

THE PRESIDENT AS CLIENT AND THE ETHICS OF THE PRESIDENT'S LAWYERS

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I

INTRODUCTION

For many, the exemplars of the unethical government lawyer are Attorney General John Mitchell and Counsel to the President John Dean, both of whom were sent to prison as a result of their excessively loyal service to President Nixon. Every attorney should easily acknowledge both that a lawyer has a high ethical duty of loyalty to his client and that this duty does not excuse, let alone require, the commission of crimes. Extreme examples like Mitchell and Dean can tempt us with the diametrically extreme view articulated by Attorney General Edward Bates: “[T]he office I hold is not properly *political*, but strictly *legal*; and it is my duty, above all other ministers of state, to uphold the law and to resist all encroachment, from whatever quarter, of mere will and power.”¹ Such vacuous pieties did not prevent Bates from adopting an exceedingly generous view of President Lincoln’s legal authority when political circumstances so demanded,² and it may well be doubted whether any government lawyer holding a political appointment has ever truly treated his office as completely apolitical.

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1. Arthur S. Miller, *The Attorney General as the President's Lawyer*, in AMERICAN ENTERPRISE INST., THE ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 41, 51 (1968) (quotation from unidentified source) (emphasis in original).

2. See Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74 (1861) (arguing that the President may lawfully deny a writ of habeas corpus in exigent circumstances even without congressional action to suspend the writ). Lincoln himself was apparently less sure than Bates about this conclusion, or at least was not sure it mattered. In a famous statement defending his refusal to obey such a writ, he asked:

Are all the laws but one to go unexecuted, and the [g]overnment itself go to pieces lest that one be violated? Even in such a case, would not the [President’s] official oath be broken if the [g]overnment should be overthrown when it was believed that disregarding the single law would tend to preserve it?

Special Session Message to Congress, July 4, 1861, 6 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 25 (J. Richardson comp., 1896).

Somewhere between the law, which imposes rules of conduct enforced by governmental sanctions, and the standards of sainthood or heroism, which by definition no one is expected to meet, lies a realm of ethical rules that supplement the criminal code. In the aftermath of Watergate, there were expressions of surprise that so many lawyers—of all people!—had been involved in illegal activities, and some discussion of the possibility of improving lawyers' ethics. What came out of this was mostly an expansion of the criminal laws and their enforcement mechanisms. The Independent Counsel law³ is the most conspicuous legacy of Watergate, and it has proved to have serious shortcomings. Countless millions of dollars in expenditures (direct and indirect) have produced few convictions for serious crimes, much agony for public officials who were eventually convicted of nothing, and no obviously discernible elevation in the conduct of public officials.

We may be at the threshold of a new debate about ethics in government, and about the ethics of government lawyers. One reason for thinking so is that the Independent Counsel statute itself has come under increasingly sharp and frequent attack. Although the spreading skepticism about the statute's value may be explained by the fact that Democrats have finally begun to be subjected regularly to the ministrations of Independent Counsel, a more interesting aspect of the recent debate has been its focus on ethical questions. Consider, for example, these incidents:

Without making any explicit accusations of illegal conduct, President Clinton has insinuated that Independent Counsel Kenneth Starr is improperly pursuing a politically motivated investigation. Asked whether he agreed with charges that Starr was "out to get the Clintons," the President responded: "Isn't it obvious?"⁴

One of President Clinton's private lawyers, David Kendall, has written to Starr saying, "The covert dissemination of both accurate and inaccurate information by your staff violates Rule 6(e) of the Federal Rules of Criminal Procedure, case law, Department of Justice Guidelines, rules of court and well-established ethical prohibitions." Starr replied that Kendall's charge was "unsupported," and said, "Fiercely aggressive representation, including through media grandstanding, cannot be an excuse for smearing a lawyer through reckless accusations."⁵

3. Title VI of the original Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867, which is now codified as amended and reenacted at 28 U.S.C. §§ 591-99 (1994). The 1978 Act is the most important post-Watergate ethics statute. After the Iran-Contra controversies, Congress returned to the subject with the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (codified as amended in scattered sections of 2, 3, 5, 10, 18, 22, 26, 28, 31, 37, 41, 42, & 50 U.S.C.).

4. *The NewsHour with Jim Lehrer*, (PBS television broadcast, Sept. 23, 1996) (transcript # 5661).

5. *Kendall: "A Deluge of Illegal Leaks"*, WASH. POST, Feb. 7, 1998, at A13.

First Lady Hillary Rodham Clinton has intimated that the President's own Attorney General, Janet Reno, became complicit in a "vast right-wing conspiracy" when she acquiesced in a request by Starr for an expansion of his jurisdiction.⁶

As this is written, in April 1998, one cannot know what will transpire from the manifold investigations and controversies involving the Clinton Administration. Nor can one know now what "lessons" will be drawn after the dust begins to settle. However, one thing seems fairly sure: that *someone's* ethical standards are going to be found seriously wanting. Whatever charges are eventually substantiated or discredited, we should expect renewed attention to the relations between law and ethics among government officials and those who monitor their behavior.

Lurid controversies like those currently surrounding the Clinton Administration seldom have as their principal effect the production of usefully disinterested analysis. Yet they often do raise serious questions that deserve such analysis. One set of such questions involves the ethical obligations of lawyers holding political appointments, especially in the White House and the Department of Justice. Whatever the verdict may be on various Clinton officials who have attracted suspicion,⁷ people in such jobs routinely encounter delicate questions about the propriety of taking political and personal loyalty to the President into account when making decisions about legal issues. Without claiming expertise in what has become the specialized field of legal ethics, I will suggest that it may be less useful than one might at first suppose to analyze these questions under that rubric. If this conclusion is correct, it raises new questions about the best means of controlling undesirable conduct by politically appointed lawyers.

6. In the course of describing a right-wing conspiracy involving Starr, Jerry Falwell, Jesse Helms, Lauch Faircloth, and the Special Division of the United States Court of Appeals for the District of Columbia Circuit, Mrs. Clinton was asked about the fact that Attorney General Reno herself had approved the expansion of Starr's jurisdiction to include matters arising from allegations involving Monica Lewinsky. Mrs. Clinton responded, "Well, you're—of course [Attorney General Reno] is, because she doesn't want to appear as though she's interfering with an investigation." *Today Show*, NBC television broadcast (Jan. 27, 1998) (interview with Matt Lauer).

7. Counsel to the President Bernard Nussbaum resigned in the wake of stories about his involvement in matters involving the First Family that were under consideration by an independent regulatory agency. See Douglas Jehl, *President Admits He Knew of Inquiry on Land Dealings*, N.Y. TIMES, Mar. 8, 1994, at A1. Deputy Counsel to the President Vincent Foster committed suicide after the controversial firings of several career employees in the White House Travel Office. See *In re: Vincent Foster*, WALL ST. J., Nov. 25, 1997, at A22. Associate Counsel William H. Kennedy III resigned, ostensibly for personal reasons, after he attracted criticism for his role in the Travel Office matter. See Alison Mitchell, *It's 1995, and They'd Rather Be in Little Rock*, N.Y. TIMES, July 30, 1995, § 4 at 3. Associate Attorney General Webster Hubbell resigned and then went to prison for crimes committed before he joined the Department of Justice; he apparently remains under investigation, possibly for conduct that may have occurred while he was in the government. See Jerry Seper, *Scandal Spurs Whitewater Probe; Many Aspects of Case Were Swirling When New Clinton Conduct Surfaced*, WASH. TIMES, Feb. 3, 1998, at A8.

II

ETHICS AND PROFESSIONAL ETHICS

"Ethics" can mean many different things, but the suppression of self-interest is almost always involved. Perhaps the most rigorous secular formulation is Kant's categorical imperative: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."⁸ In our world, neither law nor custom ever requires such purity. Instead, we settle for the partial suppression of the universal human tendency to treat humanity and other people as means to our own selfish ends. One consequence of the incomplete nature of our efforts to suppress self-interest is that we generate a multiplicity of ethical standards. Most obviously, ethical norms vary among nations and over time. Perhaps more important, however, we each encounter different ethical expectations in different areas of our lives. Consider, for example, the dramatically different duties that parents have to their children compared with the duties that employers owe their workers; or compare the duties that business partners have to each other with the mutual obligations between man and wife. People in some occupations, moreover, are held to ethical standards that might barely be recognizable as ethics to those in other lines of work.⁹

The most durable or successful ethical norms suppress self-interest in a manner and to an extent that the welfare of *both* those who are subject to the norms and those with whom they deal is enhanced. Take, for example, traditional medical ethics as symbolized by the Hippocratic Oath. Among other features, the Oath forbids physicians to kill their patients (even if another person who is paying the doctor's bill wants the patient killed); to perform useless but profitable treatments (even if the patient asks for them); to have sexual relations with patients (even eagerly consenting patients or legally powerless individuals like slaves); or to divulge a patient's confidences (even if the patient has not paid his bills).¹⁰ These rules require individual doctors to resist certain common temptations to engage in selfish behavior, but the Hippocratic Oath does not go so far as to demand altruistic acts such as providing free treatment to the indigent.¹¹

8. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS *429 (Lewis White Beck trans., 1959) (1785).

9. A retired soldier recently suggested to me that military lawyers and line officers often disagree about disciplinary proceedings because the lawyers are obsessed with "their rules" rather than with trying to figure out what is best for the soldiers. It is easy to imagine that many lawyers would consider the ethical "rules" that line officers find essential in promoting excellence in warriors equally offensive. For a useful account of some of the tensions that arise when attempts are made to instill a warrior ethic in people drawn from contemporary American society, see THOMAS E. RICKS, MAKING THE CORPS (1997).

10. For an English translation of the Hippocratic Oath and a thoughtful commentary, see LEON R. KASS, TOWARD A MORE NATURAL SCIENCE: BIOLOGY AND HUMAN AFFAIRS 224-46 (1985).

11. Cf. PRINCIPLES OF MEDICAL ETHICS, Principle VI (American Med. Ass'n 1980) *in* PROCEEDINGS OF THE AMERICAN MEDICAL ASSOCIATION HOUSE OF DELEGATES, 129TH ANNUAL CONVENTION 207 ("A physician shall, in the provision of appropriate patient care, except in emergen-

By offering assurances that physicians will behave as faithful agents for their patients' interests, the Oath encourages the sick to use doctors when they might otherwise resort to home remedies out of fear that a doctor might take advantage of their vulnerability and medical ignorance. The Oath thus reduces agency costs in the doctor/patient relationship, to the benefit of both parties: Doctors get more business and sick people more often get expert treatment.¹² By contrast, a rule requiring doctors to give their services freely to anyone who was unable to pay would not promote the *mutual* interests of doctors and patients. The Hippocratic Oath has little, if anything, to do with a categorical imperative or with the purity sought in Kantian ethics.

Professional ethics need not be confined to promoting the mutual interests of sellers and buyers. Until the practice was declared illegal under the antitrust laws, for example, codes of medical ethics commonly forbade physicians to charge their customers less than a fixed minimum price for specified services.¹³ Here again we encounter the suppression of self-interest, inasmuch as competitors are constantly tempted to raise their own incomes by lowering their prices and thereby "stealing" business from others. But the suppression is only partial. Even more so than in the case of the Hippocratic rules, it is obvious that an ethical restraint on such behavior is not altruistic: The physicians who adhere to such a price-fixing ethic are mutually benefited by the suppression of self-interested competition, just as in any other cartel.

Legal ethics have much in common with medical ethics. Like doctors, attorneys have been forced to remove explicit price-fixing rules from their ethical codes¹⁴ and to use other mechanisms in their attempts to suppress economic competition. Legally imposed barriers to entering these professions may be the most obvious such mechanism, but ethical rules affecting matters such as advertising and fee-splitting have continued to play their part.¹⁵ As in medical ethics, and perhaps more so, legal ethics has been especially preoccupied with rules addressing the natural conflicts of interest between seller and buyer. Like physicians' patients, lawyers' clients often must render themselves extremely vulnerable in the course of the engagement. A lawyer is frequently presented with

cies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical services.").

12. For a detailed discussion of the Hippocratic Oath's role in reducing agency costs, see Nelson Lund, *Two Precipices, One Chasm: The Economics of Physician-Assisted Suicide and Euthanasia*, 24 HASTINGS CONST. L.Q. (forthcoming 1998).

13. See, e.g., *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) (stating that price fixing by physicians *per se* illegal under Sherman Act); H.E. FRECH III, COMPETITION AND MONOPOLY IN MEDICAL CARE 65 (1996) (discussing the use of ethical codes to fix prices).

14. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (stating that minimum-fee schedule enforced under the rubric of professional ethics violates Sherman Act).

15. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.4, 7.1, 7.2, 7.3, 7.4, 7.5 (restrictions on lawyers' sharing legal fees with nonlawyers and on various forms of advertising). A series of First Amendment decisions in recent years has inhibited the legal profession's ability to suppress advertising by lawyers. For a useful review of the major cases, see Fred S. McChesney, *De-Bates and Re-Bates: The Supreme Court's Latest Commercial Speech Cases*, 5 SUP. CT. ECON. REV. 81 (1997).

opportunities to give bad advice that will maximize his own profit, for example by urging a client to continue litigating when the value to the client of prevailing (discounted by the probability of success) is less than the fee the lawyer expects to collect from the client. And attorneys are also frequently entrusted with information from which the lawyer could profit handsomely if he were free to use the information against his client's interest. Many of the rules of legal ethics are designed to suppress such behavior by individual lawyers in order to avoid discouraging potential clients from engaging attorneys. As with doctors, this produces more business for lawyers and more expert legal advice for clients, to the mutual benefit of both groups.

One difference between medicine and law lies in the nature, or variety, of the clients. Though physicians encounter many ethical dilemmas and insidious temptations in the course of their professional work, some of which arise when the patient is not the paying customer, doctors rarely face genuine difficulties in knowing who their patients are. However, unlike doctors, who ordinarily treat natural persons, lawyers are commonly engaged to represent artificial entities such as corporations, partnerships, and governmental organizations. In some cases, the ethical difficulties thereby created are essentially analogous to difficulties faced by doctors. Just as a doctor, for example, may be tempted to sacrifice the interests of his patient to the interests of the insurance company who pays the bills, so a lawyer may be tempted to sacrifice the interests of a corporation and its shareholders to those of the corporate officer who is actually responsible for the lawyer's engagement. In other cases, however, attorneys may face real difficulties in identifying their client with the precision needed to identify the lawyer's ethical obligations.

III

LEGAL ETHICS AND GOVERNMENT ETHICS

Perhaps the most important and interesting dilemmas arise for government lawyers. In most cases, their client is a legal fiction like "the United States" or "the Department of Agriculture." Even when the client appears on the surface to be a natural person, as when the validity of a regulation is challenged in a lawsuit against the "Secretary of Agriculture," such official-capacity suits are treated as actions against the agency itself.¹⁶ How, then, should a lawyer respond when faced with apparent conflicts between the interests of the agency or official he is representing—such as the Department of Agriculture or its Secretary—and the interests of the government as a whole (which is analogous to the corporation that employs managers and officers) or the public at large (which is analogous to the shareholders of a corporation)?

Years ago, Geoffrey P. Miller persuasively argued that agency attorneys owe their loyalty to the interests identified by the federal officer (usually the

16. See, e.g., FED. R. CIV. P. 25(d) (providing that upon the death or resignation of a public official who is party to a suit in his official capacity, the official's successor in office is automatically substituted as a party).

politically appointed agency head) who has the power of decision over the matter at issue.¹⁷ Professor Miller ruled out the interests of “the public” because they are too indeterminate, and he ruled out the interests of the government “as a whole” because Congress and the judiciary do not require the allegiance of agency attorneys to carry out their constitutional functions. Professor Miller concluded that it would be unethical for an agency attorney to assist his superiors only in very narrow circumstances, where those officials had no *bona fide* claim of constitutional power to act.

In Professor Miller's view, agency lawyers are ultimately responsible to the Executive: “[T]he attorney's obligation is most reasonably seen as running to the Executive Branch as a whole and to the President as its head.”¹⁸ But does this mean that the President is ultimately “the client,” or that the Executive Branch “as a whole” is the client, with the President merely serving as its voice? For most government lawyers, the question need hardly arise. There is a readily identifiable political appointee who serves as “the Executive's” representative to them: for agency attorneys, the head of the agency; for most Justice Department lawyers, an Assistant Attorney General or U.S. Attorney. In this scheme, government lawyers are required to pursue the lawful objectives identified by these representatives. Miller's analysis works well when one asks the question on which he focuses: Under what circumstances are agency lawyers ethically obliged to refuse assignments, to disobey orders, or to sabotage their superiors' policies? The answer is: “Almost never.”¹⁹

A more subtle kind of ethical issue, however, arises when one asks a different question: How much devotion and what kind of devotion are government lawyers required to give to the President's interests? That kind of issue tends to arise especially when lawyers have to exercise their own judgment *for the President* as to what his interests—or his legitimate interests—are.

Consider, for example, the political appointees who speak for the President to most other attorneys in the Department of Justice. They are at once lawyers with a client and officers of the United States who rarely consult the President about the decisions they make. The following hypothetical illustrates some of the uncertainties that can arise for those who have this role.²⁰

The Department of Justice recently suffered an adverse district court decision in a lawsuit involving the constitutionality of

17. See Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

18. *Id.* at 1298. As Miller recognizes, *id.* at 1298 n.8, this view is controversial, at least with respect to agencies whose heads have been statutorily insulated to some degree from removal by the President.

19. Catherine Lanctot has taken Miller's analysis a step further, showing that there are strong reasons for government lawyers defending civil cases to be governed by the same ethical rules as their private sector counterparts. See Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991).

20. Absolutely no inferences should be drawn from this hypothetical about any actual events or about the behavior or motivation of anyone who participated in any actual events.

a federal statute. That statute, which had been signed into law by the previous President, authorized a long-term lease of Yosemite National Park to the State of California on condition that major decisions by California in operating the park be subject to the veto of a state-created "Supervisors' Council." The statute required that the Council comprise individuals appointed by the state from among the members of the U.S. Senate's Committee on Environment and Public Works. The federal district court invalidated the Supervisors' Council mechanism as a violation of the separation of powers, holding that it constituted an illegitimate effort by Congress to exercise the President's Article II executive power.

In the initial stages of the litigation, the U.S. Attorney's office in California had as a matter of routine intervened in the litigation to defend the constitutionality of the federal statute. Participation in an appeal from the adverse district court decision requires authorization from the Solicitor General, Tina Brown.

Brown and her staff soon determine that a respectable legal argument can be made on either side of the principal question in the lawsuit. While there is no Supreme Court decision directly on point, the district court's holding is consistent with the spirit of a line of cases emphasizing that Congress may not delegate the administration of the laws to its own committees or to other officials under its control; the Supervisors' Council provision in the federal statute could be viewed as an effort to evade that prohibition. On the other side, it could be argued that the Supervisors' Council cannot violate the separation of powers because the Council, as a creature of state law, does not exercise federal power.²¹

Brown believes that the following facts are true:

1. The case is likely to be considered worthy of *certiorari* by the Supreme Court, and a decision upholding the district court's ruling would be a victory for the long-term interests of the presidency. In recent years, Congress has persistently been

21. The legal issue posed in this hypothetical is analogous to the issue in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991). In that case, the Court divided along somewhat unusual lines: six justices (Stevens, Blackmun, O'Connor, Scalia, Kennedy, and Souter) found a violation of the separation of powers, while three others (White, Rehnquist, and Marshall) argued that federal power was not exercised by the state-created entity.

seeking new ways to reduce the President's control over the administration of the laws, and the cumulative effects of these efforts threaten eventually to reduce the President's status to little more than a kind of chief clerk to Congress. The incumbent President has publicly and privately expressed his determination to resist this trend.

2. The transfer of control over Yosemite is extremely popular in California because it will enable the state government to finance much needed infrastructure improvements at the park, which Congress has been unwilling to fund. Because of fears that the state government will be tempted to exploit the park for short-term benefits and to cater overly much to the recreational preferences of those living near Yosemite, however, Congress would not be willing to make the transfer without retaining significant supervisory control over the state's management decisions.
3. Opposition by the current Administration to the Yosemite transfer plan might endanger the President's reelection. Election day is barely six months away, and the race is shaping up as extremely close. California's electoral votes could be decisive, and the polls show the President and his opponent neck-and-neck in that state. If the Yosemite plan becomes an issue in the race, it could tip the balance.
4. The senior Senator from California, who was the leading proponent of the Yosemite transfer statute, is also Chairman of the Judiciary Committee. Solicitor General Brown's nomination to a seat on the Supreme Court is now before that committee. Opposition to Brown's confirmation has arisen, and the opposition can probably be overcome only by strong support from the Chairman. By refusing to recommend an appeal in this case, Brown would almost certainly doom her chances of confirmation.
5. The President, who is not a wealthy man, has only one significant financial asset: a partial interest in the company that holds the concession for food sales in Yosemite. That company stands to benefit enormously from increased tourism stimulated by the infrastructure improvements that will be made if the park is transferred to California's control.

Which of these facts should affect Brown's decision, and how? The various codes of professional ethics, which were designed with private practice in mind, offer little direct guidance. Nor is it easy to adapt the spirit of such codes to cases like this.

One tempting approach would be to say that Brown should seek only to advance the long-term interests of the Executive in resisting congressional efforts to alter the inter-branch balance of powers. That result might follow from the theory that government lawyers properly represent the "office of the presidency" rather than any particular incumbent. This theory, however, suffers from what I regard as a fatal weakness. The President himself is under no legal obligation to make the defense of the presidency his paramount goal, and administration lawyers have no legal or ethical basis for substituting his office for him as their client.²² In our hypothetical, for example, it would be perfectly proper for the President to decide that the outcome of the Yosemite litigation is less important to the welfare of the country than securing Brown's confirmation by the Senate. Nothing in the Constitution demands that the President sacrifice the welfare of the nation to the interests of a litigation strategy aimed at maximizing the legal powers of the presidency.²³ Thus, if it is improper for Brown to decide that her confirmation by the Senate is more important than defending the office of the presidency, it can only be because of a potential conflict between her duty to represent the President faithfully and her interest in advancing her own career.

The obvious way to deal with such a conflict is through recusal, and the rules of professional ethics would seem at least to encourage that course of action.²⁴ In this hypothetical, however, recusal could have detrimental effects on

22. For further development of this point, see Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17, 17-28. For a contrasting view, see TERRY EASTLAND, *ENERGY IN THE EXECUTIVE* (1992).

23. It is true that the President takes a unique oath in which he promises that he "will to the best of [his] [a]bility, preserve, protect, and defend the Constitution of the United States." U.S. CONST. art. II, § 1, cl. 7; *cf. id.* art. VI, cl. 3 (requiring other officials to promise merely to "support" the Constitution). In the hypothetical, the President could reasonably believe that his choice for the Supreme Court appointment would contribute more than a brief in the Yosemite case to safeguarding the Constitution. Furthermore, the President's oath also requires that he "faithfully execute the Office of President," which entails the pursuit of many ends that may to some extent conflict with the most vigorous stewardship of the Constitution. *See id.* at art. II, § 1, cl. 7.

24. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1995):

A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. . . .

The Comment to this rule explains that a critical question is "whether [the conflict in question] will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." The Comment further explains that "[i]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."

If one makes the plausible assumption that a nominee to the Supreme Court has an extremely strong personal interest in being confirmed, it appears to follow that Brown would be required to recuse herself from the Yosemite decision even if the President consented to her making the decision. One way to escape this conclusion might be to argue that the conflict would not materially interfere

the President's interests. If the decision were left to a lower-ranking attorney in the Solicitor General's office, for example, it might well be decided merely on the basis of that lawyer's personal assessment of the relative strengths of the legal arguments. But if the Attorney General intervened to make the decision, it might create a damaging perception of a "politicized" litigation decision. Moreover, a recusal by Brown might itself offend or worry the Chairman of the Judiciary Committee: It could suggest to him either that Brown is the sort of person who tries to duck hard decisions or that she had been at least implicitly threatened by him. None of these side effects of the recusal would serve the President's interests, and it thus becomes less than obvious that recusal is the best choice. Though the question is not free from doubt, Brown might reasonably conclude that her representation of the President would not be adversely affected by her conflict of interest.

Although government lawyers will rarely face dilemmas quite so sharp as the one I framed in this hypothetical, lawyers holding political appointments like Brown's in fact face a virtually constant stream of decisions in which there is at least some potential conflict between their own career interests and their duty to represent the President's interests. Everyone who has had extensive dealings with such appointees has noticed that some of them give the most intense attention to advancing their own career interests while others seem more devoted to serving the President. Those in the first group might variously be regarded as unattractive self-promoters or as admirably ambitious, while those in the second group might be considered either laudably upright or pathetically naïve. Neither the rules nor the spirit of professional ethics, however, proscribe ambition or require genuine selflessness. For the reasons explored in Part II above, we should not expect that they would.

I suggest that it would be quixotic to create ethical rules for politically appointed lawyers that demand significantly more suppression of personal ambition than the rules that apply to private attorneys. Apart from the obvious and overwhelming obstacles to formulating administrable rules, presidents might on the whole be better served by agents with a passion for personal advancement than by those without it. Perhaps John Mitchell offers an illustration of this, for he apparently had the kind of personal integrity that made him remarkably indifferent to what others thought of him.²⁵ A thick skin may be a useful trait in a lawyer whose work mostly involves zealous advocacy on behalf of private clients, but it can be a somewhat dangerous virtue for those in public life. However that may be, it seems obviously more feasible to take advantage of peo-

with Brown's *professional* judgment or *foreclose* any reasonable course of action because the decision at hand in the Yosemite case requires an essentially political rather than legal judgment. Although this argument may seem strained if one assumes that the rules of professional ethics must be carried over as completely as possible into the realm of politically appointed lawyers, that assumption itself seems strained if one focuses on the fact that these officials have political responsibilities that make their jobs materially different from those of private practitioners or career government lawyers.

25. See, e.g., Lawrence Meyer, *John N. Mitchell, Principal in Watergate, Dies at 75*, WASH. POST, Nov. 10, 1988, at A1.

ple's personal ambition by channeling it through the use of incentives than to focus on trying to suppress it through ethics regulations. And Presidents already have considerable powers over the incentives that operate on their political appointees. Thus, whereas ethical rules work best when they are designed to promote the mutual interests of those affected by them,²⁶ rules that attempt to suppress ambition would seem to offer few systematic benefits either to presidents or to their subordinates.

Given that the President could legitimately decide that the fate of his Supreme Court nominee is more important than defending the interests of the presidency in the Yosemite litigation, perhaps it should be ethically acceptable for Brown to make the same judgment on his behalf—despite her personal interest in confirmation—in circumstances where her recusal could harm the President. In practice, I believe that most administrations would make every effort to shift the litigation decision to someone whose nomination was not before the Senate or at least to develop a consensus among senior Justice Department officials that would serve to diffuse responsibility for the decision. This may indicate that the dilemma I conjured in the hypothetical is merely academic. But a related kind of dilemma is not academic at all.

Consider the role of the President's own personal ambition in the Yosemite hypothetical. It seems plain that the President would not violate any law if he decided that his own reelection was more important than the results of the Yosemite litigation—despite the fact that his self-interest is heavily implicated in the decision. It is an accepted fact that elected politicians very frequently choose which policies to pursue in light of the effects their choices will have on their prospects for reelection. Indeed, the expectation that this will occur is an important reason for having elections. There undoubtedly are areas in which presidents and their subordinates are expected (if not legally required) to resist the urge to engage in political calculations, as with decisions about the use of military force and about criminal prosecutions. But the Yosemite case is far removed from such sensitive areas.

If the President is free to consider the needs of his reelection campaign in deciding what position to adopt in the Yosemite litigation,²⁷ is there an ethical obstacle to Brown's considering those same needs in making the decision on the President's behalf? If Brown's client is the President, it is very difficult to conclude that any such obstacle exists, and it is tempting to conclude that she

26. See *supra* Part II.

27. I assume here that Presidents have the right to dictate what positions the Department of Justice ("DOJ") will take, at least where there is room for reasonable disagreement as to what position is legally correct. For examples from recent administrations in which this right was exercised without controversy, see Paul M. Barrett, *Clinton Orders Justice Agency to Withdraw Brief*, WALL ST. J., Sept. 16, 1994, at B5 (reporting that DOJ withdrew previously filed appellate brief in bankruptcy case, and quoting the Department as saying, "The president has concluded that [the DOJ brief] adopted a narrower view of the Religious Freedom Restoration Act than his understanding of the meaning of the new statute."); Linda Greenhouse, *Bush Reverses U.S. Stance Against Black College Aid*, N.Y. TIMES, Oct. 22, 1991, at B6 (reporting that President Bush ordered DOJ to file a Supreme Court brief contradicting constitutional interpretation advocated in preceding brief in the same case).

may be ethically obliged to consider electoral politics to whatever extent she believes the President himself would consider them. Given the closeness of the legal issue in the Yosemite hypothetical, politics would then likely be the decisive factor.

To escape this conclusion, one would have to alter the assumption that the President is the client. But what is the alternative? As soon as one tries to substitute some other entity as the client—the “public” or the “United States” or the “Executive Branch”—one runs immediately into the difficulty that the genuine interests of these entities are hopelessly indeterminate or debatable. The result of such a substitution would be that Brown effectively displaces the President as the repository of the executive power that the Constitution vests in him.

In practice, politically appointed officials in the Department of Justice have no doubt frequently ignored the President’s political interests when making a wide variety of legal decisions. But has this resulted from constraints traceable to professional ethics? I think not. Rather, these officials operate in an environment that encourages them to behave as imperfect agents of the President. The requirement of Senate confirmation, for example, inhibits the President’s ability to staff the Justice Department with people whose controlling passion is political loyalty to him. The requirement of Senate confirmation for promotions from one senior government position to another has a similar effect. These effects are magnified, moreover, by informal factors such as the fact that political appointees in the Justice Department are surrounded by large numbers of civil servants on whom they must rely much more directly in performing their jobs than they rely on the President or his political aides in the White House. Along with the press—which generally (though not unfailingly) gives more favorable coverage to officials with a reputation (perhaps generated in part by leaks from civil servants) for an “apolitical” approach to government—these factors create powerful incentives for Justice Department officials to cultivate at least the image that Attorney General Bates so eloquently painted.²⁸

Note that the principal factors pushing officials to ignore the President’s political interests—despite the absence of an ethical duty to do so and possibly in violation of an ethical duty—have to do with those officials’ personal interest in creating a reputation for apolitical decisionmaking. The President himself, of course, also benefits if his Administration escapes being castigated for “politicized” legal decisions. But, inasmuch as it is the reputation that counts, not necessarily the reality, one would expect presidents to take measures designed to ensure that officials at Justice do take the President’s political interests into account, at least when it really matters. Professional ethics, I submit, cannot as a general matter prevent that from happening, nor should it. Indeed, efforts to frustrate political control over government lawyers by creating new ethical rules designed to encourage resistance to political control would likely

28. See *Miller*, *supra* note 1, and accompanying text.

result in little more than a shift of power from elected officials to unaccountable appointees and the press.²⁹

If Brown is permitted or even obliged to consider the President's personal interest in reelection, is she also permitted or obliged to consider the effect of her decision on his personal investments in the company holding the Yosemite concession? One recoils almost instinctively from giving an affirmative answer to this question, but once again it is difficult to anchor that response in the rules of professional ethics.

First, there is apparently no law generally forbidding Presidents from using government lawyers to handle their personal affairs.³⁰ More important for purposes of the Yosemite hypothetical, the presence of the President's personal business interest in the litigation decision does not convert that decision into nongovernmental work. Brown must make the decision,³¹ and the question is whether she should give any weight to the President's personal business interests. If she herself had a financial interest in the decision, the proper course of conduct would be clear, for she would be legally required to recuse herself.³² The conflict of interest statute that would require Brown's recusal, however, expressly exempts the President.³³ Accordingly, the President himself would be legally free to decide in favor of appealing the district court's decision, and to do so in order to enrich himself. This sharply distinguishes the Yosemite hypothetical from analogous situations in the corporate context, where lawyers are forbidden to assist company officials in breaching a fiduciary duty to the shareholders.³⁴ To the extent that the President has a "fiduciary duty" that might be

29. For an example of the corrosive alliances that can arise between journalists and their sources in the Justice Department, see LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987). This extended attack on President Reagan's second Solicitor General, who is supposed to have compromised the "rule of law" by accommodating the President's policy goals in briefs to the Supreme Court, is based largely on information and accusations provided by anonymous career government lawyers possessed by an extraordinarily expansive view of the rights conferred on them by their professional status. These accusations, many of which are uncritically accepted by Caplan, were manifestly motivated by disagreements with Reagan Administration policy, rather than by allegiance to actual standards of professionalism.

30. It is a crime for a government lawyer to prosecute claims against the United States or to represent anyone before government agencies "other than in the proper discharge of his official duties." 18 U.S.C. § 205(a) (1994 & Supp. II 1996). Apart from the fact that this prohibition applies only to certain limited activities, it is less than perfectly clear what limits there are on the President's ability to decide what is included within his subordinates' "official duties." Individual agencies may be affected by additional restrictions on the activities of certain of their employees, but these by definition would not constitute general restrictions on the President.

31. Assume here either that Brown's recusal is not required by the fact that her nomination to the Supreme Court is before the Senate or that the hypothetical is modified to eliminate that fact.

32. See 18 U.S.C. § 208 (1994).

33. See *id.* § 202(c).

34. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1995):

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

breached by the kind of self-dealing hypothesized here, a remedy is available only through the political process of impeachment.³⁵

Given this analysis, should Brown treat the President's personal financial interest in the same way that she should treat his personal political interest in reelection? As the hypothetical was framed, it would obviously be perfectly reasonable for Brown to assume that the President would want her to ignore his financial interest in making her decision, and I believe that almost any official in such circumstances would make that assumption. Suppose, however, that the lawyer who serves as Counsel to the President at the White House comes to Brown and tells her that the President is extremely worried about his personal financial condition. Furthermore, although the President has decided not to exercise his right to dictate a decision in the Yosemite case, he hopes that Brown will be able to decide in favor of appealing the district court's decision.³⁶ Brown could, of course, respond by resigning her position as Solicitor General on grounds of conscience or personal integrity, just as the Secretary of Defense could resign if he were ordered to conduct a military operation that he believed was motivated by the President's personal or political interests. But it is very hard to see how she would be obliged as a matter of professional ethics to do so, given that she has not been asked to behave illegally.

Brown could also throw the President's Counsel out of her office and dare him to have her fired. But it is even harder to see how professional ethics would oblige—or perhaps even permit—her to defy her client's wishes in this way. This conclusion seems to follow from the assumption that lawyers holding political appointments have as their client the President who appoints them and in whom alone the executive power is vested by the Constitution.³⁷ The conclusion is disturbing, I think, because the use of government attorneys to advance

35. The rules of professional ethics do not say whether lawyers are forbidden to assist clients in the commission of non-criminal, non-fraudulent impeachable offenses. Even if one assumes that a lawyer is impliedly obliged by professional ethics to refrain from assisting the President to commit what is clearly an impeachable offense, it is hardly clear that the hypothesized attempt at self-enrichment would be grounds for impeachment.

36. The Counsel to the President occupies a staff position in the White House, and is not subject to Senate confirmation. For more detail on the roles customarily filled by this official, see BRADLEY H. PATTERSON, JR., *THE RING OF POWER* 141-56 (1988); Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 *LAW & CONTEMP. PROBS.* 63 (Autumn 1993). The role I have assigned to the Counsel in this hypothetical should not be taken to imply that the people who have actually held this job would be more inclined than anyone else to play such a role. While it is probably true that White House staff on average have a higher degree of political and personal loyalty to the President than political appointees in the agencies do, my own experience suggests that there is too much variation within both groups to allow much in the way of useful generalizations.

37. See U.S. CONST. art. II, § 1. Apart from professional ethics, there is a body of federal regulations establishing ethics rules for executive employees in general. Some of these rules are so vague as to be almost meaningless. See, e.g., 5 C.F.R. § 2635.101(b)(7) (1998) ("Employees shall not use public office for private gain."). More specifically, employees are forbidden to use their offices "for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity." *Id.* § 2635.702. This rule would appear to allow the Solicitor General to use her office for the private gain of the President. Finally, employees are forbidden to induce their subordinates either to provide financial benefits to themselves or to use official time to perform work unrelated to their official duties, but the President is expressly exempted from these rules. See *id.* §§ 2635.102(h), 2635.702(a), 2635.705(b).

purely personal business interests smacks of a monarchical regime. No one thinks that the executive power vested in the President by the Constitution makes him the proprietor of the government's executive department, but the crass grasping for personal advantage in the hypothetical suggests just such a proprietary attitude.

Most recent Presidents have apparently been scrupulous about avoiding the use of government attorneys in conducting their personal affairs.³⁸ If Presidents and their lawyers were to prove untrustworthy in this respect, the obvious remedy would lie with Congress, which has ample and frequent opportunities to put restrictions (binding on the President and his subordinates) on the use of government employees and appropriated funds.³⁹ But if Congress fails to take such a step, why should government lawyers be obliged to fill the gap? Congress, after all, is also authorized to decide that the President should be allowed to use his legal staff for personal business, just as he is given a staff to attend to other personal matters such as his meals, health, personal travel, and housing. Whatever dispiriting possibilities may lurk in the lawyer-client relationship between Presidents and our legal officials, the prospect of "professional ethics" being used to convert unelected lawyers into unsupervisable policymakers seems manifestly worse.

IV

CONCLUSION

The rules and principles of professional ethics cannot sensibly be expected to substitute for personal integrity. Their principal use is to manage the inevitable conflicts of interest between lawyers and clients in a way that increases the welfare of both groups. As one can easily see from reading them, the codes of ethics adopted by the various states to govern the private practice of law have this as their main purpose. The rules promulgated in those codes translate reasonably well into a wide variety of governmental sectors, for a lawyer can usually take his politically appointed superior as the voice of the client, whether the client is conceived of as the employing agency or the President (or some more remote entity like the public or the United States).

For some government lawyers, however, especially the political appointees in the Department of Justice and the White House, the ordinary rules of professional ethics are not so useful. The genuinely difficult questions about right and wrong that they are most likely to face in the course of their work are inevitably going to be resolved, not by professional ethics, but by personal standards of integrity and by implicit or explicit bargaining with their appointing of-

38. This may only be generally, not universally, true. See, e.g., GREGORY S. WALDEN, ON BEST BEHAVIOR: THE CLINTON ADMINISTRATION AND ETHICS IN GOVERNMENT (1996); Paul Bedard, *White House Has Twice the Lawyers It Stated Earlier*, WASH. TIMES, Mar. 25, 1998, at A1; Ann Devroy & Susan Schmidt, *The Mystery in Foster's Office*, WASH. POST, Dec. 20, 1995, at A1.

39. Under the Anti-Deficiency Act, it is a felony to violate such restrictions. See 31 U.S.C. §§ 1341, 1350 (1994).

ficial, the President. For these lawyers, and even more for the President, the overwhelming reality is that character counts. We should not expect that to change.