supra* note 175, at 42–44.

204. See *id.* at 45–48.

205. Role of the Solicitor Gen., 1 Op. O.L.C. 228 (1977).

206. See *id.* at 229–30.

the Attorney General is in part and inevitably a political actor. To preserve the Solicitor General's more neutral role, Harmon articulated this norm of relative independence within DOJ. He further explained that the Solicitor General is also insulated from other executive officials. He can refuse to advance their arguments, confess error without permission, and decline to seek certiorari even if the relevant elected or appointed official disagrees.<sup>207</sup> The memo gives four reasons for the independent role. First, it is necessary to preserve uniformity in the government's legal position.<sup>208</sup> Second, as an officer of the court, the Solicitor General has an obligation to help it carry out its function.<sup>209</sup> Third, he has a role to play in preserving the orderly growth of the law.<sup>210</sup> And finally, independence prevents improper considerations from intruding on the government's presentation of the law before the Supreme Court.<sup>211</sup>

Harmon justified the Solicitor General's independence from the Attorney General. In theory the Attorney General is also charged with administering the law in an independent way, but because he serves as a member of the President's cabinet, in reality, it is hard to screen out partisan concerns entirely.<sup>212</sup> Thus, there is a need to create some distance between the two roles. The memo, echoing Bell's criticism of the handling of the *Bakke* case, suggests that the Solicitor General ought to formulate his own views about potential litigation before consulting the Attorney General or anyone in the administration.<sup>213</sup> In developing his legal opinion, however, the Solicitor General should be encouraged to speak to executive officials who may have information or a perspective that bears on his judgment.<sup>214</sup> According to the memorandum, after being presented with the opinion, in most cases the President and Attorney General should accept that view. Only in extraordinary circumstances would it be appropriate for them to override the Solicitor General's professional opinion. The final decision belongs to the Attorney General and the President, but in all but a few rare and extraordinary instances they should defer to the Solicitor General.<sup>215</sup> The deference ensures the integrity of the President's constitutional obligation, which has been assumed by the Solicitor General, to take care that the laws are executed faithfully, without improper influence.<sup>216</sup>

The policy designed to protect the Solicitor General's independence may be wise, but more importantly, Harmon states a position that seems consistent

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207. *See id.* at 229–31.

208. *See id.* at 230.

209. *Id.* at 231.

210. *Id.*

211. *Id.*

212. *See id.* at 232.

213. *See id.* at 233.

214. *See id.* at 233–34.

215. *See id.*

216. *Id.* at 234.

with those that came before. The Solicitor General has an obligation to the law and the courts. His decisions, while not completely inattentive to the administration's goals, ought to operate independently of them. This does not answer the question posed above about whether the Solicitor General ought to draw on court decisions in his interpretation of the law or whether he ought to develop an independent executive branch interpretation. Given the dearth of precedent for executive interpretation, it seems wise for a Solicitor General to at least draw on judicial precedent in developing an understanding of the law.

#### D. *The Office of Legal Counsel*

The 1789 Judiciary Act assigned the Attorney General the central function of providing opinions on legal matters.<sup>217</sup> The President is obligated to take care that the laws are faithfully executed, which requires that he first understand what the law means.<sup>218</sup> Office of Legal Counsel (“OLC”) opinions affect not only government agencies but also private individuals who have claims or concerns with the government. Because they don't always have a mechanism for bringing these concerns before a court, OLC's opinions are often definitive and ought to be neutral as a result, or as Attorney General Caleb Cushing put it in 1856, “quasi judicial.”<sup>219</sup>

##### 1. The Role of Office of Legal Counsel Lawyers

The Assistant Attorney General in charge of OLC is sometimes described as “the Attorney General's lawyer.”<sup>220</sup> OLC prepares formal opinions for the Attorney General, gives formal and informal legal advice to government agencies, and assists the Attorney General in his function as legal adviser to the President and cabinet.<sup>221</sup> The Office also offers formal opinions on the legality of pending legislation and “form and legality” review of executive action.<sup>222</sup> It resolves legal disputes between different executive agencies<sup>223</sup> and reviews proposed executive orders for legality before they are sent on to the

217. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

218. See David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 113–14 (1993).

219. Office & Duties of Attorney Gen., 6 Op. Att'y Gen. 326, 334 (1854).

220. HUSTON, *supra* note 23, at 60.

221. *Id.*; see 28 C.F.R. § 0.25 (2019).

222. Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 338 (1993). There is some question about whether OLC should defer to Congress once it has enacted legislation. Traditionally, DOJ did not offer opinions on the constitutionality of enacted legislation but Ronald Reagan's Attorney General, Edwin Meese, criticized the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, and both Meese and Attorney General Richard Thornburgh criticized the judicial decision in *Roe v. Wade*, 410 U.S. 113 (1973). See BAKER, *supra* note 29, at 18.

223. See Exec. Order No. 12,146, 3 C.F.R. 409 (1979), *reprinted in* 28 U.S.C. § 509 (2018).

President.<sup>224</sup> The head of OLC has also historically served in a more casual role advising Presidents about the legality of proposed or past action.<sup>225</sup> It is also asked to give its opinion on the constitutionality of proposed legislation.<sup>226</sup>

The standards for review of executive action are not clear. Particularly, it is unclear whether OLC has any responsibility to review factual findings that the President makes to support proposed executive action.<sup>227</sup> The President is not bound by OLC's legal opinions. He is free not to seek legal advice or to ignore it once he receives it.<sup>228</sup> There remain others within the executive branch, like agency lawyers and the White House Counsel, who can provide an interpretation of the law, but most important legal opinions are issued by OLC.<sup>229</sup> Many OLC opinions have significant force of law despite the fact that they are untested in court.<sup>230</sup>

Some believe that, as a descriptive matter, OLC's authority and influence declined during the Obama administration.<sup>231</sup> At least on national security issues, the Obama administration convened a group comprised of agency lawyers as well as the White House Counsel to deliberate.<sup>232</sup> While the process could avoid error by promoting deliberation and consensus, it could potentially diminish OLC's independent influence in favor of decisions focused on the White House's interest.<sup>233</sup> The OLC during the Obama administration also

224. See Exec. Order No. 11,030, 3 C.F.R. 219 (1962), reprinted in 44 U.S.C. § 1505 (2018).

225. See Samuel A. Alito, Jr., *Change in Continuity at the Office of Legal Counsel*, 15 CARDOZO L. REV. 507, 508 (1993).

226. John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 431 (1993) [hereinafter McGinnis, *Models of the Opinion Function*].

227. See Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 867 (2019); Annika Lichtenbaum, "Form and Legality": *The Office of Legal Counsel's Role in the National Emergency Declaration*, LAWFARE (Feb. 15, 2019), <https://www.lawfareblog.com/form-and-legality-office-legal-counsels-role-national-emergency-declaration> [<https://perma.cc/4N9L-UKP9>].

228. BAKER, *supra* note 29, at 6.

229. See Jennifer Wang, Note, *Raising the Stakes at the White House: Legal and Ethical Duties of the White House Counsel*, 8 GEO. J. LEGAL ETHICS 115, 134 (1994); Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1178 (2002); Jameel Jaffer, *The Office of Legal Counsel and Secret Law*, JUST SECURITY (July 18, 2017), <https://www.justsecurity.org/43253/office-legal-counsel-secret-law/> [<https://perma.cc/Y4NY-Z7MS>] (emphasizing the scope and importance of OLC's opinions).

230. For instance, the two OLC opinions concluding that a sitting President cannot be indicted led Special Counsel Robert Mueller not to offer an opinion about whether or not President Trump obstructed justice. See *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 222 (2000); Memorandum from Robert G. Dixon, Jr., Assistant Attorney Gen., Office of Legal Counsel, *Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office* 16 (Sept. 24, 1973), <https://fas.org/irp/agency/doj/olc/092473.pdf> [<https://perma.cc/P9WZ-Z98L>].

231. See, e.g., Jack Goldsmith, *More on the Decline of OLC*, LAWFARE (Nov. 3, 2015), <https://www.lawfareblog.com/more-decline-olc> [<https://perma.cc/5GAM-8WZD>].

232. See *id.*

233. *Id.*

engaged in the practice of circulating drafts of opinions, which similarly promoted a deliberative process but also risked subjecting legal opinions to political bargaining.<sup>234</sup> Despite these developments that might relegate it to the sidelines, OLC has issued a number of controversial opinions recently, reasserting its presence in charged political debates.<sup>235</sup>

## 2. The Ethical Responsibility of Office of Legal Counsel Lawyers

Agencies and administrations have consistently consulted OLC in part because its lawyers have had the reputation of being both skilled and neutral.<sup>236</sup> According to its own guidelines, OLC is supposed to provide its “best understanding of what the law requires” rather than a persuasive argument on behalf of a client.<sup>237</sup> It is supposed to “give candid, independent, and principled advice—even when that advice is inconsistent with the aims of policymakers.”<sup>238</sup> Since OLC derives its reputation in part from its skill and this stated independence, it ought to be structured to promote these ends.

The problem, as Professor Shalev Roisman points out, is that this mission is in tension with the OLC lawyers’ interest in remaining relevant and involved in official decisionmaking.<sup>239</sup> After all, the White House Counsel is more likely to consult with OLC if the lawyers are compliant and supportive of proposed executive action.<sup>240</sup> OLC has opined recently on many controversial issues, including the legality of President Trump’s refusal to turn over his tax returns.<sup>241</sup> OLC has given its blessing to the reallocation of funds to build the

234. *Id.*

235. See Shalev Roisman, *The Real Decline of OLC*, JUST SECURITY (Oct. 8, 2019), <https://www.justsecurity.org/66495/the-real-decline-of-olc/> [https://perma.cc/JG5A-EGA8] [hereinafter Roisman, *The Real Decline of OLC*].

236. See *id.*; see also BAKER, *supra* note 29, at 147 (observing this same phenomenon and arguing that the fact that the President is not required to seek legal advice or abide by the advice he is given exacerbates the problem).

237. Memorandum from David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, for Attorneys of the Office, Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [https://perma.cc/P9ES-298G].

238. *Id.* Some have argued that this quasi-judicial position is in tension with the notion of a unitary executive. The President necessarily loses control if DOJ lawyers have an obligation to something other than him. See Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 445–52 (1993) (reconciling the two by arguing that OLC simply plays the role that a private attorney would play in counseling his client on the law).

239. See Roisman, *The Real Decline of OLC*, *supra* note 235.

240. See *id.*; see also BAKER, *supra* note 29, at 13–14 (arguing that the White House Counsel competes with OLC by providing a source of legal advice to the President).

241. See Cong. Comm.’s Request for the President’s Tax Returns Under 26 U.S.C. § 6103(f), 43 Op. O.L.C., slip op. at 1 (June 13, 2019), <https://www.justice.gov/olc/file/1173756/download> [https://perma.cc/WS9C-UYH3].

border wall,<sup>242</sup> the aggressive assertion of executive privilege,<sup>243</sup> and, most recently, the validity of the whistleblower complaint that led to the President's impeachment. With regard to the latter, OLC concluded that the President's request to Ukraine to investigate his political rival Joe Biden and his son did not express an "urgent concern" under the intelligence community whistleblower provisions and therefore need not be conveyed to Congress.<sup>244</sup>

Theoretically, the addition of White House Counsel in 1939 might have ensured the independence of OLC by providing the President with a different source for more politically fraught legal opinions. But it seems that the advent of the position has, to the contrary, undermined the independence of OLC by giving the President an additional source of legal advice, which allows him to sideline OLC if it offers an undesired opinion on the meaning of the law. The theory is that OLC, jealous of its own power and relevance, will offer the opinion that the administration seeks, rather than "the best understanding of what the law requires," in order to remain relevant and avoid being marginalized.

There are several possible models for OLC lawyers. Assuming that the administration is OLC's client, the lawyers can approach their job as advocates, offering the best possible legal justification of a desired action and refusing to do so only if there is no reasonable legal defense. Alternatively, OLC could take a more judicial approach, seeking the "best" view of the law or at least the most convincing view of law regardless of the administration's wishes.<sup>245</sup>

Since OLC took over the Attorney General's opinion-writing function, it is worth exploring how early Attorneys General as well as more contemporary ones viewed that particular aspect of their job. A number of early Attorneys General considered their opinion-writing function as a neutral act requiring an independent assessment of the meaning of the law. As Attorney General Caleb Cushing wrote in 1854, "In the discharge of the [duty to provide legal opinions]

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242. Lichtenbaum, *supra* note 227.

243. See Attempted Exclusion of Agency Counsel from Cong. Depositions of Agency Emps., 43 Op. O.L.C., slip op. at 1–3 (May 23, 2019), <https://www.justice.gov/sites/default/files/opinions/attachments/2019/11/04/2019-05-23-agency-counsel-2.pdf> [<https://perma.cc/46HK-JZHM>] (finding that Congress "may not compel an executive branch witness to appear without agency counsel"); Testimonial Immunity Before Cong. of the Former Counsel to the President, 43 Op. O.L.C., slip op. at 1–2 (May 20, 2019), [https://www.justice.gov/sites/default/files/opinions/attachments/2019/11/04/2019-05-20-test-immun-fmr-whc-2\\_1.pdf](https://www.justice.gov/sites/default/files/opinions/attachments/2019/11/04/2019-05-20-test-immun-fmr-whc-2_1.pdf) [<https://perma.cc/MNN9-MLLE>] (finding that "Congress may not constitutionally compel the President's senior advisers to testify about their official duties").

244. See "Urgent Concern" Determination by the Inspector Gen. of the Intelligence Cmty., 43 Op. O.L.C., slip op. at 1–2 (Sept. 3, 2019), <https://www.justice.gov/olc/opinion/file/1205711/download> [<https://perma.cc/P3V5-S2GY>] (interpreting 50 U.S.C. § 3033(k)(5) (2018)).

245. See Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 807–11 (2017) (arguing that the role of OLC as a legal constraint or justification for presidential action itself is contingent on the political priorities of the President).

. . . the action of the Attorney General is quasi judicial. His opinions officially define the law, in a multitude of cases . . . .”<sup>246</sup> More contemporary Attorneys General have echoed this view. Attorney General Griffin Bell, for instance, wrote:

As a matter of good government, it is desirable generally that the executive branch adopt a single, coherent position with respect to the legal questions that arise in the process of government. Indeed, the commitment of our government to due process of law and to equal protection of the laws probably requires that our executive officers proceed in accordance with a coherent, consistent interpretation of the law, to the extent that it is administratively possible to do so. It is thus desirable for the President to entrust the final responsibility for interpretations of the law to a single officer or department. The Attorney General is the one officer in the executive branch who is charged by law with the duties of advising the others about the law and of representing the interests of the United States in general litigation in which questions of law arise. The task of developing a single, coherent view of the law is entrusted to the President himself, and by delegation to the Attorney General. That task is consistent with the nature of the office of Attorney General.<sup>247</sup>

By centralizing the opinion-writing function within DOJ in 1870, Congress attempted to improve efficiency and uniformity, but in doing so it also sought to promote a more professional and neutral approach to the law. For instance, Representative Thomas Jenckes expressed concern that lawyers within agencies would “give advice which seems to have been instigated by the heads of the Department.”<sup>248</sup> Congress acted in part out of a sense that department heads with a political agenda would influence their lawyers. It seems reasonable to conclude that the intent behind the law creating DOJ was, at least in part, to render this function more professional and neutral and therefore more uniform and predictable.

The function of OLC is to serve the executive branch. As such, some argue that it properly seeks to preserve the power of the presidency.<sup>249</sup> This effort to preserve the power of the Executive has been relatively consistent over time and through administrations with different political ideologies.<sup>250</sup> However, OLC’s willingness to support the executive branch is not as consistent. For instance, OLC argued that the special counsel provisions of the Ethics in

246. Office & Duties of Attorney Gen., 6 Op. Att’y Gen. 326, 333–34 (1854).

247. Griffin B. Bell, *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1068 (1978) [hereinafter Bell, *The Attorney General*].

248. CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870).

249. See, e.g., Alito, *supra* note 225, at 507.

250. *Id.*



Government Act were constitutional under the Carter administration and reversed its position when Reagan was President.<sup>251</sup> Thus the assertion that OLC has always served to expand and justify executive power would be incorrect.

Scholars have identified three possible models for OLC lawyers. First, they could approach a legal question by attempting to predict how courts would resolve a problem.<sup>252</sup> Second, they could do an independent assessment of the law, developing the President's interpretation of the law without an eye to what courts would likely do.<sup>253</sup> And finally, they could act more like a private lawyer, giving a legal interpretation that best advances the President's political interests without regard to either judicial precedent or jurisprudential norms.<sup>254</sup>

If Congress passes a law that is unconstitutional on its face, over the objection of OLC, should the President enforce it and should the DOJ defend it? President Andrew Johnson famously removed Secretary of War Edwin McMasters Stanton in defiance of the Tenure in Office Act,<sup>255</sup> which deprived him of the right to remove certain cabinet members.<sup>256</sup> This deliberate refusal to abide by a congressional edict formed the basis for the articles of impeachment against him.<sup>257</sup> Johnson's lawyer defended him by arguing that the President was obligated to decline to enforce such a blatantly unconstitutional law.<sup>258</sup> Chief Justice Salmon P. Chase agreed, insisting that a President has no obligation to enforce a law that "directly attacks and impairs the Executive power confided to him by the Constitution."<sup>259</sup> Thus, at least according to this argument, there is some independent obligation on the part of the Executive to determine constitutional flaws for itself and act appropriately. If the law is manifestly unconstitutional then the President cannot and should not enforce it. This is particularly true where a law clearly takes away a core executive function.

Given the President's constitutional obligation to take care that the laws are faithfully executed, OLC's own recent guidelines for its lawyers should govern. OLC should strive to provide a neutral interpretation of the law, regardless of the interest of the policymakers who have sent a request for interpretation. If OLC's job is to provide a neutral opinion, it ought to have

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251. *See id.* at 507–08.

252. *See* McGinnis, *Models of the Opinion Function*, *supra* note 226, at 382–89.

253. *See id.* at 389–402.

254. *See id.* at 402–03.

255. Ch. 154, 14 Stat. 430 (1867) (repealed 1887).

256. *See* ELEANORE BUSHNELL, *CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS* 133–34 (1992).

257. *See id.* at 134.

258. *See id.* at 146.

259. J. W. SCHUCKERS, *THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE* 577 (Mnemosyne Publ'g Co. 1969) (1874).

some minimal obligation to review the facts that the President assumes to support executive action.<sup>260</sup> That said, OLC is within the executive branch so it makes sense for it to issue opinions that tend to strengthen the power of the Executive. If courts are asked to review the legal issue at hand, they are free to defer to the legal analysis or disregard it, understanding that its authors sought, at least in part, to protect executive prerogative.<sup>261</sup>

What is problematic, as Roisman argues, is that OLC has been weighing in with increased frequency in controversial political battles, its reasoning has been tenuous, and even more importantly, it has put forth positions of personal political value to the sitting President rather than interpretations of the law that favor executive power generally.<sup>262</sup> The opinion on whether the Internal Revenue Service ought to turn over President Trump's taxes, for instance, has little to do with executive power generally. The power to withhold taxes from the public is not clearly in the executive interest in the long run, though it may be in some individual Presidents' interests.

In order to maintain its integrity as a source of wise and independent legal advice, OLC ought to issue fewer controversial political opinions. Those ought to be left to other lawyers like the White House Counsel. In highly charged political cases, it will be hard for the OLC to maintain its neutrality without alienating the administration. Even if it follows its direction to promote "the best understanding of what the law requires," the public perception will likely question its integrity. While the White House Counsel is the lawyer to the presidency, not the lawyer to the administration, the political and partisan aspect of the job is well known and accepted.<sup>263</sup> The taint of partisan decisionmaking, or the appearance of partisan decisionmaking, is less likely to undermine the effectiveness of the White House Counsel or other administration lawyers than it is with OLC.

#### E. *Prosecutors*

The Judiciary Act of 1789 divided the country into districts and provided for a chief attorney to supervise criminal prosecution and civil actions in which

260. Cf. MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2019) (barring a lawyer from making claims that do not have a basis in law or fact). Private lawyers who issue opinions without reviewing the relevant factual basis for those opinions have been criticized. See, e.g., Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1187–88 (2003) (describing the failure of lawyers to investigate the facts underlying the legal opinions they offered to Enron).

261. See, e.g., *Trump v. Vance*, 395 F. Supp. 3d 283, 303 (S.D.N.Y. 2019) (rejecting much of the reasoning of OLC memoranda in refusing to grant President Trump's request for an injunction against a New York grand jury subpoena directed at his accounting firm for financial records), *aff'd in part, vacated in part*, 941 F.3d 631 (2d Cir. 2019), *appeal docketed*, No. 19-635 (U.S. May 12, 2020).

262. See Roisman, *The Real Decline of OLC*, *supra* note 235.

263. See, e.g., Wang, *supra* note 229, at 117–18.

the government had an interest.<sup>264</sup> Initially, these jobs were political rewards for loyal supporters.<sup>265</sup> District attorneys were paid in fees and simultaneously engaged in private practice, a custom that was not forbidden until 1950.<sup>266</sup> The Attorney General had no control over these district attorneys, who were largely responsible to the district judges in their jurisdictions.<sup>267</sup> In 1861, Congress centralized control by giving the Attorney General power over district attorneys.<sup>268</sup>

While scholars disagree on the degree of legal or enforceable independence prosecutors have from the President,<sup>269</sup> most agree that, as a matter of practice, Presidents should not direct prosecutors' decisions in individual cases.<sup>270</sup> Reflecting that consensus, DOJ created an Assistant Attorney General for the Criminal Division.<sup>271</sup> This structural reform was designed to create a layer between the Attorney General, who may have policy and personal attachments to the President, and the day-to-day enforcement of the criminal laws.<sup>272</sup>

Administrations from Carter to Trump have issued guidance on communications from the White House to DOJ regarding individual investigations.<sup>273</sup> Responding to the recent Watergate scandal, Attorney General Griffin Bell implemented a number of practices to preserve DOJ independence. He instructed that Assistant Attorneys General should report important decisions to the Deputy Attorney General or the Attorney General, but if the political appointees disagreed with the Assistant Attorney General's opinion, the disagreement had to be written down and publicly disclosed if possible.<sup>274</sup> The memo also asks Assistant Attorneys General to report any communication from the White House or Congress about specific litigation decisions.<sup>275</sup>

264. HUSTON, *supra* note 23, at 63–64.

265. *Id.* at 64.

266. *See id.* at 64–65.

267. *Id.* at 65.

268. Act of Aug. 2, 1861, ch. 37, § 1, 12 Stat. 285, 285. *But see* Act of Aug. 6, 1861, ch. 65, 12 Stat. 327 (explaining that district attorneys would also still report to the Secretary of the Treasury).

269. *See, e.g.*, Green & Roiphe, *Can the President Control*, *supra* note 24, at 3–7.

270. For a discussion of how this has become a generally accepted norm, see Renan, *Presidential Norms*, *supra* note 2, at 2207–15.

271. *See* BAKER, *supra* note 29, at 169.

272. *See id.*

273. *See, e.g.*, Bell, Address Before DOJ Lawyers, *supra* note 84; Memorandum from Donald F. McGahn II to All White House Staff, *supra* note 85.

274. *See* Bell, Address Before DOJ Lawyers, *supra* note 84, at 8.

275. *Id.* at 7.

## 1. The Role of Federal Prosecutors

The Criminal Division supervises the enforcement of all federal criminal laws, except those that are assigned to other divisions within DOJ.<sup>276</sup> Federal prosecutors wield a great deal of power. United States Attorneys, originally called district attorneys, can request the initiation of an investigation into a violation of criminal law.<sup>277</sup> They have broad power to bring charges,<sup>278</sup> decline to prosecute,<sup>279</sup> consider alternatives to prosecution,<sup>280</sup> and plea bargain.<sup>281</sup>

While the Federal Sentencing Guidelines were enacted to rein in the discretion of federal judges, it is largely understood that they increased the power and discretion of federal prosecutors.<sup>282</sup> The increased discretion has led scholars to remark on the increasingly vast power and responsibility of prosecutors.<sup>283</sup> Prosecutors do not have a client in the ordinary sense. They represent the public's abstract interest in justice.<sup>284</sup> As such, they owe obligations to the community, including both the victim and the defendant. This obligation includes a duty to be fair.<sup>285</sup>

Federal prosecutors are regulated by state courts through local ethical rules as well as by federal courts and Congress, but much of what they do remains beyond the reach of regulation.<sup>286</sup> The abstract nature of the prosecutor's client as well as the need for independence from political influence leave prosecutors in charge of much of their own conduct. While prosecutors' power is restricted by courts and legislatures, and scholars have suggested various ways to further regulate them, the system relies, in large part, on professional and institutional norms to guide prosecutorial decisionmaking.<sup>287</sup>

276. JUSTICE MANUAL, *supra* note 6, § 9-1.000.

277. *Id.* § 9-2.010.

278. *Id.* § 9-2.030.

279. *Id.* § 9-2.020.

280. *Id.* § 9-2.022.

281. *See id.* § 9-16.000.

282. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 394 (1992).

283. *See, e.g.,* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 399 (2001).

284. *See* *Berger v. United States*, 295 U.S. 78, 88 (1935).

285. *See* Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940) (famously articulating this longstanding obligation in a 1940 speech).

286. For an analysis of the regulation of federal prosecutors, see Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 390–417 (2002).

287. *See generally* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69 (1995) (discussing the role of federal district courts, the Office of Professional Responsibility, and state disciplinary authorities in regulating federal prosecutors); Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355 (1996) (arguing that state courts should retain primary responsibility for regulating federal prosecutors). For an argument that professional and institutional norms are necessary to supplement regulation, see generally Green & Roiphe, *Rethinking Prosecutors' Conflicts*, *supra* note 165.

While insufficiently concrete, these norms at least dictate which sorts of reasons ought to guide a prosecutor's decision and which are inappropriate. Thus, notions of fairness, efficiency, retribution, legality, and deterrence, among others, can properly factor into decisions, while personal gain, partisan advantage, and institutional interest cannot.<sup>288</sup> Therefore, one of the central goals of regulation and structural reform has been to preserve prosecutorial independence while ensuring sufficient accountability.<sup>289</sup>

## 2. The Ethical Responsibility of Federal Prosecutors

Of the different Justice Department roles, the prosecutor's is probably the best theorized. Generations of scholars have observed the vast power of prosecutors, offering insight into how prosecutors ought to act and how they should be regulated.<sup>290</sup> For the purposes of this section, there is no need to weigh in on the various arguments for regulatory reform. The intention is only to articulate what the goal of regulatory reform ought to be.

Prosecutors have a duty to do justice.<sup>291</sup> Of course, it is far easier to state this obligation than to define it. A prosecutor's obligation could involve the duty to seek procedural justice or it could mean a greater substantive obligation to ensure the appropriate outcome of the case.<sup>292</sup> The vague mandate could conceivably lead different prosecutors to different conclusions in the same case because it does not offer clear guidance on how to weigh or prioritize legitimate considerations, including the defendant's rights, the victim's rights, retribution, and mercy.<sup>293</sup>

288. See Green & Roiphe, *Rethinking Prosecutors' Conflicts*, *supra* note 165, at 476–84.

289. See Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 862 (2020) [hereinafter Green & Roiphe, *A Fiduciary Theory of Prosecution*].

290. See, e.g., Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 272–74 (2013); Stephanos Bibas, *Observers as Participants: Letting the Public Monitor the Criminal Justice Bureaucracy*, 127 HARV. L. REV. F. 342, 342–43 (2014); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not To Prosecute*, 110 COLUM. L. REV. 1655, 1660 (2010); Davis, *supra* note 283, at 397; Green & Zacharias, *Prosecutorial Neutrality*, *supra* note 165, at 840; David Alan Sklansky, *Unpacking the Relationship Between Prosecutors and Democracy in the United States*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 276, 276–77 (Máximo Langer & David Alan Sklansky eds., 2017); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981).

291. See MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2019) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). See generally Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 608, 611 (1999) [hereinafter Green, *Why Should Prosecutors*] (describing the duty to do justice as an assumed fact at the United States Attorney's office and as a facet of the prosecutor's "professional ethos"); Zacharias, *supra* note 187, at 46 (citing the Model Rules' assignment of prosecutors' duty to do justice).

292. See Green, *Why Should Prosecutors*, *supra* note 291, at 622.

293. See *id.* at 622–23.

But what the mandate does do is clarify impermissible considerations for prosecutorial decisionmaking. A prosecutor should not weigh his own personal advancement or partisan political advantage. He should not think about what might benefit his office either reputationally or financially. In other words, a prosecutor has a fiduciary duty of neutrality, fairness, and disinterestedness, a duty not to consider his own personal advancement or that of his office, colleagues, or some other third party.<sup>294</sup>

The Supreme Court in *Young v. United States ex rel. Vuitton et Fils S.A.*<sup>295</sup> suggested that this disinterestedness requirement might in limited situations include an obligation to avoid the appearance of bias.<sup>296</sup> The Court reversed a criminal contempt conviction, which had been prosecuted by a private prosecutor who was also representing the victim in a related civil proceeding.<sup>297</sup> The Court concluded that the prosecution undermined the basic commitment that the state act in a “rigorously disinterested fashion.”<sup>298</sup> In reversing the conviction, the Court stated that even if the prosecutor did not act in favor of his private client, the risk in these circumstances was too high.<sup>299</sup> While the Court failed to articulate a constitutional due process right to a disinterested prosecutor,<sup>300</sup> the dicta suggests that prosecutors ought to strive to both be and appear impartial.<sup>301</sup> Although the Court has been reticent to voice a strong or enforceable obligation, it has at least declared an aspiration that “justice must satisfy the appearance of justice.”<sup>302</sup>

Federal prosecutors must be able to make decisions without partisan pressure. They should, of course, allocate resources and focus priorities on areas of interest to elected officials, but when they make discretionary decisions in individual cases, such as the decision to investigate, charge, plea bargain, and recommend sentences, they should be driven by proper concerns such as truth seeking, legality, deterrence, proportionality, equality, and efficiency.<sup>303</sup>

294. See Green & Roiphe, *Rethinking Prosecutors' Conflicts*, *supra* note 165, at 471–72; Green & Zacharias, *Prosecutorial Neutrality*, *supra* note 165, at 847–52.

295. 481 U.S. 787 (1987).

296. See *id.* at 811.

297. *Id.* at 814.

298. *Id.* at 810.

299. *Id.* at 807 n.18 (“An arrangement represents an actual conflict of interest if its potential for misconduct is deemed intolerable.”).

300. See Green & Roiphe, *Rethinking Prosecutors' Conflicts*, *supra* note 165, at 490.

301. See *Vuitton*, 481 U.S. at 811 (noting that the appointment of an interested prosecutor “creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general”).

302. *Offutt v. United States*, 348 U.S. 11, 14 (1954) (upholding the disqualification of a judge from a contempt proceeding of a lawyer because the defense counsel and judge had exchanged heated insults at the underlying trial).

303. See Green & Roiphe, *A Fiduciary Theory of Prosecution*, *supra* note 289, at 808.

### III. DOJ LAWYERS IN THE TRUMP ADMINISTRATION

How well have DOJ lawyers lived up to these roles under increased pressure from the Trump administration? Examples from the current administration help highlight the vulnerability of DOJ lawyers' norms and traditions as well as their remarkable resiliency under pressure.

#### A. *Attorney General*

President Trump has had two Attorneys General, Jeff Sessions and Bill Barr, and one Acting Attorney General, Matthew Whitaker. Trump publicly criticized Attorney General Sessions for failing to look into Hillary Clinton's lost emails.<sup>304</sup> When Sessions recused himself from the investigation into Russian interference in the 2016 election, Trump excoriated him on Twitter for doing so.<sup>305</sup> He used the same public platform to direct Sessions to investigate Clinton for potential criminal acts and urged him to reverse his decision on recusal.<sup>306</sup> After his effort to convince Sessions and White House Counsel Don McGahn to influence Special Counsel Robert Mueller, or even have him fired, in July 2017, Trump tried to recruit his former campaign adviser Corey Lewandowski to convince Sessions to reassert control over the Russia investigation.<sup>307</sup> Ultimately, the President forced Sessions out and replaced him temporarily with Whitaker.<sup>308</sup>

Amidst accusations that he had appointed Whitaker because of his public stance against the Mueller investigation, Trump eventually nominated Bill Barr for Attorney General.<sup>309</sup> At his confirmation hearings, Barr promised he would maintain the independence of the Department of Justice. He swore that he would protect the legitimacy of the institution. Articulating a clear message that neutral principles should guide DOJ, Barr stated: "I'm in a position in life where I can provide the leadership necessary to protect the independence and the

304. See Donald J. Trump (@realDonaldTrump), TWITTER (July 25, 2017, 3:12 AM), <https://twitter.com/realDonaldTrump/status/889790429398528000> [<https://perma.cc/AT7N-U8UB>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2017, 5:49 AM), <https://twitter.com/realDonaldTrump/status/889467610332528641> [<https://perma.cc/EFY9-B638>].

305. See Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2018, 4:31 AM), <https://twitter.com/realDonaldTrump/status/1003962584352030720> [<https://perma.cc/5BST-Z3BZ>].

306. See 2 ROBERT S. MUELLER, III, U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 5 (2019), <https://www.justice.gov/storage/report.pdf> [<https://perma.cc/Z9DH-LXZB>].

307. See *id.*

308. See Peter Baker, Katie Benner & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html> [<https://perma.cc/8KZ2-Z2YD> (dark archive)].

309. David Smith, *Trump Nominates William Barr as Next Attorney General*, GUARDIAN (Dec. 7, 2018), <https://www.theguardian.com/us-news/2018/dec/07/donald-trump-nominates-william-barr-attorney-general> [<https://perma.cc/PV92-3LVT>].

reputation of the department . . . [I won't] be bullied into doing anything I think is wrong . . ."<sup>310</sup> That said, in an exchange with Senator Amy Klobuchar, Barr explained that he would help the administration justify action with a "reasonable construction of law" even if it was not what he would have chosen to do.<sup>311</sup> Under the standard outlined in Part II, this seems like a fairly good definition of the Attorney General's job, especially the vow to protect the independence of DOJ. Barr's conception of his role, at least as articulated in the confirmation hearings, was appropriate. In retrospect, the legislators might have asked him how he intended to protect DOJ from political influence. A commitment to the practices and traditions outlined above might have been more useful than a broad, vague statement about independence.

Barr's handling of the Mueller Report led many to question this commitment.<sup>312</sup> After reviewing the report, Barr offered his own conclusion that the President had not obstructed justice despite Mueller's carefully reasoned choice not to opine on the question.<sup>313</sup> Barr's letter to leaders of the House and Senate Judiciary Committees summarizing the report made it seem as if Mueller had determined that there was not enough evidence to support criminal charges, which was, at a minimum, misleading.<sup>314</sup> Once the report came out, it became clear that while Mueller did conclude that there was not enough evidence to prove a criminal conspiracy, he laid out multiple acts that could constitute obstruction of justice and noted that he would not offer an opinion since it was the constitutional role of Congress, not DOJ, to do so.<sup>315</sup> The *New*

310. Zapotosky et al., *supra* note 125.

311. *Id.*

312. See, e.g., David Rohde, *How William Barr Politicized the Release of the Mueller Report*, *NEW YORKER* (Apr. 18, 2019), <https://www.newyorker.com/news/current/william-barr-mueller-report-released-donald-trump-press-conference> [<https://perma.cc/56AQ-M9HX>] (describing how Attorney General Barr failed to be apolitical during the Mueller Investigation); William Saletan, *Barr Is Lying About Mueller's Evidence*, *SLATE* (June 7, 2019), <https://slate.com/news-and-politics/2019/06/barr-lying-mueller-report.html> [<https://perma.cc/42YA-BJEL>] (detailing Attorney General Barr's various statements when attempting to defend President Trump from accusations of abuse of power and obstruction of justice); Jacqueline Thomsen, *Barr Faces Political Storm over Mueller Report*, *HILL* (Mar. 25, 2019), <https://thehill.com/policy/national-security/435727-barr-faces-political-storm-over-mueller-report> [<https://perma.cc/TR2F-EQGQ>] (describing Democrats' questioning of Attorney General Barr's conclusion on the Mueller Report).

313. Letter from Attorney Gen. William Barr to Senator Lindsay Graham, Representative Jerrold Nadler, Senator Dianne Feinstein, and Representative Doug Collins 3 (Mar. 24, 2019), <https://games-cdn.washingtonpost.com/notes/prod/default/documents/9048a12b-2332-4645-a1be-d645db216eb5/6f3248a4-4d94-4d5f-ad42-8ff6ccb1a89e.pdf#page=1> [<https://perma.cc/R4LB-T4YJ>]. For a discussion of the difference between Barr's presentation and Mueller's, see Mark Mazzetti & Charlie Savage, *Standing Where Barr Cleared Trump on Obstruction, Mueller Makes a Different Case*, *N.Y. TIMES* (May 29, 2019), <https://www.nytimes.com/2019/05/29/us/politics/mueller-barr.html> [<https://perma.cc/4WMS-4GNS> (dark archive)].

314. See Mazzetti & Savage, *supra* note 313.

315. See Charlie Savage, *How Barr's Excerpts Compare to the Mueller Report's Findings*, *N.Y. TIMES* (Apr. 20, 2019), <https://www.nytimes.com/2019/04/19/us/politics/mueller-report-william-barr-excerpts.html> [<https://perma.cc/F53D-PGKF> (dark archive)].



*York Times* reported in early April that members of Mueller's team were disappointed with Barr's letter, finding it misrepresented the President's criminal exposure.<sup>316</sup> Weeks later, the DOJ released a letter from Special Counsel Mueller written shortly after Barr's summary, objecting to the Attorney General's description of the report.<sup>317</sup> This internal struggle made public itself undermined the integrity of the DOJ and invited speculation about political motivation. Of course, lawyers will disagree, but they ought to follow internal procedures for resolving difference of opinion rather than airing these disputes publicly. In this instance, the special counsel was appointed because political appointees like Barr had perceived conflicts. Therefore, Mueller's determination ought to have prevailed.

Given the hybrid nature of the Attorney General's job, it is critical to assess ethical responsibility with attention to the function he is serving. When Bill Barr issued his summary of the Mueller Report and opined on the obstruction charge, he was supervising a criminal investigation. His job was to protect the nonpartisan nature of criminal prosecution as well as the appearance of impartiality. This obligation was, if anything, heightened given the President's repeated accusations that the Mueller investigation was a politically motivated "witch hunt."<sup>318</sup> He should have worked to guard the independence of the DOJ and preserve its legitimacy by maintaining the lawyers' reputation as impartial administrators of justice, at least before obtaining clear evidence to the contrary.<sup>319</sup>

Bill Barr failed in this regard. Robert Mueller had carefully declined to decide the question of criminal responsibility. He did so because DOJ policy dictates that a sitting President cannot be indicted.<sup>320</sup> The Constitution designates Congress and the voting public as the proper entities to hold a President accountable.<sup>321</sup> The ability of Congress and the public to hold the

316. Nicholas S. Fandos, Michael S. Schmidt & Mark Mazzetti, *Some on Mueller's Team Say Report Was More Damaging Than Barr Revealed*, N.Y. TIMES (Apr. 3, 2019) <https://www.nytimes.com/2019/04/03/us/politics/william-barr-mueller-report.html> [<https://perma.cc/R9F8-GF7N> (dark archive)].

317. See Mark Mazzetti & Michael S. Schmidt, *Mueller Objected to Barr's Description of Russia Investigation's Findings on Trump*, N.Y. TIMES (Apr. 30, 2019) <https://www.nytimes.com/2019/04/30/us/politics/mueller-barr.html> [<https://perma.cc/NX4E-49SY> (dark archive)].

318. See Olivia Paschal, *Trump's Tweets and the Creation of 'Illusory Truth'*, ATLANTIC (Aug. 3, 2018), <https://www.theatlantic.com/politics/archive/2018/08/how-trumps-witch-hunt-tweets-create-an-illusory-truth/566693/> [<https://perma.cc/WA92-FMBQ> (dark archive)] (cataloguing the repeated assaults on Mueller's investigation and explaining how this tactic could work to undermine the public's faith in the probe and in the DOJ in general).

319. Cf. Bell, Address Before the L.A. County Bar, *supra* note 106, at 9–10.

320. See A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 222 (2000); Memorandum from Robert G. Dixon, Jr., *supra* note 230, at 16.

321. Impeachment is mentioned in several places in the Constitution. See, e.g., U.S. CONST. art. I, § 2, cl. 5 (giving the House of Representatives the "sole Power of Impeachment"); *id.* art. I, § 3, cl.

President accountable through impeachment and election does not depend on a professional interpretation of criminal statutes but rather on full access to the facts. By refusing to offer a legal conclusion, Mueller left it to Congress and the public to use their own standards and judgment to assess the President's conduct. Weeks before the redacted version of the Mueller Report became public, Barr insisted that it was his job to decide the question.<sup>322</sup> By doing so, he plunged the DOJ into political debate and opened it to allegations of partisan bias.<sup>323</sup> Since criminal investigations are supposed to be nonpartisan, Barr should have followed Mueller's lead by declining to involve the DOJ in a necessarily partisan decision about presidential accountability, especially when DOJ's own legal opinion prevented it from considering an indictment. This is especially true because the special counsel was appointed in part due to concerns that the Attorney General and prosecutors who reported directly to him would be biased due to his close relationship with the individuals who were being investigated.<sup>324</sup>

In summarizing the Mueller Report and opining on the question of whether the President obstructed justice, Barr betrayed his role—but not because he was too political or partisan. Attorneys General are often political actors, cabinet members chosen by the President to advise closely on important policy matters. He failed because he did not filter political motivations from prosecutorial decisions, and this dereliction undermined the independence of federal criminal law enforcement. Once the executive summaries of the report came out and it became clear that some on Mueller's team objected to Barr's characterization of the report,<sup>325</sup> Barr not only appeared himself a political actor but cast doubt on the Mueller team, undermining the legitimacy of the law

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6 (giving the Senate "the sole Power to try all Impeachments"); *id.* art. I, § 3, cl. 7 (limiting the consequence of impeachment to removal from office).

322. See Melanie Schmitz, *Barr Decided To Clear Trump of Obstruction Before Reading Mueller's Report*, THINKPROGRESS (May 1, 2019), <https://thinkprogress.org/william-barr-attorney-general-cleared-trump-obstruction-before-reading-mueller-report-84f8cde8bfa4/> [<https://perma.cc/EZ9X-JPGC>] (discussing testimony Barr gave in response to questioning by Senator Sheldon Whitehouse (D-RI) on May 1, 2019).

323. See, e.g., Ed Pilkington, *Nadler: Barr Is 'Biased' and Mueller's Trump-Russia Report Must Be Released*, GUARDIAN (Apr. 7, 2019), <https://www.theguardian.com/us-news/2019/apr/07/nadler-barr-biased-mueller-trump-russia-report> [<https://perma.cc/U2KN-YELM>]; Abigail Tracy, *"It's Not What the Department of Justice Does": Barr and Durham Go Rogue on the Inspector General's Report*, VANITY FAIR (Dec. 10, 2019), <https://www.vanityfair.com/news/2019/12/bill-barr-john-durham-michael-horowitz-inspector-general-report> [<https://perma.cc/E9DQ-3F9W> (dark archive)].

324. See 28 C.F.R. § 600.1(a) (2019) (providing that a special counsel should be appointed when the United States Attorneys' Offices would have a conflict of interest).

325. See Devlin Barrett & Matt Zapotosky, *Mueller Complained That Barr's Letter Did Not Capture 'Context' of Trump Probe*, WASH. POST (Apr. 30, 2019), [https://www.washingtonpost.com/world/national-security/mueller-complained-that-barrs-letter-did-not-capture-context-of-trump-probe/2019/04/30/d3c8fdb6-6b7b-11e9-a66d-a82d3f3d96d5\\_story.html](https://www.washingtonpost.com/world/national-security/mueller-complained-that-barrs-letter-did-not-capture-context-of-trump-probe/2019/04/30/d3c8fdb6-6b7b-11e9-a66d-a82d3f3d96d5_story.html) [<https://perma.cc/WW6R-SL9B> (dark archive)].

enforcement decisions they made. Barr also made it such that future related decisions, like those made by United States Attorney John Durham in the Russia probe, will inevitably be questioned based on allegations of political bias. Internal disagreements should never have been aired publicly and ought to have been resolved pursuant to internal policies. The dispute between the Attorney General and the special counsel's team cast doubt on the legitimacy of the special counsel's work and made it seem, at least, as if the President's partisan and personal agenda had shaped the law enforcement conclusion that Barr made. If Barr had followed proper procedure for internally investigating DOJ officials and decisions, he would have achieved his goal of examining the origins of the Russia probe without sacrificing the legitimacy of the DOJ as a nonpartisan, independent organization.

Just two weeks after receiving the report, on April 10, 2019, Attorney General Barr testified before a Senate Appropriations Committee and suggested that he was going to look into the origins of the Russia probe and that he believed "spying" had occurred.<sup>326</sup> Despite the fact that the Inspector General was already scrutinizing the origins of the investigation, Barr referred the case to Assistant United States Attorney John Durham for a criminal investigation.<sup>327</sup> Using the term "spying" to describe a court-ordered wiretap played into the President's rhetoric delegitimizing law enforcement and the FBI. Barr's choice of words echoed the President, who called Michael Cohen a "rat" for cooperating with federal authorities<sup>328</sup> and insisted that the FBI had "broke in to" Cohen's office when it executed a court-ordered warrant.<sup>329</sup> Barr's political allegiance to Trump alone ought not to be the basis for criticism, but casting criminal justice decisions as illegitimate using language of the criminal underworld without proof is.

Once the Inspector General's report was released, Barr once again failed to preserve the legitimacy and independence of federal law enforcement decisions by publicly disagreeing with the Inspector General's conclusions. The

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326. See Devlin Barrett & Karoun Demirjian, *Attorney General Says He Believes 'Spying Did Occur' in Probe of Trump Campaign Associates*, WASH. POST (Apr. 10, 2019), [https://www.washingtonpost.com/world/national-security/attorney-general-faces-second-day-of-questioning-about-muellers-report/2019/04/09/362cc648-5b02-11e9-a00e-050dc7b82693\\_story.html](https://www.washingtonpost.com/world/national-security/attorney-general-faces-second-day-of-questioning-about-muellers-report/2019/04/09/362cc648-5b02-11e9-a00e-050dc7b82693_story.html) [https://perma.cc/PTH8-SLMH (dark archive)].

327. See Katie Benner & Adam Goldman, *Justice Dept. Is Said To Open Criminal Inquiry into Its Own Russia Investigation*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/us/politics/john-durham-criminal-investigation.html> [https://perma.cc/6KKB-DH3P (dark archive)].

328. See Isaac Stanley-Becker, *Calling Michael Cohen a 'Rat,' Trump Brings 'American Underworld' Lingo to the White House*, WASH. POST (Dec. 17, 2018), <https://www.washingtonpost.com/nation/2018/12/17/calling-michael-cohen-rat-trump-brings-american-underworld-lingo-white-house/> [https://perma.cc/Z42X-BRL6 (dark archive)].

329. See Matt Apuzzo, *F.B.I. Raids Office of Trump's Longtime Lawyer Michael Cohen; Trump Calls It 'Disgraceful'*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/us/politics/fbi-raids-office-of-trumps-longtime-lawyer-michael-cohen.html> [https://perma.cc/V2B4-Z8CU (dark archive)].

Inspector General's report found plenty to criticize about the FBI and the FISA warrant process, but it also clearly concluded that the origins of the investigation were unbiased and valid, as were the major law enforcement decisions.<sup>330</sup> This conclusion clearly undermined one of the President's talking points: that the Russia probe itself was a politically motivated "witch hunt."<sup>331</sup> Without citing support for his disagreement, Barr made a public statement that the FBI had launched the investigation on "the thinnest of suspicions" that he concluded were insufficient to justify the probe.<sup>332</sup> Departing from DOJ policy not to comment on an ongoing investigation, Assistant United States Attorney John Durham similarly publicly stated that he disagreed with some of the report's conclusions.<sup>333</sup> Both of these public statements, which depart from internal guidelines and practices, undermine faith in the DOJ and demonstrate Barr's failure to adhere to the proper role for the Attorney General.

If Durham's conclusions diverge from the Inspector General's, he should have waited until the conclusion of his investigation to say so. With few exceptions, the only way in which prosecutors are permitted to speak is through indictments.<sup>334</sup> It is extremely rare to issue a public update on an ongoing investigation.<sup>335</sup> By failing to adhere to procedures and publicly airing, once again, an internal disagreement with his own department, Barr undermined the legitimacy of the DOJ and failed to prevent improper partisan concerns from infiltrating law enforcement decisions. Even if DOJ remains untainted by these pronouncements, Barr has done damage to the public faith in the law department as a neutral body. Of course it is important and even critical to have robust checks on law enforcement abuses, but it is equally important for an Attorney General to abide by proper procedures when alleging or investigating such abuses to ensure that any internal monitoring of DOJ lawyers' and agents' conduct is not motivated by partisan, political concerns or a personal loyalty to the President, or perceived as such.

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330. See Charlie Savage, Adam Goldman & Katie Benner, *Report on F.B.I. Russia Inquiry Finds Serious Errors but Debunks Anti-Trump Plot*, N.Y. TIMES (Dec. 9, 2019), <https://www.nytimes.com/2019/12/09/us/politics/fbi-ig-report-russia-investigation.html> [<https://perma.cc/59PX-4FLM> (dark archive)].

331. See *id.*

332. See Katie Benner, *Barr and Durham Publicly Disagree with Horowitz Report on Russia Inquiry*, N.Y. TIMES (Dec. 23, 2019), <https://www.nytimes.com/2019/12/09/us/politics/barr-durham-ig-report-russia-investigation.html> [<https://perma.cc/2878-DRSC> (dark archive)].

333. *Id.*

334. The Justice Manual states, "DOJ generally will not confirm the existence of or otherwise comment about ongoing investigations. . . . DOJ personnel shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress before charges are publicly filed." JUSTICE MANUAL, *supra* note 6, § 1-7.400(B). The only exception is when the public needs to be reassured that the appropriate law enforcement agency is investigating a matter or if the information is necessary to protect the public safety, neither of which apply here as the public already knew that Durham was investigating the matter further. See *id.* § 1-7.400(C).

335. See *id.* § 1-7.400.

Two thousand former members of the Justice Department accused Attorney General Barr of politicizing the Department after he overruled the sentencing recommendation in the Roger Stone case, a prosecution that arose out of Robert Mueller's investigation.<sup>336</sup> The U.S. Attorney's Office in Washington, D.C., had recommended a sentence of seven to nine years, which was within the sentencing guidelines range. Barr ordered the submission of a new memo, recommending a sentence "far less" than the previous recommendation. After the second memo was submitted, four U.S. Attorneys withdrew from the case and one of those four resigned from DOJ.<sup>337</sup> When President Trump tweeted his approval of Barr's new memo and questioned the judge's ability to be neutral, Barr complained that the President's tweets were making it "impossible for me to do my job."<sup>338</sup>

In other politically sensitive cases, Barr has taken the unusual step of assigning lawyers, both within and outside of DOJ, to review the work of the original prosecutors.<sup>339</sup> The Attorney General has also assigned a prosecutor in Pittsburgh to consider evidence that the President's personal attorney Rudy Giuliani gathers in Ukraine on political rival Joe Biden and his son, Hunter.<sup>340</sup> All of this gives the appearance, at least, that the President is hand picking his prosecutors, shopping around to find those who will do his bidding. Even assuming that Barr has not coordinated this work with Trump, Barr is the most

336. Melissa Quinn, *2,000 Ex-Justice Department Employees Call on Barr To Resign over Roger Stone Case*, CBS NEWS (Feb. 18, 2020), <https://www.cbsnews.com/news/1100-ex-justice-department-employees-call-on-william-barr-to-resign-over-roger-stone-case/> [<https://perma.cc/5AT3-9F59>]. In a strongly worded op-ed, Donald Ayer, former U.S. Deputy Attorney General under George H.W. Bush, also called for Barr's resignation. Donald Ayer, *Bill Barr Must Resign*, ATLANTIC (Feb. 17, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/donald-ayer-bill-barr-must-resign/606670/> [<https://perma.cc/SXA9-XFWZ> (dark archive)].

337. See Brian Naylor, *Attorney General Barr To Testify in House Amid Criticism over Roger Stone Case*, NPR (Feb. 12, 2020), <https://www.npr.org/2020/02/12/805159485/trump-praises-attorney-general-barr-for-taking-charge-of-roger-stone-case> [<https://perma.cc/8LHQ-W7BS>].

338. Daren Gregorian, *AG Barr Says Trump Tweets 'Make It Impossible for Me To Do My Job'*, NBC NEWS (Feb. 14, 2020), <https://www.nbcnews.com/politics/donald-trump/ag-barr-says-trump-tweets-make-it-impossible-me-do-n1136726> [<https://perma.cc/4CJQ-R37H>]. This statement echoes Barr's assertion at his confirmation hearing that he considers it his job to protect the independence of DOJ. See *supra* note 310 and accompanying text. It is, however, also in tension with Barr's confident assertion during the same hearing that he has the capacity to do so. Barr's frustration with the President seems disingenuous given that he must have known before he took the job that Trump frequently opines on DOJ decisions, particularly those related to the Mueller investigation, thereby making it hard for prosecutors to appear impartial and apolitical.

339. See Devlin Barrett, Matt Zaptosky & Josh Dawson, *Barr's Internal Reviews and Re-Investigations Feed Resentment, Suspicion Inside Justice Dept.*, WASH. POST (Feb. 15, 2020), [https://www.washingtonpost.com/national-security/barrs-internal-reviews-and-re-investigations-feed-resentment-suspicion-inside-justice-dept/2020/02/15/7007695a-5029-11ea-9b5c-eac5b16dafa\\_story.html](https://www.washingtonpost.com/national-security/barrs-internal-reviews-and-re-investigations-feed-resentment-suspicion-inside-justice-dept/2020/02/15/7007695a-5029-11ea-9b5c-eac5b16dafa_story.html) [<https://perma.cc/D9VR-P6WD> (dark archive)].

340. See Evan Perez, Manu Raju & Jeremy Herb, *Federal Prosecutors in Pittsburgh Vetting Giuliani's Ukraine Allegations*, CNN: POLITICS (Feb. 11, 2020), <https://www.cnn.com/2020/02/11/politics/pittsburgh-giuliani-ukraine-allegations/index.html> [<https://perma.cc/NC4P-2S26>].

politically connected official within DOJ, as explained above, so it is inappropriate for him to take control over and second guess the discretionary decisions that prosecutors make in individual cases, particularly in politically sensitive ones.

In serving as a filter to keep political influence out of federal prosecution, Barr ought to preserve the practices that are designed to promote that end. One of these practices is that, as a general matter, line assistants and local United States Attorneys are responsible for making decisions in individual cases, and political actors and their appointees, like Barr himself, maintain a distance. Of course, he can and should communicate the administration's policy priorities with prosecutors but that hardly seems to be what happened here. While Barr claims that by taking control of the case he will ensure political accountability, much of what prosecutors do never becomes public.<sup>341</sup> It will be impossible for voters to know whether decisions to prosecute were made for political reasons or not. Nor can the public have faith that decisions not to prosecute, similarly opaque deliberations, were made in a fair and evenhanded way.

Rather than ensuring order, fairness, or accountability, Barr has sown distrust because he has failed to filter political considerations from prosecutorial decisionmaking. He has failed to promote faith in the neutral enforcement of the laws. By complaining that it was the President's tweets and not his own conduct that undermined faith in prosecutorial neutrality, he misunderstands his job. The President should respect prosecutorial independence, but the Attorney General provides an extra layer of protection. Of course, serving that role is difficult when the President seeks to influence prosecutorial decisions, but Barr was aware of this added challenge when we took the job. Even if he truly believes he is acting in a neutral way, a premise that is belied by at least some of his acts, Barr's job is not only to act without political bias, it is also to preserve the legitimacy of DOJ. He knew that this was going to be difficult when he took the job, but he has compounded the problem rather than doing what he could to preserve the reputation of the institution as it is under assault.

It is hard to assess exactly the harm done by Barr's failure to fulfill the proper role of an Attorney General. Some have suggested that his conduct has already had consequences within the DOJ.<sup>342</sup> But the real test is whether the institution can regain the respect of a broad majority of Americans such that its fact investigations and enforcement actions have the legitimacy necessary to support the rule of law. If federal criminal investigations and proceedings can

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341. For a discussion of how Barr justifies his decisions, see David Rohde, *Why Is William Barr Really Criticizing Donald Trump*, NEW YORKER (Feb. 14, 2020), <https://www.newyorker.com/news/daily-comment/who-is-william-barr> [<https://perma.cc/2387-7JFE>] (dark archive)].

342. See David Shortell, Evan Perez & Josh Campbell, *FBI Agents Warn of 'Chilling Effect' from Trump and Barr Attacks*, CNN: POLITICS (Dec. 12, 2019), <https://www.cnn.com/2019/12/12/politics/fbi-chilling-effect-trump-barr-attacks/index.html> [<https://perma.cc/NYK5-DTHF>].

be convincingly cast as biased and partisan without proof, then the American public would be right to be skeptical of the entire institution. At such a point, it is not clear that the American public would abide by or trust the results of such enforcement actions.

While it may be true that Barr intended only to preserve the power of a strong presidency against what he deemed an excessively aggressive investigation, his conduct was unethical because he owed a duty to the public to keep partisan politics out of criminal investigations. He could have followed orthodox prescribed methods to try to prove his point, but by straying so far from these procedures, he did serious damage to the legitimacy of the institution he promised to protect. Even if he was not motivated by a desire to protect President Trump, his unnecessary conclusion on criminal obstruction in the Mueller findings undermined the legitimacy of the DOJ by subjecting it to credible allegations of partisanship.

One thing is important to note, though, in leveling criticism at Barr. The job of the Attorney General is not apolitical. The Attorney General is a cabinet member involved in policy decisions and political calculations. He is not a career prosecutor like many of the United States Attorneys and line prosecutors who enjoy substantial independence both from the administration and from the Attorney General himself.<sup>343</sup> The layers of subordinate attorneys to whom much of the work of DOJ is delegated are part of an infrastructure that together protects law enforcement from the improper infiltration of politics. Thus, while Barr erred in his role because he failed to screen out partisan political concerns where appropriate, this error has not fully undermined the legitimacy and efficacy of DOJ. The layers of lawyers beneath him, in this case Robert Mueller and the special counsel team, were there to absorb the shock.

#### B. *Civil Division Lawyers*

Recently, Senior Litigation Counsel for the Department of Justice, Sarah Fabian, argued that the government does not have to supply soap and toothbrushes to immigrants in border facilities in order to comply with a settlement agreement that requires “safe and sanitary” conditions.<sup>344</sup> The Trump administration’s political position with regard to immigration is itself controversial, but this argument spurred a particularly intense reaction. Twitter users directed their anger, for the most part, at Fabian herself. “[W]hat kind of

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343. See Libby Cathey & Ryan Shepard, *William Barr: Everything You Need To Know About Trump’s Controversial Attorney General*, ABC NEWS (Feb. 13, 2020), <https://abcnews.go.com/Politics/william-barr-trumps-attorney-general/story?id=59661840> [<https://perma.cc/6TET-K4ZL>].

344. See Manny Fernandez, *Lawyer Draws Outrage for Defending Lack of Toothbrushes in Border Detention*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/sarah-fabian-migrant-lawyer-doj.html> [<https://perma.cc/N4CE-2T54> (dark archive)].

vile person would argue this?” one user excoriated.<sup>345</sup> Another referred to her as “[a] heartless DOJ attorney.”<sup>346</sup> Another made a personal stab, writing “Never. Forget. Her name.”<sup>347</sup> A *New York Times* editorial piled on, insisting that any member of the bar who defends the administration’s treatment of children at the border ought to be sanctioned.<sup>348</sup> If Fabian is supposed to promote justice in an abstract sense, this criticism would arguably be warranted. If, on the other hand, she is serving her client—in this case the Department of Homeland Security (“DHS”)—the way a private attorney serves his, then under the standard conception of lawyering described above, she should not be implicated in the underlying policy, just as private attorneys are not implicated in the underlying morality of their clients’ actions or agenda.

Based on the ethical duties outlined above,<sup>349</sup> Fabian’s argument was problematic—but not because she did not pursue an abstract notion of justice. Nor was her argument improper because she ought to be implicated in the morality of the administration’s border policy. Quite the contrary, as a government litigator she is obligated to defend this policy on behalf of DHS. DOJ is, after all, in part a legal arm of the administration, tasked with representing its interests in court. But government lawyers, like all lawyers, are not permitted to pursue *any* line of argument. All attorneys ought to treat the law with respect and Fabian, like private civil attorneys, has an obligation not to make unreasonable arguments, even if her client so wished. Arguing that the government’s failure to provide soap to migrants met the requirement of providing “sanitary” conditions is like arguing that up is down. Soap is essential to the prevention of disease. It is necessary to comply with the terms of the settlement agreement and arguing otherwise is both unreasonable and unethical.<sup>350</sup>

The fact that Vice President Mike Pence denied knowledge of Fabian’s argument and insisted that he believed immigrants at detention facilities should have soap indicates a potential failure of communication and counseling.<sup>351</sup>

345. Soledad O’Brien (@soledadobrien), TWITTER (June 22, 2019, 5:19 AM), <https://twitter.com/soledadobrien/status/1142406849918115840> [<https://perma.cc/LW75-DRW7>].

346. Jon Cooper (@joncoopertweets), TWITTER (June 21, 2019), <https://twitter.com/joncoopertweets/status/1142122467189809152> [<https://perma.cc/45VS-L3VQ>].

347. Scott Dworkin (@funder), TWITTER (June 23, 2019), <https://twitter.com/funder/status/1142812927914852352> [<https://perma.cc/82BZ-7SW8>].

348. See Kate Cronin-Furman, *The Treatment of Migrants Likely ‘Meets the Definition of a Mass Atrocity,’* N.Y. TIMES (June 29, 2019), <https://www.nytimes.com/2019/06/29/opinion/immigration-children-detention.html> [<https://perma.cc/4RNP-6YRH> (dark archive)] (“[T]he American Bar Association should signal that anyone who defends the border patrol’s mistreatment of children will not be considered a member in good standing of the legal profession.”).

349. See *supra* Section II.B.2.

350. See WENDEL, *supra* note 157, at 29–31 (describing the standard conception of legal ethics).

351. See Caroline Kelly & Paul LeBlanc, *Pence: ‘Of Course’ Migrant Children Should Have Toothbrushes, Blankets and Medicine,* CNN: POLITICS (June 23, 2019), <https://www.cnn.com/>



Perhaps Fabian and the DOJ should have advised DHS that this argument was unsound and that it should revisit its policy. If she had done so, DHS could have spoken with the administration and tried to work out a solution other than defending seemingly indefensible actions in court.<sup>352</sup> This lack of communication between federal civil litigators and their clients is an ongoing problem in the Trump administration. For instance, in the census case, the DOJ lawyers argued that there was a deadline for printing the census forms, only to later explain that perhaps the deadline was not so firm.<sup>353</sup> But this observation does not change the ultimate calculation that Fabian failed not because she did not pursue justice in an abstract sense but rather because she put forward an absurd argument on behalf of her client that would be equally unethical in private civil litigation.

### C. *Solicitor General*

Solicitor General Noel Francisco argued before the Supreme Court in April 2019 that the decision to add a citizenship question to the U.S. Census was not subject to judicial review because Congress had left the issue to the Commerce Department.<sup>354</sup> He further explained that Commerce Secretary Wilbur Ross acted reasonably in adding the citizenship question when faced with inadequate alternatives recommended by the census staff.<sup>355</sup> The challengers, including the American Civil Liberties Union and the New York Attorney General, countered that the citizenship question would result in a massive undercount, especially among minority communities.<sup>356</sup> This, in turn, would affect federal funding and the calculation of congressional districts.<sup>357</sup> Secretary Ross insisted that he added the question because it would be useful

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2019/06/23/politics/mike-pence-border-conditions-congress/index.html [https://perma.cc/M286-N2YL].

352. Attorney General Griffin Bell notably pointed out in 1978 that DOJ lawyers fail in counseling client agencies. Bell, *The Attorney General*, *supra* note 247, at 1062–63. Their role, like that of private lawyers, is not just to pursue the stated interest of the agency but also to advise the client about the legal problems with the proposed policy. See MODEL RULES OF PROF'L CONDUCT rr. 1.4, 2.1 (AM. BAR ASS'N 2019).

353. See Michael Wines, Katie Benner & Adam Liptak, *Justice Dept. To Replace Lawyers in Census Citizenship Question Case*, N.Y. TIMES (July 7, 2019), <https://www.nytimes.com/2019/07/07/us/politics/census-citizenship-question-justice-department.html> [https://perma.cc/8DU5-HP9E (dark archive)]. This is not an isolated occurrence but rather part of a trend of DOJ attorneys contradicting the administration. For a list of other similar discrepancies, see Brad Heath (@bradheath), TWITTER (Dec. 30, 2019, 10:29 AM), <https://twitter.com/bradheath/status/1211715995280248832> [https://perma.cc/QUA2-BL79].

354. See Transcript of Oral Argument at 8, *Dep't of Commerce v. New York*, 139 S. Ct. 1543 (2019) (No. 18-966), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2018/18-966\\_i4dj.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-966_i4dj.pdf) [https://perma.cc/TAG2-ET4Y].

355. See *id.* at 6.

356. See *id.* at 43–44, 65–68.

357. See *id.* at 70–71.

in enforcing the Voting Rights Act, but plaintiffs claimed, and several lower courts agreed, that this reason was pretextual.<sup>358</sup> Long after deciding to put the citizenship question on the Census, Ross pressured the DOJ to come up with a plausible rationale.<sup>359</sup> In a fractured decision, the Supreme Court ruled that the purported rationale was pretextual.<sup>360</sup> While executive branch officials have broad discretion under the Administrative Procedure Act, they are obligated to “pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.”<sup>361</sup> The Court remanded the case with instructions for the agency to provide a better explanation for the citizenship question.<sup>362</sup>

Another wrinkle in the case: Solicitor General Noel Francisco represented to the Court that it ought to decide the appeal on an expedited basis and not wait for a related case with new evidence about Ross’s intent to conclude.<sup>363</sup> Francisco argued, in part, that the delay would burden the government because the census forms had to be printed by June 30, 2019.<sup>364</sup> We now know, after remand, that the Department of Commerce subsequently acknowledged that it could print the forms later.<sup>365</sup>

As explained above, the Solicitor General has a role in assisting the Supreme Court, helping to ensure a uniformity and rational development of federal law.<sup>366</sup> As such, the Solicitor General, unlike civil government lawyers litigating on behalf of an agency, owes a special obligation to the law and justice itself.

While admittedly vague, this standard must mean something more than that any member of the public can justifiably criticize the Solicitor General for abandoning his role if he strays from that individual’s own view of the justness

358. See David Lawder, *Commerce’s Ross Insists Census Citizenship Question Supports Voting Rights Act*, REUTERS (Mar. 14, 2019), <https://www.reuters.com/article/us-usa-census-ross/commerces-ross-insists-census-citizenship-question-supports-voting-rights-act-idUSKCN1QV270> [<https://perma.cc/AX74-M8KW>].

359. See Barry K. Robinson & Edgar Chen, *Principle over Pretext: The Supreme Court Isn’t Buying What Wilbur Ross Is Selling*, JUST SECURITY (July 1, 2019), <https://www.justsecurity.org/64762/principle-over-pretext-the-supreme-court-isnt-buying-what-wilbur-ross-is-selling/> [<https://perma.cc/Q9XU-V3ZM>] (discussing how lower courts found evidence that the rationale for the census question “was essentially a pretext, fabricated at Ross’ direction”).

360. See *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2757 (2019) (noting that the agency rationale “seems to have been contrived”).

361. *Id.* at 2576.

362. See *id.*

363. See Amy Howe, *Opinion Analysis: Court Orders Do-Over on Citizenship Question in Census Case (Updated)*, SCOTUSBLOG (June 27, 2019), <https://www.scotusblog.com/2019/06/opinion-analysis-court-orders-do-over-on-citizenship-question-in-census-case/> [<https://perma.cc/7RHT-TEDH>].

364. See *id.*

365. Wines et al., *supra* note 353.

366. See *supra* Section II.C.2.

of the government's position. There must be some mechanism for assessing whether Francisco served his role other than whether or not he promoted one particular vision of substantive justice. If the Solicitor General has an obligation to the rule of law, then it seems more accurate to say that he has an obligation to put forward reasonable arguments that are well supported in the case law. He has an obligation to be principled and thoughtful in his arguments and to stop short of advancing a position of the administration that might cause lasting damage to orderly development of the law or to the government as a whole. He does not have to accurately predict how the Supreme Court will rule, but his argument should offer a plausible and even convincing view. The majority agreed with Francisco on his constitutional argument,<sup>367</sup> and four justices agreed that the government's reason for posing the citizenship question was not pretextual.<sup>368</sup> On this record, it is hard to conclude that Francisco betrayed his obligation.

Critics accused Francisco and other DOJ staff attorneys of misleading the Court when they argued for an expedited timeframe by asserting that the Commerce Department had a deadline: the forms had to be printed by the end of June.<sup>369</sup> While it is clearly unethical for any lawyer to lie to the court, it is worse given the Solicitor General's special role as advisor to the Supreme Court. That said, if Francisco had a good faith belief that the deadline was absolute, then he did not violate that obligation. While it is easy to see now that the government was not being entirely honest about the deadline or that there was substantial confusion within DOJ, there is no evidence that Francisco either knew or should have known that the agency was lying.

#### D. *Office of Legal Counsel Lawyers*

OLC has sanctioned many controversial and legally questionable policies of the Trump administration. This is not the first administration to use OLC to support politically charged policies. During the Obama administration, OLC issued an opinion supporting the President's controversial Deferred Action for Childhood Arrivals ("DACA") program, an immigration policy that allowed certain undocumented immigrants to avoid deportation.<sup>370</sup>

367. *Dep't of Commerce*, 139 S. Ct. at 2567.

368. *See id.* at 2577–83 (Thomas, J., concurring in part and dissenting in part); *id.* at 2597 (Alito, J., concurring in part and dissenting in part).

369. *See, e.g.,* Tierney Sneed, *Eating Its Words: DOJ Now Willing To Blow Right Past Bogus Census Deadline*, TALKING POINTS MEMO (July 9, 2019), <https://talkingpointsmemo.com/news/muckraker/justice-department-trump-census-citizenship-deadline> [<https://perma.cc/UGM5-DUU6>].

370. *See* Dep't of Homeland Sec.'s Auth. To Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & To Defer Removal of Others, 38 Op. O.L.C. 1, 17–20 (2014); *see also* Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 97–98 (2016) (discussing President Obama's DACA program and OLC's response).

Others have criticized the substance of recent Trump OLC opinions.<sup>371</sup> This section will focus on the opinion OLC issued on the whistleblower complaint that led to the impeachment proceedings against President Trump to illustrate two points.<sup>372</sup> First, OLC ought to refrain from issuing controversial political opinions unless absolutely necessary, and second, failing to do so often leads OLC to compromise its own guidelines to deliver the “best view of the law” rather than an opinion that advances the President’s or the administration’s objectives.

In August 2019, an anonymous whistleblower within the intelligence community detailed a July 25, 2019, phone call between President Trump and the President of Ukraine, noting in addition the decision by White House officials to “lock down” the call record.<sup>373</sup> The intelligence community Inspector General Michael Atkinson found the complaint credible and “urgent” and forwarded it to Director of National Intelligence Joseph Maguire, who initially declined to pass it on to Congress.<sup>374</sup> Instead, Maguire consulted the White House Counsel’s office and OLC. OLC concluded that the complaint did not present an “urgent concern,” the statutory predicate for reporting the conduct to Congress.<sup>375</sup> Disagreeing with Maguire, Atkinson informed the House Intelligence Committee of the whistleblower’s filing.<sup>376</sup>

OLC reasoned that there was no “urgent concern” necessary to trigger the statutory obligation to report to Congress. Because the subject of the complaint—the President—is not a part of the intelligence community and the complaint didn’t arise out of any intelligence activity, OLC concluded that it did not meet the standard.<sup>377</sup> As such, the Director of National Intelligence was

371. See, e.g., Roisman, *The Real Decline of OLC*, *supra* note 235.

372. See “Urgent Concern” Determination by the Inspector Gen. of the Intelligence Cmty., 43 Op. O.L.C., slip op. at 1–3 (Sept. 3, 2019), <https://www.justice.gov/olc/opinion/file/1205711/download> [<https://perma.cc/P3V5-S2GY>]. In analyzing this opinion, this section draws on two Twitter threads on the subject, by professors Steve Vladek and Shalev Roisman. See Shalev Roisman (@Shalev\_Roisman), TWITTER (Sept. 25, 2019, 3:19 PM), [https://twitter.com/Shalev\\_Roisman/status/1176939393161912320](https://twitter.com/Shalev_Roisman/status/1176939393161912320) [<https://perma.cc/9BLQ-382Z>]; Steve Vladek (@steve\_vladek), TWITTER (Sept. 25, 2019, 12:20 PM), [https://twitter.com/steve\\_vladek/status/1176894169459187712](https://twitter.com/steve_vladek/status/1176894169459187712) [<https://perma.cc/VZ7D-UPXB>].

373. See *Document: Read the Whistle-Blower Complaint*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/interactive/2019/09/26/us/politics/whistle-blower-complaint.html> [<https://perma.cc/UX2M-F6DS> (dark archive)].

374. See Quint Forgey, *Government Watchdogs Slam DOJ’s Opinion on Whistleblower Report*, POLITICO (Oct. 25, 2019), <https://www.politico.com/news/2019/10/25/doj-opinion-whistleblower-report-057612> [<https://perma.cc/QKY7-YMH2>].

375. See *id.*

376. See *id.*

377. See “Urgent Concern” Determination by the Inspector Gen. of the Intelligence Cmty., slip op. at 1–3 (interpreting 50 U.S.C. § 3033(k)(5)(G)(i) (2018)).

properly governed by a different statute that required reporting potential criminal conduct to the Attorney General rather than Congress.<sup>378</sup>

While there is nothing egregious in the legal reasoning of the OLC opinion, it still represents a violation of the obligations laid out above. The first problem is the decision to opine at all. The statutory scheme seems to give the Inspectors General the right to decide what constitutes an “urgent concern” without consulting OLC.<sup>379</sup> Given the highly charged political nature of the complaint, it would have been wiser to decline to enter the fray. Leaving other lawyers and officials to interpret the law when it is at least arguably their job would serve to preserve the role of OLC as nonpartisan legal advisor. Of course, if OLC had decided on constitutional grounds that the statute violated separation of powers concerns,<sup>380</sup> that might have been more central to its mission; but wading into a matter of statutory construction when it seems unambiguous that Congress intended the Inspectors General to interpret the statute themselves is problematic.<sup>381</sup> OLC should not have taken on the task of interpreting the meaning of “urgent concern” in light of the whistleblower’s allegation when Congress explicitly assigned that task to the Inspector General.

The OLC opinion includes two facts that have subsequently become Republican talking points but that are not relevant to the legal determination in the opinion. OLC notes first that the report was hearsay<sup>382</sup> and second that the Inspector General found some indicia of political bias on the part of the whistleblower.<sup>383</sup> Neither of these two facts, which go to the credibility of the whistleblower report, are necessary or even relevant to the legal determination at hand. But the opinion includes them anyway. Whether true or not, these unnecessary facts tend to make it seem as if the opinion has a broader political purpose to discredit the whistleblower’s report. It reads more like a brief or argument with a favorable narrative than an objective view of the law. Even if OLC’s choice to write this opinion was appropriate, it should have done so without including unnecessary facts that tend to make its position look partisan.

Finally, this opinion violated the principle, stated above, that OLC should not wade unnecessarily into highly partisan waters. The complaint went to Congress despite OLC’s legal opinion, so it had no practical effect. The opinion adds to the many recent highly partisan legal opinions but ultimately had no impact on the resulting government actions. It tends to undermine the

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378. *See id.*, slip op. at 2 (referring to 18 U.S.C. § 535 (2018)).

379. 50 U.S.C. § 3033(k)(5)(A)–(B) (2018).

380. The opinion explicitly notes that, by deciding on narrow statutory grounds, it was avoiding the larger constitutional issue. *See* “Urgent Concern” Determination by the Inspector Gen. of the Intelligence Cmty., slip op. at 5 n.5.

381. 50 U.S.C. § 3033(k)(5)(C).

382. *See* “Urgent Concern” Determination by the Inspector Gen. of the Intelligence Cmty., slip op. at 7.

383. *Id.*, slip op. at 4.

legitimacy of the OLC as a neutral body without any practical trade-off. If the legal opinion were crucial or necessary to a pressing concern, then OLC might have no choice; but where, as here, the opinion made no practical difference, it would be wiser to resist issuing an opinion at all.

It is important for OLC to retain its reputation as a source of excellent and neutral legal advice, while also remaining helpful to policy makers. This is not an easy balance because, if OLC offers excellent legal advice that goes against the administration's wishes, it may well be marginalized. The best way to address this concern may be to try to do less. If OLC is more modest and declines to opine on extremely partisan issues unless asked, it will be less tempted to compromise its ethical obligation to interpret the law in a disinterested way.

#### E. *Federal Prosecutors*

The most well-known federal prosecutor during Trump's administration has, of course, been Robert Mueller. Deputy Attorney General Rod Rosenstein appointed Mueller Special Prosecutor shortly after Trump fired former FBI Director James Comey.<sup>384</sup> Mueller was widely respected by both Democrats and Republicans and hailed as a fair, professional, nonpartisan choice.<sup>385</sup> But this reputation was soon buried under President Trump's vitriol as he repeatedly accused Mueller of leading angry Democrats in a "witch hunt."<sup>386</sup>

Mueller's 448-page report was released on April 18, 2019.<sup>387</sup> The report consisted of two parts. The first part found that Trump and his campaign had not engaged in a criminal conspiracy but detailed numerous instances in which members of the campaign, including Trump, encouraged and welcomed foreign interference in the 2016 presidential election.<sup>388</sup> The second part catalogued

384. See Press Release, Dep't of Justice, Appointment of Special Counsel (May 17, 2017), <https://www.justice.gov/opa/pr/appointment-special-counsel> [https://perma.cc/BA95-PVWZ]; Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html> [https://perma.cc/CQV7-SH6M (dark archive)].

385. See, e.g., Sean Sullivan et al., *Finally Something Democrats and Republicans Agree On: Former FBI Director Is Right Pick for Special Counsel*, WASH. POST (May 17, 2017), [https://www.washingtonpost.com/powerpost/finally-something-democrats-and-republicans-agree-on-former-fbi-director-is-right-pick-for-special-counsel/2017/05/17/32468266-3b20-11e7-9e48-c4f199710b69\\_story.html](https://www.washingtonpost.com/powerpost/finally-something-democrats-and-republicans-agree-on-former-fbi-director-is-right-pick-for-special-counsel/2017/05/17/32468266-3b20-11e7-9e48-c4f199710b69_story.html) [https://perma.cc/5MT7-6V3J (dark archive)].

386. See Sahil Chinoy, Jessie Ma & Stuart A. Thompson, *Trump's Growing Obsession with the 'Witch Hunt'*, N.Y. TIMES (Aug. 23, 2018), <https://www.nytimes.com/interactive/2018/08/22/opinion/trump-cohen-mueller-investigation.html> [https://perma.cc/QKK8-CG89 (dark archive)] ("Since May 2017, President Trump has tweeted more than 110 times about a 'witch hunt,' his way of diminishing the ongoing investigation into Russian interference in the 2016 election.")

387. See Dana Farrington, *Read: The Mueller Report, with Redactions*, NPR (Apr. 18, 2019), <https://www.npr.org/2019/04/18/708850903/read-the-full-mueller-report-with-redactions> [https://perma.cc/FE2U-NW4A].

388. See 1 MUELLER, *supra* note 306, at 2, 33–34.

several instances of the President's obstructive behavior but did not determine whether these incidents would constitute criminal obstruction of justice.<sup>389</sup> Several months later, on July 22, Mueller testified somewhat tepidly in Congress, and both political parties criticized the previously revered prosecutor.<sup>390</sup>

Assessing a prosecutor's job under the standards laid out above is difficult. It is difficult because most discretionary decisions are necessarily invisible to public scrutiny. Even the more public decisions, like Mueller's choice not to subpoena the President's testimony, are made privately, so it is unclear how a prosecutor reached a particular conclusion. Even if we had access to the decisionmaking process, it is hard to measure a prosecutor's discretionary decisions because they necessarily involve weighing different public interest concerns. Without access to all the facts Mueller and his team had at the time, it is impossible to assess whether and how well the prosecutor weighed those concerns. Not to mention that even if we did have all the relevant facts, reasonable prosecutors can disagree about priorities and the relative weight to place on different criminal justice concerns. There is no one prescription for how these concerns ought to be weighed or which ones deserve priority.<sup>391</sup>

Rather than assess any of these discretionary decisions, this section argues that Mueller followed DOJ policy, managed to find facts in a way that the public credited, and, under severe attack from the President and others, consistently appeared neutral, independent, and impartial. It is possible that Mueller's effort to appear impartial in the face of accusations to the contrary might have made him more reticent than he would otherwise have been. If the legitimacy of DOJ and his investigation in particular were not so consistently under attack, perhaps he would have offered his conclusion about the obstructive behavior or subpoenaed the President's testimony instead of settling for written responses. In his effort not to preempt Congress's impeachment role, he may also have been mindful to keep DOJ out of highly charged partisan politics at a time in which it was being challenged as a part of the so-called "deep state," a liberal holdover, impeding the democratically elected President.<sup>392</sup>

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389. See 2 MUELLER, *supra* note 306, at 182.

390. See, e.g., Olivia Beavers, *Democrats Express Private Disappointment with Mueller Testimony*, HILL (July 25, 2019), <https://thehill.com/homenews/house/454823-democrats-express-private-disappointment-with-mueller-testimony> [<https://perma.cc/GH4L-PDEH>]; Burgess Everett, Marianne Levine & Melanie Zanona, *Republicans Turn on Mueller*, POLITICO (May 1, 2019), <https://www.politico.com/story/2019/05/01/mueller-gop-attacks-1296824> [<https://perma.cc/H5BS-GEGG>].

391. See Green & Roiphe, *A Fiduciary Theory of Prosecution*, *supra* note 289, at 807.

392. See Mark Mazzetti & Katie Brenner, *Mueller Finds No Trump-Russia Conspiracy, but Stops Short of Exonerating President on Obstruction*, N.Y. TIMES (Mar. 24, 2019), <https://www.nytimes.com/2019/03/24/us/politics/mueller-report-summary.html> [<https://perma.cc/U7L7-ZH3B> (dark archive)].

Like Barr, Mueller was operating in a difficult climate, with the President consistently targeting him and his investigation. Mueller's success in preserving the reputation of his team as neutral, nonpolitical actors contrasts with Barr's inability to do so. Unlike Barr, Mueller did not lash out at the President for tweeting. In fact, he said almost nothing during the investigation. But it is at least possible he did make some choices differently with an eye toward preserving the legitimacy of his work. Instead of complaining publicly, Barr too could have gone out of his way to support the DOJ as an institution rather than publicly second guessing career prosecutors. If he truly believed that DOJ was behaving in a partisan way, he should have used proper existing mechanisms to investigate, rather than involving himself directly, defying DOJ policy, and seeming to do the President's bidding.

In the course of the investigation, Mueller referred several matters to United States Attorneys.<sup>393</sup> One worth noting is the Southern District of New York's prosecution of Michael Cohen, the President's attorney and fixer, for, among other things, campaign finance violations.<sup>394</sup> Prosecutors charged that Cohen engaged in campaign finance violations "'at the direction' of 'Individual-1,'" referring clearly to then-candidate Trump.<sup>395</sup> Cohen subsequently pled guilty to lying to Congress, admitting that he did so to serve the President's political interest.<sup>396</sup> The Southern District of New York seems to have acted disinterestedly, analyzing facts and interviewing witnesses. It pursued the facts and brought the case despite a barrage of criticism from the President himself.<sup>397</sup> Thus, it seems as best as we can tell that prosecutors, for the most part, lived up to the standards laid out above.

While Barr seeks to review these cases, there has, as yet, been no evidence of partisan bias. If anything, it seems as if Mueller and the other prosecutors involved have been reluctant to charge too aggressively. For instance, Mueller stated that while it is illegal to accept foreign assistance for a campaign and the President's son, Donald Trump Jr., clearly did just that, "the government would unlikely be able to prove beyond a reasonable doubt that the June 9 meeting participants had general knowledge that their conduct was unlawful."<sup>398</sup> Thus,

393. See Eliza Relman & Sonam Sheth, *Mueller Referred 14 Criminal Matters to Other Prosecutors, but Only 2 of Them Are Public So Far*, BUS. INSIDER (Apr. 18, 2019), <https://www.businessinsider.com/mueller-report-referred-criminal-matters-prosecutors-2019-4> [<https://perma.cc/BK98-LXBY>].

394. See *id.*

395. *Id.*

396. See Mark Mazzetti et al., *Cohen Pleads Guilty and Details Trump's Involvement in Moscow Tower Project*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/2018/11/29/nyregion/michael-cohen-trump-russia-mueller.html> [<https://perma.cc/2J9C-53DF> (dark archive)].

397. See Erica Orden, Rebecca Ballhaus & Michael Rothfeld, *Agents Raid Office of Trump Lawyer Michael Cohen in Connection with Stormy Daniels Payments*, WALL ST. J. (Apr. 9, 2018), <https://www.wsj.com/articles/fbi-raids-trump-lawyers-office-1523306297> [<https://perma.cc/E2J5-UACU> (dark archive)].

398. 1 MUELLER, *supra* note 306, at 187.



while prosecutors have been under significant pressure, there is no evidence that they have abandoned a neutral professional role.

#### CONCLUSION

DOJ has evolved over the course of a century and a half to manage a much more complex and vast federal criminal justice system. In expanding, it has come to be more specialized and perhaps more efficient, but it has also divided roles of lawyers in a way that preserves the independence, accountability, and efficacy of the office. One of the purposes and results of these expansions and added roles is that the Attorney General is now free to play a more overtly political role because he is personally no longer responsible for the fair interpretation or neutral enforcement of the laws. But in order to maintain the balance within DOJ, he simultaneously has assumed the responsibility for preserving the independence of DOJ and thereby protecting its legitimacy. He achieves this goal by filtering improper partisan concerns from those responsible for enforcing the law in a neutral, evenhanded way, but he also has a role in protecting the legitimacy of the institution. To do so, the Attorney General should not publicly allege political bias unless he has clear evidence and even then should avail himself of existing mechanisms to check abuse, rather than inventing his own.

As the examples from the Trump administration show, it is much harder for the Attorney General to preserve the legitimacy of DOJ when the President repeatedly comments on individual law enforcement decisions. It is not, however, impossible. Despite the President's repeated assaults, Mueller, for example, managed to conduct the investigation into Russia's meddling in the 2016 election in such a way that the public had, for the most part, faith in his factual findings. The Attorney General's role is more difficult if the President does not respect the independence of the institution, but as long as he follows norms, policies, and procedures, he too can do his part to preserve the legitimacy of DOJ.

The Solicitor General has assumed the more neutral role, reflecting a historical understanding of a part of the Attorney General's function as quasi-judicial. OLC is theoretically free to write opinions in a neutral manner, civil attorneys can represent the public interest as articulated by agency heads, and prosecutors are insulated from political pressure as they enforce the laws. As detailed above, this division of labor has worked to a large extent. Thus DOJ as a whole has stumbled toward a rational way to ensure that the lawyers who are supposed to be neutral remain so and those who ought to be responsive to administration priorities similarly can do their jobs. Politicians will be politically accountable for the policies they adopt rather than the people or entities they prosecute.

Of course, there needs to be centralized control over DOJ, and the Attorney General plays that role. But the professional norms, traditions, and practices described in this Article help ensure that the institution as a whole achieves a proper balance between responsiveness to the administration and independence from political will.

The system has worked, more or less, with momentary failings but its basic integrity intact. The Trump administration, however, has put a unique strain on the system, exposing how vulnerable this structural order is and how dependent it is on the integrity of individual DOJ lawyers. This Article leaves for another day whether DOJ and other government legal positions can be restructured so as to better protect this delicate balance. As an initial matter, it is helpful to understand, articulate, and continue to hold lawyers within the Justice Department responsible for the roles articulated above. It is reassuring that, despite the undeniably extreme pressure that DOJ lawyers have experienced in this administration, many have managed to live up to their roles and responsibilities, ensuring that, while the reputation of DOJ has been badly damaged during this administration, it has not been destroyed.

