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GOVERNMENT LAWYERS, DEMOCRACY, AND THE RULE OF LAW

*W. Bradley Wendel**

INTRODUCTION: GETTING THE CLICHÉS OUT OF THE WAY

What does it mean for a government actor to lack the quality of independence? Specifically, in connection with government lawyers, how should we understand core evaluative notions like the distinction between neutrality and partisanship? These terms are used casually as epithets—the Bush Justice Department’s independence was “shattered,” says one former government lawyer,¹ and the Department’s process of vetting job candidates was widely decried as “politicized” or ideological.² Naturally the other side uses the same terms of abuse. The Republican Party, in its 2000 platform, complained bitterly that “[a]n administration that lives by evasion, coverup, stonewalling, and duplicity has given us a totally discredited Department of Justice . . . [and] the unprecedented politicization of decisions regarding both personnel and investigations.”³ This sort of distinction, between politicization and impartiality, is not only familiar in contemporary rhetoric, but has a long historical pedigree. George Washington is reported to have wanted a neutral expounder of the law instead of a political advisor when he selected the nation’s first Attorney

* Professor of Law, Cornell University. Thanks to the participants in the Yale Legal Theory Workshop, workshops at Georgetown University Law Center, Queen’s University Faculty of Law, and Dalhousie Law School, and the Cornell Law School faculty retreat, for their helpful comments and criticism. For feedback above and beyond the call of duty, I am grateful to Jules Coleman, Tsvi Kahana, Daniel Markovits, Jeff Rachlinski, Mark Suchman, and Alice Woolley.

1. See Tony Mauro, *Justice Department’s Independence “Shattered,” Says Former DOJ Attorney*, LEGAL TIMES, Apr. 16, 2007, <http://www.law.com/jsp/article.jsp?id=1176455062969>.

2. For a typical attack on the George W. Bush administration, see John S. Koppel, Op-Ed., *Bush Justice Is a National Disgrace*, DENVER POST, July 9, 2007, at 1E (DOJ civil appellate attorney lambasting episodes of “politiciz[ation],” including the pardon of Scooter Libby, the abuse of warrantless surveillance, and the firing of U.S. Attorneys).

3. The American Presidency Project, Republican Party Platform of 2000, <http://www.presidency.ucsb.edu/ws/index.php?pid=25849> (last visited Feb. 4, 2008). Ted Olson—who was then former Reagan administration Office of Legal Counsel head, and subsequently would serve as President George W. Bush’s Solicitor General—also excoriated the politicization of the Clinton DOJ, including the FBI investigation of the White House travel office and alleged interference with the investigation of the death of Vince Foster. See Theodore B. Olson, *Politicizing the Justice Department*, in THE RULE OF LAW IN THE WAKE OF CLINTON 151, 252 (Roger Pilon ed., 2000).

General.⁴ In the wake of the Watergate scandal, Gerald Ford similarly lamented that “the Justice Department had become increasingly politicized for a quarter of a century. But the problem had reached crisis proportions by the time [he] became President.”⁵

Although the rhetorical power of this distinction is apparent, one does not have to push the analysis very far before the line between impartial decision making and bias becomes uncertain. One reason for this is the fairly banal point that all government policies discriminate in some way, and many discriminate on the basis of contestable values. It cannot be the case that government decision making has been impermissibly politicized just because the basis for the decision happens to line up with the policy preferences of the incumbent President. In fact, considerations of democratic accountability would seem to favor this outcome. Not only do government policies discriminate, but government decision makers act on the basis of reasons that may also overlap with the preferences of one side or the other of a political divide. If it is “partisanship” to base a decision on grounds that are congenial to Republicans and not to Democrats, or vice versa, then it would appear that most decisions made by government officials are partisan. Therefore, there would seem to be no way to criticize coherently a government actor for lacking the virtue of neutrality. Unsurprisingly, terms like neutrality, independence, politicization, and partisanship are woefully undertheorized in the literature on government lawyers’ ethics.⁶

The basic problem of the ethical responsibilities of government lawyers is easy to state, and generally well understood: the President has an agenda.⁷ People vote for presidential candidates in part on the basis of

4. See Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1308 (2000).

5. See Gerald R. Ford, *In Memoriam: Edward H. Levi*, 67 U. CHI. L. REV. 975, 975 (2000).

6. I do not mean that we cannot identify blatant examples of political inference with what should be an impartial process of decision making. For example, Colonel Morris Davis, the former chief prosecutor in the military commissions at Guantánamo Bay, resigned after being placed under the command of William J. Haynes, the civilian general counsel of the Department of Defense, who had previously indicated that acquittals in the commission hearings would be intolerable. When Colonel Davis noted there had been acquittals at Nuremberg, Haynes responded, “If we’ve been holding these guys for so long, how can we explain letting them get off? We can’t have acquittals. We’ve got to have convictions.” See Ross Tuttle, *Rigged Trials at Gitmo*, NATION, Feb. 20, 2008, at 4, 4; see also Morris D. Davis, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, at A15; William Glaberson, *Ex-Guantanamo Prosecutor to Testify for Detainee*, N.Y. TIMES, Feb. 28, 2008, at A18. If the concept of politicized decision making means anything, this must be an instance of it. The problem I want to pursue in this essay is that in *interesting* cases, not involving the exercise of raw coercive power and obvious rigging of procedures, we do not have a promising way to theorize the notion of politicization.

7. See, e.g., Steven G. Calabresi, *The President, the Supreme Court, and the Constitution: A Brief Positive Account of the Role of Government Lawyers in the Development of Constitutional Law*, LAW & CONTEMP. PROBS., Winter 1998, at 61, 66 (“American Presidents must, as a practical matter, have some kind of program for the Supreme Court and for the legal system as a whole. . . . [A]ll Presidents must, as a political

ideology. The winner of the election justifiably believes that he has a mandate from voters to pursue a particular political agenda. The President accordingly selects executive branch officials on the basis of their fealty to this agenda—again, not just because it is the President’s agenda, but because the content of the agenda has been set by a democratically legitimate process. The responsibility of these officials is, in part, to serve as agents of the President, faithfully executing the President’s agenda.⁸ At the same time, however, all government officials have an obligation of fidelity to the U.S. Constitution and the laws of the United States. The President takes a constitutionally specified oath to “preserve, protect and defend the Constitution of the United States.”⁹ Executive branch officials similarly are required to swear to support the Constitution.¹⁰ Lawyers advise all of these executive branch officials on how to act in compliance with the law. In a certain sense, to be explored in depth in this paper, federal government lawyers have a duty of impartiality or neutrality with respect to the Constitution and the framework of laws enacted by Congress pursuant to its constitutional authority.¹¹ Government lawyers who deviate too much from their obligation of fidelity to the law are criticized for “politicizing” their conduct, implying that it is possible to construct standards of impartiality that may be used as normative benchmarks.

The deeper theoretical problem, of which our inability to coherently sustain the “politicization” critique is a part, is the tension between two ideals of democratic self-government—collective self-rule through majoritarian political processes, and the rule of law (or, in the case of public law, constitutionalism).¹² The separation of law and politics is at the heart of the liberal ideal of the rule of law, which emphasizes the constraint on the arbitrary exercise of power by restricting the state to acting through relatively stable, determinate rules capable of being ascertained in advance by citizens.¹³ The irony, and source of an endlessly fascinating

matter, have some goals in mind while staffing the legal positions in their administrations . . .”).

8. See, e.g., Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1194–95 (2006) (“[P]olitics has an entirely appropriate role in the executive branch. By politics, I mean discretionary considerations of policy and even ideology, as opposed to the mandatory . . . constraints of legal rules.”).

9. U.S. CONST. art. II, § 1.

10. *Id.* art. VI.

11. I am talking about federal government officials here, and will analyze issues of federal government lawyers’ ethics throughout this essay, but the same analysis applies at the state level as well.

12. See Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1500–01, 1509, 1527 (1988).

13. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270–76 (1980); LON L. FULLER, *THE MORALITY OF LAW* 33–91 (2d ed. 1969); F. A. HAYEK, *THE ROAD TO SERFDOM* 76 (1944); JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 213 (1979). A few modern critics question this formal conception of the rule of law and argue that a system of norms must satisfy some substantive criteria, such as adequately protecting human rights, to be worthy of the label “law.” See,

jurisprudential puzzle, is that this restriction on state power must be given effect by creating some institution, itself part of the apparatus of the state, which acquires power by limiting the power of other institutional actors. The strategy of constitutionalism vests courts with the authority to invalidate the actions of the political branches on the basis of entrenched rights, the source of which is held to be some founding decision of "We The People," embodied in an act of collective self-constitution. It is to be expected, however, that interpretive questions might arise concerning the scope and limits of the entrenched rights against majoritarian actions, that the officials empowered to enforce the terms of the constitution will be making decisions that have a profound impact on the lives of citizens, and that those affected citizens will wonder why they should not have a say in defining the terms of the rights enforced against the institutions that more directly reflect their will.¹⁴ While the problem of the legitimacy of the power of unelected judges has been endlessly discussed under the rubric of the countermajoritarian difficulty, and there is a burgeoning literature on executive branch constitutional interpretation,¹⁵ considerably less attention has been paid to how the same jurisprudential puzzle arises when thinking about the ethics of lawyers acting as advisors to government officials.¹⁶

e.g., RONALD DWORKIN, *Political Judges and the Rule of Law*, in *A MATTER OF PRINCIPLE* 9 (1985); Lord Bingham, *The Rule of Law*, 66 *CAMBRIDGE L.J.* 67 (2007).

14. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

15. See, *e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L.J.* 541 (1994); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *ARK. L. REV.* 23 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *HARV. L. REV.* 1153 (1992); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, *LAW & CONTEMP. PROBS.*, Summer 2004, at 105; Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1 (1994); Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 *CARDOZO L. REV.* 201 (1993); Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 *MICH. L. REV.* 676 (2005); Saikrishna B. Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 *YALE L.J.* 991 (1993). By comparison, less scholarly attention has been devoted to the issue of legislative constitutional interpretation. For an important recent contribution to this area, see the essays collected in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* (Richard W. Bauman & Tsvi Kahana eds., 2006).

16. The relevant lawyers under consideration here are acting in an advisory capacity—rendering legal opinions on the permissibility of government action, or even helping to design and execute government policy. Lawyers acting as counselors are, in effect, lawgivers with respect to an action, except in the event the action is made the subject of a litigated dispute. By contrast, government lawyers in litigation contexts have more latitude to urge creative or aggressive interpretations of law. The obligation of lawyers representing clients (including public agencies) in litigated matters is still fundamentally to exercise fidelity to law, but the law in that case includes procedural entitlements and rules of evidence that enable lawyers to place more reliance on adversarial procedures, rather than their own beliefs about what the law permits. Litigation advocacy can be seen as an indirect strategy

The aim of this essay is to hold on to the distinction between faithful interpretation of, and advising on, the law, and improper politicization of the role of government lawyers, while acknowledging that considerations of democratic legitimacy require that the President have considerable discretion to establish a substantive, ideologically nonneutral policy agenda. There is a middle ground here, in which government lawyers may be called upon to resist the impermissible influence of politics and ideology, but not because there is an ideologically neutral standpoint from which policies and actions can be evaluated. Rather, as *lawyers*, these government officials can differentiate between permissible and impermissible exercises of state power with respect to the content of the law. There is no claim here that the content of law is ideologically neutral.¹⁷ Instead of seeking a conception of legal legitimacy in which neutrality is central, we can rely on a thinner conception, in which a necessary condition of legal legitimacy is the procedures by which legal norms are enacted and interpreted. This is still a liberal account, in that some considerations are excluded as an acceptable justification for government decision making. But the exclusion does not work on standard law-politics lines.¹⁸ Some considerations may be “political” in the sense that they form part of a larger ideological project, but are nevertheless considerations that may properly count in favor of a legal judgment.

Accordingly, the foundation of a theory of government lawyers’ ethics should be the obligation of fidelity to law enacted by tolerably fair procedures, which supersedes the values (characterized as political, ideological, or whatever) that would ordinarily constitute the ethics of some public role.¹⁹ A system of political institutions enables people who would otherwise disagree intractably, and perhaps violently, to live together peacefully, cooperate on common projects, and enjoy at least some moderate amount of social solidarity. Legal norms are legitimate, which is to say entitled to respect by citizens, because compliance with the demands of reason *in communities* requires some kind of coordinating device to take account of the competing claims asserted by people who may not be able to resolve their disagreements using reason and persuasion alone.²⁰

for ensuring fidelity to law, while advising and transactional representation requires a more direct strategy.

17. For claims that the law must be ideologically neutral in order to be legitimate, see, for example, ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 66–67 (1976) (criticizing liberalism for being unable to solve the problem of arbitrariness, in the sense that any legal restriction placed on the ability of one person to satisfy her desires will necessarily benefit some individuals more than others).

18. *Cf.* Owen Fiss, *The Death of the Law?*, 72 *CORNELL L. REV.* 1 (1986) (distinguishing politics, which is about “mere” preferences, from adjudication, which is aimed at applying, or even creating, public values).

19. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 42, 48, 58–61 (1986).

20. See FINNIS, *supra* note 13, at 136, 317–18 (“[T]he complexity of human community . . . is often lost sight of by those who attempt to explain one order of reality using exclusively techniques of analysis suitable for another order. . . . [T]he formulae expressive of legal obligation . . . fit into and give a special conclusory force to the practical

Admittedly, this is a thin conception of the legitimacy of law, particularly as compared with republican, deliberative, or dialogic notions of law-creation through participation or the contestation of legal meanings.²¹ As we will see, however, I think there are good reasons to favor thinning out the grounds on which agreement is necessary in order to secure legitimacy. If this approach is borne out, it has significant implications for the way we understand the ethical obligations of lawyers acting in any context, but particularly as legal advisors to government officials.

I. THE INADEQUACY OF THE STANDARD APPROACHES

A. *Interpretive Controversies in the Executive Branch*

To illustrate and help draw contrasts among the competing theoretical foundations of a conception of government lawyers' ethics, it will be helpful to refer, as an extended case study, to one of the controversies arising from the Bush administration's claims of virtually unlimited executive power. To summarize a complicated story, lawyers in the Justice Department's Office of Legal Counsel (OLC) had initially approved a program whereby the National Security Agency (the government service responsible for electronic surveillance, spying, and wiretapping) would be permitted to record telephone conversations without first obtaining a search warrant or court order.²² The administration sought this permission despite the existence of a streamlined process for obtaining permission to conduct electronic surveillance for national security purposes, established by a statute called the Foreign Intelligence Surveillance Act (FISA).²³

Administration lawyers considered two legal arguments to justify the President's authority to approve wiretaps without going through the FISA procedures. First, they argued that the Authorization for Use of Military Force (AUMF), passed by Congress soon after the September 11, 2001

reasonings of those who see and are generally willing to act upon the need (for the common good) for authority.”).

21. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

22. For the background on the warrantless wiretapping program, the Foreign Intelligence Surveillance Act, and the executive-power controversy, see Barton Gellman & Jo Becker, 'A Different Understanding with the President,' WASH. POST, June 24, 2007, at A1; Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007, at A1; Carol D. Leonnig & Dafna Linzer, *Judges on Surveillance Court to Be Briefed on Spy Program*, WASH. POST, Dec. 22, 2005, at A1; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; Michael J. Sniffen, *Ex-Surveillance Judge Criticizes Warrantless Taps*, WASH. POST, June 24, 2007, at A7; Suzanne E. Spaulding, *Power Play: Did Bush Roll Past the Legal Stop Signs?*, WASH. POST, Dec. 25, 2005, at B1. A great deal of this reporting is recounted in ERIC LICHTBLAU, *BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE* (2008).

23. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. § 1801 (2000)).

attacks, in effect superseded FISA for any intelligence-gathering activities that could help prevent a terrorist attack.²⁴ Second, some lawyers within the administration advanced a position that, as a matter of constitutional law, the President has the inherent authority as Commander-in-Chief of the armed forces to authorize the collection of signals intelligence on enemy forces, notwithstanding limitations imposed by FISA. The internal debate over the legality of the program came to light in a dramatic fashion several years later, when former Deputy Attorney General James Comey testified before the Senate Judiciary Committee about the refusal of then Attorney General John Ashcroft to certify the legality of the program when it came up for reauthorization in March of 2004.²⁵ Ashcroft had acted on the advice of Jack Goldsmith, who had reviewed the program when he became the new head of the OLC.²⁶ Then White House Counsel (later Attorney General) Alberto Gonzales attempted to secure Ashcroft's approval of the program while Ashcroft was recovering from surgery in a Washington hospital.²⁷

24. The Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. V 2005)). The AUMF provides,

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id. The Justice Department's arguments were summarized in a letter to the ranking majority and minority members of the House and Senate Intelligence Committees following disclosure of the warrantless wiretapping program by the *New York Times*. The Justice Department also made available a longer "White Paper" containing more detailed versions of the arguments. Both letters provoked responses from a group of legal scholars and former government lawyers who had served in both Democratic and Republican administrations. The principal criticism of the Justice Department's position can be found in a letter signed by numerous legal scholars and former government officials published in the *New York Review of Books*. See Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. BOOKS, Feb. 9, 2006, at 42, available at <http://www.nybooks.com/articles/18650>. All of the relevant letters were published in an issue of the *Indiana Law Journal*, with an introduction by David Cole and Marty Lederman. See David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355 (2006). The commentary of several legal scholars, including Marty Lederman, Jack Balkin, and Stephen Griffin, on the *Balkinization* blog were invaluable in summarizing the many complex legal issues involved. See Posting of Jack Balkin to *Balkinization*, <http://balkin.blogspot.com/2006/12/anti-torture-memos.html#PartIV> (Dec. 22, 2006, 14:31 EST).

25. The debate had been reported previously, see, e.g., Eric Lichtblau & James Risen, *Justice Deputy Resisted Parts of Spy Program*, N.Y. TIMES, Jan. 1, 2006, at A1, but the story did not really take off until almost eighteen months later, when James Comey testified about the dramatic attempt at an "end run" around John Ashcroft. See *Hearing on the U.S. Attorney Firings Before the Sen. Judiciary Comm.*, 110th Cong. 23 (2007) (statement of James B. Comey, Attorney Gen. of the United States).

26. Jack Goldsmith has stated that he is not permitted to discuss the legal basis for the administration's so-called Terrorist Surveillance Program. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 182 (2007).

27. Dan Eggen & Paul Kane, *Gonzales Hospital Episode Detailed*, WASH. POST, May 16, 2007, at A1.

In fairness to the OLC lawyers who initially authorized the surveillance, who come off looking like a bunch of partisan hacks in some versions of this story, these lawyers sincerely believed their view of the law to be sound, even if it had not been generally accepted by courts. They certainly had a coherent, forcefully argued theory of executive power, and were not troubled by taking a position outside the “mainstream,” because they believed they were at the forefront of legal developments in this area.²⁸ In their view, the September 11th attacks should be regarded as a paradigm-shifting event, which courts will eventually recognize as having fundamentally altered the normative landscape. In the meantime, it is the job of lawyers to push for legal change, either in litigation or by taking creative positions when counseling clients. To my contention that it cannot be the case that the professional responsibility of lawyers is merely to provide a veneer of legality, these lawyers would respond that their advice is not a sham, but is respectful of the law, as long as “the law” is not interpreted in such a static way that it can never respond to pressure for change. Moreover, one must resist the temptation to criticize their approach with reference to subsequent decisions of the U.S. Supreme Court that rejected many of the most sweeping claims made by the Vice President and his allies.²⁹ The plausibility of a legal judgment cannot be judged only in hindsight, but must be evaluated to the extent possible from the *ex ante* point of view. The law can change unexpectedly, and old verities suddenly swept away. Reasonable professional judgment is not the same thing as clairvoyance.³⁰ The relevant evaluative standpoint for the plausibility of a judgment is the state of the law at the time the lawyer provided the advice, with allowances made for what a member of the professional community would regard as a reasonable argument for the extension, modification, or reversal of existing law.

Because there is some superficial plausibility to the OLC lawyers’ position, it would appear difficult to base an ethical critique of these lawyers on their failure to exhibit fidelity to the law. In particular, these lawyers might respond that there are multiple potentially correct interpretations of the governing law, and all they have done is rely on the interpretation that is the most congenial to their client’s ends. What can be

28. For scholarly support of the strong executive power thesis in foreign affairs, see, for example, Calabresi & Prakash, *supra* note 15; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999); John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305 (2002); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002).

29. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

30. In fact, allies of Vice President Dick Cheney have raised exactly this argument, claiming that the U.S. Supreme Court “‘decided to change the rules,’” as opposed to emphatically restating the existing law that the administration had been ignoring. Barton Gellman & Jo Becker, *The Unseen Path to Cruelty*, WASH. POST, June 25, 2007, at A1 (quoting former Deputy White House Counsel Timothy Flanigan).

wrong with this? As I discuss in Part III, we need not withhold criticism, on the grounds of disrespect for the law, just because there is a superficially plausible interpretation, as judged by the standards of an apparently legitimate interpretive community. It is possible to deny the legitimacy of the interpretive norms of certain communities where those norms fail to track the conceptual requirements of legality. However, recognizing the challenge of making this position stick, I first review some alternative grounds for criticizing or approving of the conduct of these lawyers. These positions, the subjects of Parts II.B and C, respectively, are that (1) the principal ethical obligation of any lawyer, for a public or private client, is to pursue the client's lawful *interests*, with the "lawful" qualification not imposing much in the way of limitation, because of the indeterminacy of the law; and (2) the ethical obligation of government lawyers is to act in the public interest, and in particular to facilitate a process of dialogic engagement between the state and citizens, over the content of the public interest.

B. Public Choice

The position I am defending here requires lawyers to exhibit fidelity to the law when advising their clients. Lawyers can thus be criticized for politicizing the advice they give to clients if the advice deviates from what the law, impartially interpreted, would permit or require. One who is inclined to reject this conception of ethical government lawyering might fall back on the analytical tools of public choice theory, particularly the emphasis on the interests of various players—government officials, pressure groups and lobbyists, the other branches of government, and lawyers themselves. On the public choice account, the President competes with the other branches of government, and other actors within the executive branch, over the scarce good of determining government policy.³¹ A lawyer, as the faithful agent of her client, seeks to advance her client's interests through any lawful means. From this perspective, the politicization critique is literally vacuous, because political actors should not be understood as pursuing the public's interests or exhibiting fidelity to the law.³² Rather, executive branch officials, career bureaucrats, agency

31. See, e.g., Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671 (1992); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

32. See John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 381 (1993) (defining, among three models of executive branch lawyering, a "situational model," in which "the President simply interprets the law to advance his political objectives, taking into account precedent or legal principles only to the extent that they may create a political obstacle to fulfilling those objectives").

lawyers, and citizens should be understood as competing to maximize their share of the scarce good of government policy. Although lawyers may have their own interests, they are required, by contract and agency law, to serve as fiduciaries of their clients. If the client has an agenda, it is the lawyer's job to advance it, as long as the client's preferred course of action does not contravene applicable law. (Or, in a more extreme version, as long as the client is unlikely to be caught and punished for engaging in a course of action.) In the context of government lawyering, the "client" is generally understood to be an executive branch agency, which may have its own agenda and policy differences vis-à-vis other government actors.³³ The lawyer's duties therefore must be understood with reference to these interests—a government lawyer, like any lawyer, may offer advice, but beyond that should not interfere with the client's liberty to take any lawful action.³⁴

Sophisticated public choice theory can illuminate inter- and intrabran­ch conflicts, as well as suggest ways that perverse incentives may affect decision making by government officials and their advisors.³⁵ It cannot, however, do any *normative* work in a theory of government lawyers' ethics if one believes there really is a distinction between impartial interpretation and execution of the law as it exists, and simply getting away with something.³⁶ In other words, the public choice alternative is that it cannot account for the distinction between de facto power and legitimate authority. "Do X" may be the preference of a government official, but "It is legal to do X" cannot be restated in public choice terms in a way that captures the reason-giving force of law. It is central to the concept of legality that it changes the normative situation of citizens and government officials. Anyone who claims to care about having her actions described as lawful, as opposed to "something I got away with," is thereby committed to viewing the law as creating reasons for actions as such. The linchpin of this expressivist argument is therefore the purpose for which a citizen or a government official engages the law. She may be interested only in describing and predicting certain patterns of behavior among fellow citizens, in which case it is perfectly appropriate to take an external perspective on the law. If she is interested in acting lawfully, however, her practical reasoning necessarily proceeds from a perspective in which the law imposes genuine obligations—what H. L. A. Hart called the internal

33. See Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1116 (1994).

34. See Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 449 (1993).

35. See, e.g., JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997).

36. Strictly speaking, public choice is a *positive* theory, an attempt at an explanation of behavior, not a normative theory, which is an attempt at a justification. In practice, however, the positive and normative uses of public choice theory are often run together by legal scholars, generally relying on broadly consequentialist axiological assumptions. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487 (2006).

point of view.³⁷ The internal point of view is mandated by the conjunction of *action*, as opposed to observation (for which an external perspective would be adequate), and the evaluation that an action is *lawful*, as opposed to merely something that one can get away with. If this relationship holds, then acting under law while regarding the law from an external point of view would be on a par, normatively speaking, with robbing a bank and successfully asserting an alibi defense, or bribing a prosecutor to drop charges. The actor would have managed to avoid sanctions, but the evaluation of the action would be that it was wrong from the standpoint of a relevant normative framework, that of legality.

The appeal to the discourse of legality is natural when one wishes to assert not only that one wants something, or has the power to obtain it, but that it is *right* that one have it. For something to be a legal right, it must be an aspect of a legal system, which is necessarily connected with the interests and values of a society, not the individual. Legality is the normative domain in which citizens seek to “transform[] brute demands into assertions of right[s].”³⁸ This transformation necessarily commits one to a certain pattern of explanation and justification. This is the case for participants in any practice, whether players in a game, initiates of a religious vocation, political officials, or, in this case, citizens who seek the ascription of lawfulness for their actions.³⁹ Participating in social practices entails accepting the authority of internal, practice-dependent regulative standards as guides to behavior, and accepting the legitimacy of criticism based on those standards. These regulative standards are not arbitrary, but have their origin in some ultimate state of affairs or value that is the aim of the social practice of which they are a part.⁴⁰ The regulative standards of the practice have authority for a participant because of the participant’s voluntary act of “opting in” to the practice.⁴¹ It would be a conceptual error for participants to regard the norms of a practice from an external point of view, because to participate in a practice means to aim at the end for which the practice is constituted, and doing this requires conformity to the internal regulative standards of the practice. Thus, the “bad man” perspective on

37. For further argument on this point, see W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473 (2006).

38. I owe this useful phraseology to Daniel Markovits. See Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 FORDHAM L. REV. 1367, 1385 (2006).

39. I use the term “practice” here in the sense, developed by Alasdair MacIntyre, of “any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity.” ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY OF MORAL THEORY* 187 (2d ed. 1984).

40. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955). In the postscript to the second edition of *The Concept of Law*, H. L. A. Hart explains the internal/external distinction with reference to the practice conception of rules. See H. L. A. HART, *THE CONCEPT OF LAW* 254–55 (2d ed. 1994).

41. MACINTYRE, *supra* note 39, at 190.

any practice is ruled out by the act of avowing that one is a participant rather than an observer.⁴²

Applying all of this to public choice theory, it should be apparent that it is insufficient, from a normative point of view, to assert that the duty of a government lawyer is to maximize the likelihood that her “clients”—a particular agency, for example—will prevail in some struggle for control over the policy-making agenda. Descriptively, it may be the case that “Congress, the federal courts, and other agencies can and should protect their own interests.”⁴³ This does not mean, however, that ascertaining the interests of one’s political superiors exhausts the practical reasoning of government lawyers, *if* lawyers are concerned to attribute a special legal significance to their advice. It may be that lawyers care only about keeping their political superiors out of trouble, in which case the expressivist argument set out here would not have much bite. It may be the case that political superiors are looking only for political cover in the form of an opinion from a lawyer authorizing the conduct; this may be different in important ways from a lawyer’s advice that the conduct is lawful.⁴⁴ To the extent a lawyer’s legal advice is intended in good faith, however, it is simply incoherent to render it without regard to the actual content of the law, as opposed to the likelihood of punishment, the interests of the various parties, and other considerations that may be weighed as costs and benefits.

With respect to the politicization critique, it would be a mistake to rely on public choice theory to argue that there is really no such thing as politicized legal advice. An oversimplified public choice approach to government lawyers’ ethics might be to instruct lawyers simply to pursue the interests of their agency clients—to be “zealous advocates” of these positions when there is some conflict with other branches of government or political opponents outside of government. This conception of the duty of government lawyers will not do because it omits the concept of lawfulness entirely. As lawyers (in both private and government practice) sometimes forget, the little mantra describing their duties is actually “zealous representation *within the bounds of the law*.”⁴⁵ That means that the interests of clients—political or otherwise—are not the only consideration

42. See Rawls, *supra* note 40, at 25–26.

43. Macey & Miller, *supra* note 33, at 1116.

44. For example, David Luban has argued that, with respect to legal advising on the treatment of detainees and permissible interrogation techniques, the Bush administration desired, and Justice Department lawyers provided, only the pretense of legal advice, in order to provide political cover for doing something that the administration was committed to doing anyway. DAVID LUBAN, *The Torture Lawyers of Washington*, in LEGAL ETHICS AND HUMAN DIGNITY 162, 163–65 (2007).

45. The Restatement provides that the lawyer’s basic duty is to “proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (2000). The term “zealous advocacy” derives from the ethical considerations in the ABA’s Model Code, promulgated in 1969. See MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1969) (“A [l]awyer [s]hould [r]epresent [a] [c]lient [z]ealously [w]ithin [t]he [b]ounds [o]f [t]he [l]aw.”).

to be taken into account. Instead, the lawyer's job is to pursue the interests of the client, but only to the extent it is legally permissible to do so. I do not believe legal permissibility is a matter of making simple, binary judgments that the law either does or does not permit something. The law does not work like that, and there may be a range of reasonable, good faith disagreement over what is legally permitted. The underdetermination of legal judgments by existing legal materials (texts, immanent principles, interpretive methodologies, and so on) creates the possibility that a lawyer's advice may be deemed more or less well supported. There is usually a confidence dimension attached to legal advice, so that lawyers' judgments come in the form of a two-place variable. Lawyers are accustomed to thinking in this way, even if they do not always communicate their doubts to clients, so that the conclusion of legal research and analysis might be, "I'm pretty sure you can do that," or "You can give it a shot, but I expect it won't work." More formally, an interpretive judgment would consist of $N = (x, y)$ where N is the conduct the client wishes to engage in, x is the lawyer's judgment about a substantive entitlement, and y is the confidence dimension.

The politicization critique can therefore be restated in terms of (1) how much confidence a lawyer must have in an interpretive judgment before advising a client that it can do what it wants to do, and (2) how much "creativity" we are willing to tolerate in legal interpretation before we conclude that a lawyer is not interpreting the law in good faith, but is instead providing "plausible deniability" or a veneer of legality to cover a lawless act by the client. In the context of government lawyering, particularly the opinion function of the Attorney General and the OLC, there is a well-known debate over whether lawyers should be "neutral expositors" of the law, offering the best view of what the law actually is, reasoning from a quasi-judicial point of view—or whether lawyers are permitted to push the envelope and rely on interpretations that are defensible but farther from the core of the best available interpretation of the law.⁴⁶ To put it another way, must executive branch lawyers faithfully follow existing court decisions, or is their independent opinion function less constrained than a judge's discretion in a comparable case? No one really questions the principle that executive branch officials must independently make judgments about the legal permissibility of some course of action; the separation of powers doctrine vests each branch with a substantial measure of autonomy, including the responsibility to evaluate the legal basis for their activities. The question, instead, is whether an executive branch

46. See John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988); McGinnis, *supra* note 32; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

official may act on the basis of a judgment that diverges from what the judiciary would decide, if it considered the case.

At this point in the argument, critics of the neutral expositor model engage in a subtle sleight of hand. John McGinnis's formulation is typical:

The strongest argument for executive independence with respect to the analytical judgments of the Court rests on the notion that even these judgments need to be subject to challenge by another institution with a *different* perspective. The distinctive institutional perspective of the executive branch, however, rests precisely on the fact that it is closer to the popular will.⁴⁷

The italicized word, "different," slyly suggests that the executive and judicial branches may simply have a disagreement about the right way to interpret the law, and that is all that can be said about the matter—you say tom-ay-to, I say tom-ah-to. If the disagreement were just a matter of taste or preference, then McGinnis would be correct to favor the interpretation of the branch with a closer connection to the will of the people. But notice how we are supposed to take for granted that all disagreements over legal interpretations come down to questions of taste.

McGinnis's argument implicitly denies that lawyers in the executive branch and judges can reach intersubjective agreement on the correctness of legal judgments, so that disagreements over interpretation are simply a matter of preference, as opposed to one of the interpreters having gotten it wrong. If McGinnis is correct about this, then there really is nothing left of the politicization critique. While this may be too strong, the public choice critique can be restated in a moderate form in cases in which reasonable minds can differ over the correct interpretation—not because there is no such thing as objectivity, but because genuine (i.e., objective) uncertainty exists over the best way to interpret existing law. Lawyers commonly give advice of the form, "I'm pretty sure you can do that, but there's a risk that a court won't go along," or, "While I think it's a bit of a stretch to argue that the AUMF supersedes the warrant requirement in FISA, it's not a ridiculous argument, so if you're willing to accept the risk of losing in court, you can go for it." No one disputes that if a court has rendered a binding judgment, executive branch officials are duty-bound to respect it. There is nevertheless uncertainty over the binding effect of legal principles that have been invoked in support of past judicial decisions.⁴⁸ In essence, the neutral expositor view instructs executive branch lawyers to consider those principles and other underlying reasons, and render the same decision as an ideal judge, who is concerned to come up with the best interpretation of the law—to show the law in its best light, as Ronald Dworkin puts it.⁴⁹ Superficially, at least, this seems odd. Lawyers and judges occupy discrete roles in the legal system, and should be expected to have different

47. McGinnis, *supra* note 32, at 381–82 (emphasis added).

48. See generally Merrill, *supra* note 46.

49. RONALD DWORKIN, *LAW'S EMPIRE* 225, 256 (1986).

responsibilities. The adversary system—to say nothing of the separation of powers doctrine—enacts a normative division of labor among various institutional actors, responding to political needs such as limiting government power and enhancing accountability. Lawyers for private clients, at least in litigation, need not assert only legal positions they believe to be the best view of the law, or even reasonably well founded. As long as a legal argument is not lacking in any foundation whatsoever, it is permissible to urge it to a court.

I have never understood why this argument from the adversary system is thought to prove anything about legal advising outside the litigation context. The argument proceeds by taking the lawyer's litigation-advocacy role as the baseline, and then demanding a justification for any deviation from that baseline. Regarding executive branch lawyers, the arguments that have been offered, from history, the text of the Constitution (particularly the Take Care Clause and the presidential oath of office), and constitutional structure, are inconclusive.⁵⁰ Thus, goes the appeal to the adversary system, we do not have a sufficient reason to deviate from the baseline conception of the lawyer's role. But why should we take the lawyer's litigation-related duties and permissions as the baseline, and not as a special case? In my view, the obligations of lawyers, as agents of clients, have to be understood with reference to the client's legal entitlements. In any principal-agent relationship, including the attorney-client relationship, the agent's rights and obligations are derivative of those of the principal. Someone who retains a broker to sell property empowers the broker to transfer only whatever title the owner has. Similarly, a lawyer's professional role is defined with reference to the rights and duties vested in the client by the law. This principle pervades the law governing lawyers, including specific rules of tort, agency, and constitutional law as they apply to lawyers. For example, as the agent of the client, the lawyer retains inherent authority, which cannot be overridden by agreement with the client, to refuse to perform unlawful acts.⁵¹ Regarding the Sixth Amendment's guarantee of the effective assistance of counsel to criminal defendants, the Supreme Court held in *Nix v. Whiteside* that a criminal defendant cannot complain if his lawyer refuses to permit him to perjure himself at trial because a lawyer's duty is "limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth."⁵² As Justice Harry Blackmun noted in his concurring opinion, the client had no *legitimate* interest that conflicted with his lawyer's obligation not to present perjured testimony.⁵³

50. See CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 48–80 (considering historical examples of more or less political Attorneys General). Compare Moss, *supra* note 46, at 1312–14, with Merrill, *supra* note 46, at 53–54 (assessing the Take Care Clause as the source of the duty to serve as a neutral expositor).

51. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 23(1) (2000).

52. *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

53. *Id.* at 187.

Litigation is a special case because lawyers are permitted to assert the *arguable* legal entitlements of clients, leaving it up to the workings of the adversary system to evaluate whether the lawyer's position is plausible. Even in the litigation context, however, the rights and permissions of lawyers are ultimately grounded in their clients' legal entitlements. Lawyers may not assert constructions of law that are not adequately grounded either in existing law or in a good faith argument for the extension, modification, or reversal of existing law.⁵⁴ Lawyers have an obligation to disclose controlling legal authority not cited by their adversary, an obligation that does not extend to factual evidence not discovered by opposing counsel.⁵⁵ Advocates have been severely sanctioned for stretching legal arguments too far and not candidly informing the court of the limitations of their position.⁵⁶ Even in litigation, fidelity to law is one of the fundamental obligations of the lawyer, along with loyalty to the client. The difference between the litigation and counseling contexts is that, in litigation, lawyers share responsibility with other institutional actors for ensuring that the law is not distorted or misapplied. In the counseling context there is no institutional mechanism, comparable to adversary briefing, oral argument, and appeal, to ensure that the lawyer's proposed interpretation of law is the correct one. Thus, lawyers have what feels like a heightened obligation of fidelity to law, but in reality the obligation is the same—it is just not shared with coordinate institutional actors.

To turn the burden-of-proof argument around, one who contends that a government lawyer need provide only a colorable legal basis for a proposed course of action has the burden to explain why a lawyer, seeking to ascertain whether a client has a legal entitlement to do something, should be content to get the answer only approximately right, or should aim for the best answer. Consider a comparable professional principal-agent relationship, such as a patient seeking medical advice. Suppose the doctor could provide a colorable diagnosis or the best diagnosis, with roughly the same investment of time and effort. It is hard to imagine a patient who would be content with anything less than the best diagnosis the doctor was able to provide. In the legal counseling context, the reason clients seek merely colorable advice is that they are interested in getting away with something that is not a genuine legal right. In the FISA example, if it would be a real stretch to believe that the AUMF supersedes the FISA warrant requirement, and the better view of the governing law is that it does not, the lawyer would be offering two alternatives—what the client's right probably is, and what the client's right likely is not. Granting that the administration's interest in this case is to avoid the warrant requirement, I do not see how that interest changes the normative situation of the lawyer,

54. FED. R. CIV. P. 11; MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007).

55. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2).

56. *See, e.g., Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346 (Fed. Cir. 2003).

whose role is defined by the obligation to ascertain and apply the client's legal entitlements. Deliberately relying on the less plausible interpretation of the applicable law is nothing but an evasion of the basic responsibility of a lawyer. Again, if a matter is in litigation, we permit lawyers to urge less plausible interpretations of law, because we think the adversary system needs some input of interpretive creativity if it is to remain sufficiently flexible to adapt to changing circumstances. In the counseling context, however, a lawyer's job is to find the limits of the client's legal entitlements, because the client is only permitted to act with legal authorization.⁵⁷

In summary, the shortcoming of the public choice approach to lawyers' ethics is that it denies that lawyers can have any genuine obligation of fidelity to law. The public choice theorist asserts that we may talk in normative terms, using the language of duties and "oughts," but all of these would-be obligations are really just roundabout ways of saying that there would be negative political repercussions to appearing to act lawlessly. If it is possible to act lawlessly and get away with it, lawyers have no duty to advise their client against that course of action and, indeed, if it is in the client's interests, the lawyer may have a duty to assist the client. On the level of ordinary-language analysis, one might ask the public choice theorist why she bothers using words like "lawful" and "right" when what she really means is "what my client can get away with." A more natural interpretation of that language is that lawyers and government officials really do mean to avow, when they use the language of obligation and right, that they are acting with reference to some normative considerations that are independent of their interests.

C. Civic Republicanism and the Public Interest

A very different fallback position, which would allow one to criticize government lawyers for politicized decision making, is to appeal to a notion of the public interest. This position is a staple of the self-justifying rhetoric of government lawyers—present or former Attorneys General, or nominees for the office. As President Carter's Attorney General, Griffin Bell, stated in a lecture at Fordham University School of Law, "Although our client is the government, in the end we serve a more important constituency: the American people."⁵⁸ Courts similarly state that government lawyers have an obligation to see to it that justice is done, not simply to maximize the likelihood that the client's interests will be achieved.⁵⁹ However, this is not just empty rhetoric for graduation speeches. It has been offered in this form

57. See Moss, *supra* note 46, at 1315–16.

58. Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1069 (1978).

59. See, e.g., *Freeport-McMoRan Oil & Gas Co. v. Fed. Energy Regulatory Comm'n*, 962 F.2d 45, 47 (D.C. Cir. 1992) (chiding attorneys for the Federal Energy Regulatory Commission for not taking an opportunity to settle ongoing litigation and noting that "government lawyers have obligations beyond those of private lawyers").

as a sophisticated alternative to the view, dominant among practicing lawyers, that the lawyer's role is primarily to be understood with reference to client interests, with the law understood as nothing more than an obstacle standing in the way of their clients' ends.⁶⁰ In addition, there is a long tradition in political philosophy, associated with the ideal of the rule of law, of understanding the principal obligation of government officials as acting in the public interest.⁶¹

Significantly, the public interest is not understood in rational-choice terms, as the aggregation of preferences through some procedure of majoritarian decision making. In civic republican theory, the public interest is expressly contrasted with the will of (perhaps transient) political majorities. Frank Michelman, for example, criticizes the Supreme Court's *Bowers v. Hardwick* decision for its assumption that "public values meriting enforcement as law are to be uncritically equated with . . . the formally enacted preferences of a recent legislative or past constitutional majority."⁶² Because it is now accepted wisdom that executive branch officials—not just the courts—have a role in enforcing the law, the implication of Michelman's critique is that government lawyers—as well as judges—should not concern themselves only with "the formally enacted preferences of a recent legislative . . . majority."⁶³ As law constantly re-creates itself in line with the public reasons of citizens, its precise contours remain uncertain, subject to contestation in the dialectic process of politics. In other words, Michelman would instruct government lawyers not to be legal positivists and not to enforce only those public values that have an appropriate democratic pedigree.

The natural response to this antipositivist move is to point out that government decisions are supposed to be traceable back to some manifestation of the popular will. When lawyers act on what they take to be the public interest, they usurp power that should belong to the people as a whole.⁶⁴ We would not bother having elections if it were clear what the public interest requires, not only for the epistemological reason that

60. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003); Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 177, 180 (Robert L. Nelson et al. eds., 1992); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 242 (1992); William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565 (1985).

61. See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 272–73 (1980) (arguing that one aspect of the rule of law is fundamentally about "holding . . . the rulers to their side of a relationship of reciprocity, in which the claims of authority are respected on condition that authority respects the claims of the common good").

62. Michelman, *supra* note 12, at 1496.

63. *Id.*

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

elections provide information on the preferences of citizens, but also for the deeply moral reason that *de facto* power is insufficient to justify the claim by the state to possess authority.⁶⁵ Michelman, however, calls this answer “both lazy and presumptuous.”⁶⁶ Political freedom means *both* collective self-rule and government by laws.⁶⁷ These two conceptions of freedom can be best reconciled by understanding the legitimacy of the product of a political process in terms of shared, collective participation, not merely the aggregation of antecedent preferences. In Robert Cover’s term, politics must be *jurisgenerative*—i.e., capable of transforming private persons into public-regarding citizens.⁶⁸ The political process must be structured in such a way that it does not simply feed in exogenous preferences as inputs, and produce laws as outputs, according to some aggregation process. Instead, the political process must permit citizens to persuade each other, to alter their pre-existing preferences, and to work together as a community, in the name of the interests of the society as a whole. Citizens must act nonstrategically, be open to persuasion, and be committed to acting from a kind of idealized first-person-plural point of view, as opposed to trying to maximize the satisfaction of their preferences.

I tend to regard this whole line of thought as far-fetched, not because it is not appealing to imagine the kind of community it presupposes, but because it is ill suited to serve as a regulatory ideal for a large-scale, decentralized, complex, pluralistic society. There are at least three reasons for this. The first pertains to the motivation to participate in jurisgenerative politics: a sizeable number of would-be citizens are in fact concerned only to maximize the satisfaction of their preferences, and regard politics as a zero-sum game. If it is a necessary condition of political legitimacy that people are open to persuasion, a broad swath of law would have to be regarded as illegitimate. The second is that most people simply are not committed to any point of view with regard to the technical details of government policy, but the function of politics and law is frequently to settle on those pesky technical details. This is particularly true where there is agreement at a high level of generality but, as the saying goes, the devil is in the details. Even assuming a general consensus that, for example, taxation should be generally (but not too steeply) progressive, there will still be a great deal of disagreement at the level of application, such as how mortgage interest and retirement savings should be treated for tax purposes. A related objection is that the technical details in question may pertain to the procedures used to handle debate and settle on the position that will be adopted in the name of

65. See BERNARD WILLIAMS, *Realism and Moralism in Political Theory*, in *IN THE BEGINNING WAS THE DEED* 1, 5 (Geoffrey Hawthorn ed., 2005) (defining the “Basic Legitimation Demand” as a constitutive element of “there being such a thing as politics”).

66. Michelman, *supra* note 12, at 1498.

67. *Id.* at 1500–01.

68. Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11, 15 (1983).

society.⁶⁹ It seems unlikely that deliberation will yield real consensus on important matters (a point elaborated below), so we need some way to reach at least provisional agreement—"an uneasy compromise, subject to constant renegotiation,"⁷⁰ which is at least final enough to enable coordinated action for the time being. If deliberative engagement does not produce consensus, some procedure will have to be adopted to resolve the disagreement, but if consensus is required on how these procedures are to be structured, then the result may be an infinite regress of unsettled disagreement. Third, and of the greatest theoretical interest, politics may inevitably involve compromises, and have a zero-sum nature, because many of the issues at stake in politics are not susceptible to rational resolution.

Human experience, and the goods and values associated with it, is sufficiently complex that it is impossible to reduce all of these goods and values to some higher-order, master value that can be used to rank and prioritize competing ethical considerations.⁷¹ Competing values may be *formally* different, in that some pertain to things we have reason to care about from an impersonal perspective (i.e., consequences), while others depend on seeing ourselves as in some way the source of value (agent-relative reasons, such as deontological considerations).⁷² These microlevel value conflicts may represent conflicts within a single conception of the good life or they may represent conflicts between rival visions of human flourishing. As Isaiah Berlin argued, there are many different ends people may pursue, and still be recognized as fully rational, and fully human; there are multiple *objectively valuable* things that individuals and cultures may regard as fulfilling and worthy objects of attainment.⁷³ The attainment of one of these ideals often requires the subordination or abandonment of others.⁷⁴ There is no possibility of a life which embodies certain goods or virtues without excluding others.⁷⁵

69. See Don Herzog, *Some Questions for Republicans*, 14 POL. THEORY 473, 487–88 (1986).

70. *Id.* at 488.

71. See, e.g., JEREMY WALDRON, LAW AND DISAGREEMENT 112 (1999) ("On any plausible account, human life engages multiple values and it is natural that people will disagree about how to balance or prioritize them.")

72. See CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 131–34 (1987); THOMAS NAGEL, MORTAL QUESTIONS 128–41 (1979) (discussing the fragmentation of value). David Ross famously listed categories of *prima facie* moral obligations, arising from different circumstances of human existence, including duties of loyalty, gratitude, beneficence, nonmaleficence, and perfectionist duties. See W.D. ROSS, THE RIGHT AND THE GOOD 20–21 (1930).

73. See, e.g., Isaiah Berlin, *The Pursuit of the Ideal*, in THE CROOKED TIMBER OF HUMANITY 10–11 (Henry Hardy ed., 1990).

74. STUART HAMPSHIRE, MORALITY AND CONFLICT 146 (1983).

75. Isaiah Berlin, *Two Concepts of Liberty*, in CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY 369, 413 (Robert E. Goodin & Philip Pettit eds., 1997) ("[W]e are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others. . . . [I]t seems to me that the belief that some single formula can in principle be found whereby all the diverse ends of men can be harmoniously realised is demonstrably false. If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of

These goods are incommensurable in that there is no way that one can rationally judge one way of life to be better than another, or of equal value. For Berlin the primary significance of this observation was political. One of the central themes in his work is that human history teaches us to be extremely wary of any claim to political legitimacy and authority that is founded upon a claim that the rulers have accurately discerned the “true” nature of their subjects.⁷⁶ “In the ideal case, liberty coincides with law[;] autonomy with authority,”⁷⁷ but this is true only if human beings have only one true purpose, and “the ends of all rational beings must of necessity fit into a single universal, harmonious pattern.”⁷⁸ Berlin’s striking observation is that the worst tyrannies and the most utopian hopes for human salvation through government shared the Platonic belief that there is only one rationally appointed order for human life.⁷⁹ It would be a dramatic overstatement to say that directing government officials and government lawyers to act directly on their perception of the public interest would lead to tyranny. However, it may nevertheless be the case that government decisions based on an official’s beliefs—even sincere, good faith beliefs—about morality are lacking in legitimacy.

One might respond that deliberative or jurisgenerative politics can exist despite moral pluralism and the incommensurability of values. Michelman himself accepts that, arguing that it is impossible to understand even a fairly thin conception of democratic legitimacy without positing the “mutual and reciprocal awareness [of citizens] of being co-participants not just in this one debate, but in a more encompassing common life.”⁸⁰ But he seems to slide a bit too easily from the possibility of participation in a shared experience—“the possibility of cases in which [legal] validation occurs when participants, rather than abandoning their commitments, come to hold the same commitments in a new way”⁸¹—to a necessary condition of legal validity. A great many laws would appear to fail this test for validity, since many do not arise as the result of any public debate at all, and among those that do, many result from compromises between positions that remain unaltered. In fairness to Michelman, he is talking about constitutional law,

conflict—and of tragedy—can never be wholly eliminated from human life, either personal or social.”).

76. *Id.* at 403–04.

77. *Id.* at 404.

78. *Id.* at 407.

79. *Id.* at 405 (“The sage knows you better than you know yourself, for you are the victim of your passions, a slave living a heteronomous life, purblind, unable to understand your true goals. You wish to be a human being. It is the aim of the State to justify your wish. . . . [H]umanity is the raw material upon which I impose my creative will; even though men suffer and die in the process, they are lifted by it to a height to which they could never have risen without my coercive—but creative—violation of their lives. This is the argument used by every dictator, inquisitor, and bully who seeks some moral, or even aesthetic, justification for his conduct.”).

80. Michelman, *supra* note 12, at 1513.

81. *Id.* at 1527 (quoting HANNA FENICHEL PITKIN, *FORTUNE IS A WOMAN: GENDER AND POLITICS IN THE THOUGHT OF NICCOLO MACHIAVELLI* 279 (1984)) (internal quotation marks omitted).

not ordinary laws of less moment, but the tenor of much writing on civic republicanism tends to valorize participatory politics and the possibility of the transformation of prelegal preferences through engagement with one's fellow citizens.⁸² What Michelman objects most strongly to is legal positivism, i.e., "the view that judicial power cannot be legitimate unless its exercise consists, in the final analysis, of the translation of directions uttered in the past by someone else."⁸³ To be a positivist is to accept that the content and validity of any law is fundamentally a matter of social fact, and the relevant social facts are generally the past utterances of institutional actors such as legislators and judges. If this is the case, then it is an empirical matter to discover the content of the law—one simply looks at the relevant sources to determine what judges have relied upon as reasons for their decisions. Metaphorically, one can draw a boundary line separating reasons that are "inside" the law from those that are "outside" the law. Armed with this information, one can then criticize, as failing to respect the obligation of impartiality, government lawyers who make reference to reasons outside the law when justifying a would-be legal interpretation. On the other hand, if some kind of moral or political argument is required to differentiate between law and nonlaw, it is not simply an empirical matter to draw a boundary separating inside from outside. The distinction between law and nonlaw would be evaluative and contestable, and would make reference to the very sorts of political, ideological, and policy reasons that may or may not be part of the law.

The claim that the possibility of a value-free or apolitical distinction between law and nonlaw is untenable is also at the heart of Ronald Dworkin's theory of law. Dworkin argues that "judicial decisions in civil cases . . . characteristically are *and should be* generated by principle not policy."⁸⁴ For Dworkin, the distinction between reasons of principle and reasons of policy is that principles can be shown to be consistent with past political decisions made by other officials (judges and legislators) within a general political theory that justifies those decisions.⁸⁵ Policy reasons, in contrast with principles, may refer to moral norms but these are not norms that belong to *this particular society's* political morality.⁸⁶ Reasons of principle are therefore "inside" a particular society's law and reasons of policy are "outside" the law of that community, but note that for Dworkin, "the law" must be understood in an idiosyncratic way. Hart claims that for any legal system, there is a master rule for distinguishing law from nonlaw; this is the rule of recognition.⁸⁷ He further insists that the existence and

82. This is a major theme of the work of Daniel Markovits. See Markovits, *supra* note 38; Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897 (2004); Daniel Markovits, *Legal Ethics from the Lawyer's Point of View*, 15 YALE J.L. & HUMAN. 209 (2003).

83. Michelman, *supra* note 12, at 1522.

84. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 84 (1977) (emphasis added).

85. *Id.* at 87–88.

86. *Id.* at 22, 90–92.

87. HART, *supra* note 40, at 100–10.

content of the law can be determined without reference to moral criteria.⁸⁸ Dworkin challenges both the existence of a rule of recognition and the content-independence of law. He denies that a rule of recognition can ever be formulated because moral argumentation is necessary to establish the existence of legal principles.⁸⁹ Reasons of principle are controversial in the sense that they cannot simply be “read off” the law in a straightforward way without arguing that they are justified on the basis of the normative political theory.⁹⁰ There can be no source-based criteria for identifying legal principles. Reasons given by judges in precedent cases must be understood as arguments of political theory about what the law *should* be.⁹¹ The practice of making and justifying legal judgments is therefore normative all the way down.

The question is, therefore, why one should be a positivist and not subscribe to Michelman’s view that legal interpretation is not a matter of uncovering what has happened in the past, but is a dynamic process of creating one’s normative universe, or Dworkin’s view that the law consists in part of principles, which embody the community’s political morality. For if Michelman and Dworkin are right, there is a strong case that lawyers in government service are out to contribute to the process of jurisgenesis by urging political officials to act on a conception of the public interest, even if it is presently contested. A theory of lawyers’ ethics is therefore connected to a theory of law by the question of what sorts of considerations “count” as law, and therefore should be taken into account by lawyers advising their clients on the legality of a proposed course of action. Michelman and Dworkin resist the separation of law and politics by arguing for a conception of law, and a conception of politics, in which law and politics are two sides of the same coin. In response, some legal positivists may rely on conceptual arguments, like Joseph Raz’s well-known authority argument.⁹² Alternatively, positivists may offer normative (or maybe better described as functional) arguments, relying on the point of having law in the first place.⁹³ Something like the debate about the nature of law cannot be settled solely by conceptual analysis; progress depends, instead, on having some idea of why we care about questions like whether there are legal principles, and how they are different from legal rules and extralegal

88. *Id.* at 269. Hart stressed the content-independence of law in papers written after the first edition of *The Concept of Law*. See H. L. A. Hart, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243 (1982).

89. DWORKIN, *supra* note 84, at 40–41, 43, 90.

90. *Id.* at 65–68.

91. DWORKIN, *supra* note 49, at 248 (“[H]e must decide which interpretation shows the legal record to be the best it can be *from the standpoint of substantive political morality.*” (emphasis added)).

92. Joseph Raz, *Authority, Law and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 210 (1994).

93. See, e.g., Jeremy Waldron, *Normative (or Ethical) Positivism*, in *HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 411 (Jules Coleman ed., 2001).

“policy” considerations. Michelman appeals to history and political theory; Dworkin to common usage among lawyers and judges. My reliance here on moral pluralism is intended to underwrite a functional claim that the point of having law is to enable citizens to coexist and cooperate on mutually beneficial projects despite persistent disagreement.

Law is “an importantly distinct mode or aspect of governance”⁹⁴ precisely because of its independence from contested conceptions of the public good. It provides a framework for coordinated action in the face of dissensus, perhaps at the expense (as Michelman suggests, with his reference to the legitimacy of *Brown v. Board of Education*) of respect for marginalized groups and the capacity to keep pace with social change.⁹⁵

The claim of the normative positivists is that the values associated with law, legality, and the rule of law—in a fairly rich sense—can best be achieved if the ordinary operation of such a system does not require people to exercise moral judgment in order to find out what the law is.⁹⁶

The value of legality within government can best be achieved by directing government lawyers not to act directly on what they perceive to be the public good because what the public good requires is contested, in good faith, in most interesting cases. Government through law means, however, that we must eventually move beyond this disagreement and do something about a problem. The law provides a framework for dealing, cooperatively, with these problems by enacting a provisional settlement of normative disagreement. It is therefore incumbent upon lawyers, as an aspect of their obligation of fidelity to law, to respect this settlement and not act directly on what they believe to be the public interest.

II. FIDELITY IN INTERPRETATION AS THE FOUNDATION OF GOVERNMENT LAWYERS’ ETHICS

There must be an alternative to, on the one hand, using terms like “politicization” merely as terms of abuse to signify actions with which one disagrees, and on the other hand capitulating to the view that there is no such thing as a faithful, neutral exposition of law. If the law were perfectly determinate—that is, if there were only one right answer to any given question of law—we could criticize government lawyers for politicizing their advice if it deviated from the right answer in a way that favored the party in power. The basic responsibility of any lawyer—whether in government or private practice—is to order her client’s affairs with respect to the client’s legal entitlements. This basic responsibility can be contextualized, so that a lawyer in litigation may urge that the client’s

94. *Id.* at 420.

95. Michelman, *supra* note 12, at 1524 (“Black Americans . . . were not tantamount to ‘the people,’ and there is no telling how long it would have taken for their new foundations to have risen to the level of constitutional significance for a Court following Ackerman’s argument.”).

96. Waldron, *supra* note 93, at 421.

entitlements be interpreted in a way that is the most favorable to the client. In the advising context, the lawyer attempts to ascertain the boundaries of the client's entitlements, and then counsel the client to comply with the law. Even if one accepts this vision of legal ethics in theory, however, a natural objection is that the boundaries of the client's entitlements are unclear; that is, the law is indeterminate to some extent. The evident fact of the underdetermination of legal judgments by social sources can sometimes lend unwarranted credence to arguments attempting to cast doubt on the capacity of law to establish any provisional settlements of normative controversy. The strong indeterminacy critique can then be combined with the public choice notion that client interests are the most important thing in the lawyer's normative universe, creating an unholy alliance of cynical perspectives on the law. The idea that the fundamental ethical obligation of lawyers is to exhibit fidelity to law thus seems laughable.

I have argued that there is actually a great deal of determinacy in the law, but that lawyers are often looking for it in all the wrong places. Interpretation is, by its nature, a community-bound practice, and the criteria for an acceptable interpretation are the property of a professional interpretive community, not the thing to be interpreted.⁹⁷ The difficulty with this reliance on the notion of an interpretive community is that there may be factions within the community, which may deem acceptable incompatible interpretations of the applicable legal materials. However, the idea of an interpretive community is not a jurisprudential primitive, so that there is nothing more that one can say about an interpretation, beyond that it is acceptable to *some* faction within the community. Instead, one can always appeal to extracommunity standards related to the concept of law as a purposive, reason-giving enterprise. More specifically, the conception of that concept is given by the ideal of the rule of law and the value of legality, which emphasize considerations such as generality, publicity, and the capacity of legal norms to check the exercise of power.⁹⁸ These rule-of-law ideals enable us to critique the interpretive claims made by factions within the community and determine which interpretation is the right one.

The most basic constraint on what counts as a plausible interpretation of law is that law must be viewed as a purposive activity, as having some point

97. See, e.g., Fiss, *supra* note 18. Owen Fiss refers to the norms of an interpretive community as "disciplining rules," *see id.* at 11, but this imprecise use of the term "rules" has created unnecessary confusion, as is evident in Fiss's debate with Stanley Fish. See Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984). Fish makes an infinite regress argument, noting that if these interpretive norms were indeed rules, they would stand in need of interpretation, requiring further meta-disciplining rules. *See id.* at 1326, 1334. Instead of rules, Fish believes an interpretive community is constituted by "interpretive assumptions and procedures [that] are so widely shared in a community that the rule appears to all in the same (interpreted) shape." *Id.* at 1327. Fiss's argument, read carefully, is that there are "interpretive assumptions and procedures" that are widely shared within a community. Apparently, Fiss actually does not disagree with Fish at all, and Fish has simply seized on Fiss's use of the word "rule" to argue against a position that Fiss does not hold.

98. See, e.g., DAVID LYONS, *ETHICS AND THE RULE OF LAW* 194-214 (1984); RAZ, *supra* note 13, at 210.

or end.⁹⁹ One might also say that legal argumentation is a *craft*, which carries with it internal standards of excellence which are related to the ends served by the craft. Ethical lawyering is interpreting the law and applying it in the representation of one's clients with fidelity to the craft of legal reasoning in a professional community. The normative ideal of a craft depends on the assumption that legal interpretation is a process of *reasoned* elaboration. Fundamentally, in order to represent a legitimate interpretive community, a cluster of would-be legal interpreters must be dedicated to the process of understanding the meaning of legal norms as a reasoned settlement of normative controversy, not simply as positions that can be won or lost in a political contest.

To illustrate this argument, return to the example of the FISA case discussed in Part II.A. One of the remarkable aspects of this story is that the President decided to continue with the warrantless wiretapping program, and changed his mind only after Comey, who was serving as acting Attorney General, threatened to resign, along with then-OLC head Jack Goldsmith, the director of the FBI, and several top officials at the Justice Department.¹⁰⁰ For the purposes of the discussion of legal interpretation, imagine the *President's* legal decision before the threat of mass resignations. His top legal advisors had concluded that the wiretapping program was illegal. However, the same office had previously concluded that the program was legal based on former OLC lawyer John Yoo's arguments for virtually limitless presidential power. There were lawyers elsewhere in the executive branch, most notably then-White House Counsel Alberto Gonzales and David Addington, the legal advisor to Vice-President Dick Cheney, who continued to believe that the President had authority to authorize the program.¹⁰¹ Therefore, from the President's perspective there appeared to be a split within the interpretive community—the Yoo/Addington camp and the Goldsmith/Ashcroft camp—reaching diametrically opposed interpretations of the governing law. Leaving aside

99. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 143–50 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Henry Hart and Albert Sacks talk about attributing a single purpose to a piece of legislation, but their legal process materials have come to be understood as embodying the more general point that the law should be understood as a purposive activity. As David Luban shows in an insightful discussion, Lon Fuller is another legal theorist who emphasizes the purposive nature of law. See DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, in *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 44, at 99, 108–09 [hereinafter LUBAN, *A Reading of Fuller*]. The theory of interpretation I defend here is indebted substantially to the idea that the purposiveness or goal-directedness of any practice—what it is all about, so to speak—is a noncircular source of obligations internal to the practice, because it would be incoherent to claim to be engaging in any activity without caring about the goods that are internal to that form of activity. MACINTYRE, *supra* note 39, at 190–91.

100. Richard B. Schmitt, *Cheney Is Said to Have Halted Promotion*, L.A. TIMES, June 7, 2007, at A13.

101. Eggen & Kane, *supra* note 27; Dan Eggen, *Official: Cheney Urged Wiretaps*, WASH. POST, June 7, 2007, at A3; Scott Shane & Eric Lichtblau, *Cheney Pushed U.S. to Widen Eavesdropping*, N.Y. TIMES, May 14, 2006, at A1.

the matter of the competence of a nonlegally trained President to evaluate these arguments independently, the central question is whether there is any method for resolving intracommunity interpretive disputes—that is, we are looking for some principled way to conclude that the Yoo/Addington interpretation is not the right one.

The only way to avoid begging all of the central questions here is to rely on a notion of the law and legal advising as a practice, and to seek to derive from that a set of internal criteria of success or failure in terms of the ends of the practice. David Luban reads Lon Fuller as proposing something along these lines.¹⁰² The distinctive feature of Fuller's jurisprudence is that he defines law not in terms of existence conditions, but as an activity—"the enterprise of subjecting human conduct to the governance of rules."¹⁰³ As an activity, it can be carried out well or poorly. In Luban's arresting phrase, "lawyers can sin against the enterprise in which they are engaged."¹⁰⁴ Marking deviations from a well-performed activity is a matter of grasping the point of the practice to see what sorts of commitments it entails. Law, in other words, is a *purposive* activity, and we can give a functional argument for the ethical obligations that attach to anyone who participates in it. "[T]o recognize something as a steam engine or a light switch is already to recognize what it ought to do, to recognize a built-in standard of success or failure."¹⁰⁵ Similarly, understanding the point of some practice carries with it the implicit acceptance of internal regulative standards that enable that practice to aim at its end.

This is a familiar Aristotelian way of thinking, and the objections to it are just as familiar. Functional arguments place a great deal of analytical weight on the function we impute to some object or activity.¹⁰⁶ In a standard example in the philosophy of science, how do we know that the function of the heart is to pump blood, and not to make a thumping sound? One typical response is to define a function in terms of the proper working of a system such as a biological organism. But of course this just pushes the problem back one step, to defining the *proper* working of something. Concepts like adaptive fitness can be used to define the proper working of organisms, but in the case of social practices like law there is not such a clear external referent that can be used to define the function of the practice. Fuller says the function of law is subjecting human activity to the

102. See LUBAN, *A Reading of Fuller*, *supra* note 99, at 99–130.

103. FULLER, *supra* note 13, at 106.

104. LUBAN, *A Reading of Fuller*, *supra* note 99, at 105.

105. *Id.* at 109; see also FULLER, *supra* note 13, at 96 (noting that the natural law regulating "the enterprise of subjecting human conduct to the governance of rules" is conceptually no different from the natural law of carpentry, as perceived by a carpenter who is interested in a building not falling down); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 204–31 (1995) (arguing that interpretation ought to look to whatever rationality is immanent in a particular mode of ordering).

106. See generally Carl G. Hempel, *The Logic of Functional Analysis*, reprinted in *READINGS IN THE PHILOSOPHY OF SOCIAL SCIENCE* 349 (Michael Martin & Lee C. McIntyre eds., 1994); Larry Wright, *Functions*, 82 *PHIL. REV.* 139 (1973).

governance of rules, but one might also argue that the function of law is to ensure that justice is done, protect human rights,¹⁰⁷ limit the power of the state, express the community's public values,¹⁰⁸ enable the little guy to stand up to the big guy and say, "hey, you can't do that to me,"¹⁰⁹ and so on. Not surprisingly, I have my own views about the best way to understand the function of law, but I offer them somewhat tentatively, as a view about the function of law. If one finds this view attractive, then certain things follow from it as a matter of the internal normativity of that practice (which is to say, as principles of legal ethics). If another functional account seems more attractive, then different internal normative standards will follow from it.

As mentioned previously, I think the function of the legal system (write large, including legislatures, courts, and administrative agencies, as well as roles or offices within the system, such as lawyer and judge, and rhetorical practices that constitute the distinctive mode of justification of directives given by the system) is to enable citizens to establish, using tolerably fair procedures, a provisional framework for peaceful coexistence and cooperation, despite the evident fact of deep and persistent disagreement pertaining to just about everything that otherwise could serve as a framework.¹¹⁰ The set of relevant actors, whose behavior must be coordinated by the law, includes the government. Thus, it must be possible to differentiate, as a conceptual matter, between what a government actor (or the government as a whole) *wants* to do and what it has a *right* to do. At a minimum, we must be able to coherently criticize the directive attributed to Andrew Jackson, who told his legal advisor that "you must find a law authorizing the act or I will appoint an Attorney General who will."¹¹¹ The problem is that Jackson's stance conflates *lawful* power with raw power.¹¹² If it means anything, the notion of the rule of law must mean that the

107. See, e.g., Bingham *supra* note 13.

108. See, e.g., DWORKIN, *supra* note 49 (talking in terms of a community of principle, not public values, but making essentially the same point); Fiss, *supra* note 18, at 2, 8.

109. One way of understanding the defense of the rule of law is found in E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 258-69* (1975). I owe the colloquial formulation to Yasutomo Morigiwa, but he has published it only in Japanese.

110. Cf. JOHN RAWLS, *POLITICAL LIBERALISM: EXPANDED EDITION*, at xxvi (rev. ed. 2005) (noting that it is the very fact of "the absolute depth of . . . irreconcilable latent conflict" that makes liberal political institutions necessary).

111. See CLAYTON, *supra* note 50, at 18 (quoting Andrew Jackson).

112. On the other hand, President Andrew Jackson's statement could be understood as an appeal to the indeterminacy of law. For a more recent statement along similar lines, although more clearly an appeal to legal indeterminacy, consider President George W. Bush's reaction to the *Hamdan* case, which held that all detainees were covered by Common Article 3 of the Geneva Conventions, proscribing outrages upon human dignity. Bush responded: "That's like—it's very vague. What does that mean, 'outrages upon human dignity'?" That's a statement that is wide open to interpretation." See Press Release, Office of the White House Press Secretary, Press Conference of the President (Sept. 15, 2006), available at <http://web.archive.org/web/20060923185835/http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html>. The unedited comment is reported in Richard Leiby, *Down a Dark Road: Movie Uses Afghan's Death to Ask Tough Questions About U.S. and Torture*, WASH. POST, Apr. 27, 2007, at C1.

existence of de facto power is not conclusive of the question of whether power has been exercised rightfully.

This may be starting to sound too abstract to provide much guidance for lawyers in practice, but it is only abstract when stated as a theoretical problem. As a description of a practical activity, it is perfectly intelligible. Identifying good or bad instances of legal reasoning is exactly what lawyers do. The standards of the lawyering craft resist distillation into summary form, but experienced lawyers nevertheless can recognize well reasoned judgments or instances of fallacious argumentation. To continue our domestic spying example, one can criticize the government lawyers' advice to the Bush administration, authorizing the warrantless wiretapping program on the basis of the AUMF and wartime executive power, with reference to the failure of that advice to cohere with existing law.¹¹³ First of all, the FISA statute contemplates a situation of war, and permits warrantless wiretapping during wartime, but only for a limited period of time.¹¹⁴ Under ordinary principles of statutory construction,¹¹⁵ this specific limitation on wiretapping in a time of war would control over the general grant of power in the AUMF. Moreover, the Supreme Court has said that where Congress has spoken with regard to an issue, the President's authority is at its lowest ebb, even in wartime.¹¹⁶ That rule pertains not only to the open-ended claims of executive power in the lawyers' letter, but to the interpretation of conflicting statutes, such as the AUMF and FISA. Congress has acted to regulate the President's authority to conduct electronic surveillance, and the AUMF does not change that specific regulation in any way. From the standpoint of proponents of strong executive power, the AUMF should be seen as redundant in any event, so it cannot change the regulatory scheme adopted by FISA without specifically amending FISA. The government lawyers might respond that the President has the authority to disregard congressional restrictions—at one time the OLC took that position with respect to prohibitions on torture¹¹⁷—but the Justice Department wisely chose not to make that argument in this case, because it is wholly lacking in legal support.

The FISA example is offered as a case study only, and the point of citing it is not really to establish a substantive conclusion about that particular legal issue (although I do think it is accurate to call the OLC lawyers'

113. See Letter from William E. Moschella, Assistant Attorney Gen., Office of Legal Affairs, to Pat Roberts and John D. Rockefeller IV, Senate Select Comm. on Intelligence, and Pete Hoekstra and Jan Harman, House Permanent Select Comm. on Intelligence (Dec. 22, 2005), reprinted in David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355, 1360–63 (2006).

114. See 50 U.S.C. § 1811 (2000).

115. See NORMAN J. SINGER & J. D. SHAMBIE, STATUTES AND STATUTORY CONSTRUCTION (7th ed. 2008).

116. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

117. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

advice deficient). The point is, rather, to illustrate the way one might go about critiquing government lawyers for failing to live up to their ethical obligations. Politicized—which is to say unethical—legal advising is that which cannot be defended with reference to the governing law. Making this conclusion stick, in turn, is a matter of delving into the governing law, making and analyzing legal arguments, and relying on the tacit norms of acceptability to the professional community. The argument against the Yoo/Addington understanding of FISA and executive power is an internal one, offered within the practice of legal reasoning. However, the nature of the craft of lawyering, which is tacitly in view whenever one offers criticism of a legal argument, is constrained at a deeper level by the value of legality. This ideal means that reasons given by anyone, whether a private citizen or the state, must satisfy certain formal criteria such as generality, prospectivity, clarity, and stability.¹¹⁸ These criteria may not be cited directly, but function in the background when there is an argument within the professional community between factions competing to establish that one interpretation is the right one. The familiar arguments that lawyers and legal scholars make back and forth, claiming that some interpretation is good or bad, are in my view the substance of legal ethics, when we are considering the role of lawyers as advisors.

CONCLUSION

The right way to theorize the claim that the activities of government lawyers have become politicized is not to look for evidence of ideological motivations or overlap between the interests of the President and the way in which government lawyers exercise discretion. The law itself, not some notion of neutrality or conformity with the public interest, sets constraints on what lawyers may do. In order to perform this function, the law must be interpreted in a way that respects its capacity to bear a substantive meaning. Lawyers cannot understand their role as merely executing their clients' preferences; the distinctive function of lawyers is that they act as agents of their clients, but only within the bounds of the law. Because the meaning of the law is a function, in part, of the acceptability of the interpretation to a professional community, the only way to evaluate whether lawyers have given advice within the bounds of the law is to engage the interpretive arguments on their own terms. Fortunately, that is something that lawyers and legal scholars are well-equipped to do. The best response to the problem of politicization is to seek to strengthen respect for the craft of lawyering, which supports the capacity of the law to constrain and regulate the exercise of power.

118. See FINNIS, *supra* note 13; FULLER, *supra* note 13; RAZ, *supra* note 19; Bingham, *supra* note 13.