

HELL, HANDBASKETS, AND GOVERNMENT LAWYERS: THE DUTY OF LOYALTY AND ITS LIMITS

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I

INTRODUCTION: HOW I KILLED TWELVE MILLION PEOPLE

I am responsible—indirectly, remotely, only contributorily, and perhaps excusably, but nonetheless partially responsible—for the deaths of one and a half million innocent unborn children per year. I might have been able to stop the nomination of David Souter to the United States Supreme Court, and thus possibly could have prevented the Court's disastrous reaffirmation of *Roe v. Wade*¹ two years later in *Planned Parenthood v. Casey*,² if only I had been willing to violate my duty of confidentiality as a government lawyer and leak to pro-life groups my advance knowledge of Souter's likely nomination to the Supreme Court by President Bush in 1990. I had the information. I had the opportunity. I had the time. I had the telephone in hand. But indecision, inertia, uncertainty—and probably cowardice—prevailed. I did nothing.

I remain racked with guilt over my inaction. I alternate between being convinced that I acted in the only ethical, lawful, and honorable manner available to me as an attorney and government employee, and being convinced I should have leaked the information, either secretly or openly, in order to avert a much greater wrong and that my failure to do so was an act of great cowardice and a miserable failing of moral principle on my part. Sometimes I feel there must have been some available middle course that would have lessened the moral and legal dilemma with which I was confronted. Other times, I excuse myself on the ground that I could not have known for sure how things would play out in the end.

But two points are clear to me: First, my moral responsibility for my own conduct as a government lawyer (and as a human being) is not lessened by the complicity or superior power of others, or by doubts about whether the chain of

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1. 410 U.S. 113 (1973).

2. 505 U.S. 833 (1992).

causation would in fact have been altered even if I had acted. Second, in the eyes of the law, I acted properly.

Fast forward eight years to a seemingly unrelated series of events today, in 1998. Government lawyers, both within the Justice Department and the White House, almost certainly can be assumed to have known of President Clinton's (and perhaps others') involvement in serious federal crimes while in office.³ Yet, at the time of this writing,⁴ apparently none has (yet) seen fit to come forward to the proper government officials or the public with this knowledge. If these lawyers do indeed possess such knowledge, they are responsible—indirectly, remotely, and only contributorily, but nonetheless partially responsible—and inexcusably so, for very serious violations of federal law involving the corruption of the legal process.

If any government lawyer has been racked with guilt over this situation, we do not (yet) know of it. No government lawyer has publicly resigned from continued representation of the Clinton Administration in a manner that withdraws or disaffirms his or her prior legal work on behalf of Administration officials related to matters under investigation by Independent Counsel Kenneth Starr, and with respect to which the President of the United States has admitted to, at minimum, duplicity. Yet the course legally required of the government lawyer is clear: He or she must discontinue any representation that implicates the lawyer in an ongoing crime or fraud by a governmental official, must take necessary steps to rectify the fraud (including disclosure), and must at all events disclose the unlawful conduct at least to the appropriate, not-involved officials empowered to act on behalf of the United States government concerning such matters (the Attorney General or the Independent Counsel with jurisdiction over the matter).

That no one has done so indicates one of four things, in ascending order of likelihood: (1) that no law violation has occurred to the knowledge of any government lawyer; (2) that known law violations have occurred to the knowledge of some Administration lawyers, but they incorrectly believe that their professional duty is to keep such knowledge confidential; (3) that violations have occurred, but the lawyers with knowledge of the violations perceive that they have a moral obligation to cover up or not disclose such information, and that

3. It is possible that government lawyers, in the White House and in the Department of Justice, were systematically deceived by the President and other high Administration officials. This possibility is addressed below. See *infra* text accompanying note 32. It nonetheless remains likely that, sometime between mid-January and mid-August 1998, at least some Administration lawyers had acquired actual knowledge of probable illegal conduct by Clinton Administration officials, and that is the premise on which I proceed.

4. As this article goes to press (November 1998), the situation remains fluid. For the most part, I will discuss the conduct of Clinton Administration lawyers from January 1998 to August 1998, with specific reference to the probability that President Clinton and others may have engaged in obstruction of justice in connection with Clinton's testimony and the testimony of others in the Paula Jones sexual harassment civil lawsuit. See Neil A. Lewis, *Clinton Advisors Map out Defense in Lewinsky Matter*, N.Y. TIMES, Aug. 31, 1998, at A14. Accordingly, though I will for the most part use the past tense in describing these events, I recognize that they may have an ongoing character that may sometimes create awkwardness in my presentation.

that moral duty trumps their clear legal obligation; or (4) that some government lawyers with such knowledge are simply paralyzed by cowardice, uncertainty, moral confusion, personal loyalties, and self-interest concerning whether and how to act in accordance with their legal and ethical obligations.

This essay is a tale of two cases of divided loyalties. It is an essay, partly autobiographical (the Souter appointment) and partly conjectural (the Clinton situation), about personal and professional dilemmas for government lawyers, and what the law has to say about how those dilemmas are supposed to be resolved. It is an essay on the government lawyer's ethical duty of loyalty and its limits.

Part II tells the story of the "Souter Scenario." Part III tells the unfinished story of current government lawyers' possible complicity in, or assistance in, criminal misconduct by President Clinton and others. The two stories frame two equal and opposite questions: Is it ever proper for an executive branch government lawyer to sabotage or undermine the lawful policies or decisions of the administration in which he or she serves? Is it ever proper for an executive branch lawyer to acquiesce in the *unlawful* actions of government officials?

II

THE SOUTER SCENARIO: LOYALTY TO LAWFUL (BUT AWFUL) ADMINISTRATION DECISIONS

A. The Law

The ethics rules of the legal profession (to say nothing of federal statutes and regulations that carry criminal penalties for their violation) plainly require an executive branch attorney to abide by, indeed to carry out and further, the policy choices of the legitimately elected administration in which he or she serves, no matter how strongly the attorney disagrees with those policy choices, as long as those choices lie within the bounds of the law. The lawyer may resign, ask to be reassigned, or ask to be relieved of responsibility for a matter when he finds his governmental client's objectives "repugnant."⁵ But the government lawyer may not engage in internal obstructionism or, worse, external disloyalty, by disclosing confidential information. Only if government officials are engaged in illegal conduct, breaching their fiduciary duties to the United States, may the lawyer disclose otherwise confidential information. Otherwise, the duty of loyalty lies to the incumbent administration's policies and purposes. As a friend of mine once said, when I asked how he could serve as a lawyer for an administration whose (lawful) objectives he so totally despised, "they want to take the country to hell in a handbasket and it's my job to help them get there."

5. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1983) ("[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if . . . the client insists upon pursuing an objective the lawyer considers repugnant or imprudent . . .").

By the same token, the ethics rules of the legal profession (to say nothing of federal statutes concerning obstruction of justice, conspiracy, and aiding and abetting substantive offenses) plainly require executive branch lawyers to refrain from providing substantial assistance to known unlawful conduct by government officials, no matter how much the government lawyer respects and supports the policies or conduct of the government officials whom he or she serves. Such forbidden assistance to illegality can come in the form of the lawyer's silence where the law imposes a duty to speak.⁶ Thus, for example, if the President or other executive branch official has, to the knowledge of an executive branch lawyer, engaged in (or is continuing to engage in) unlawful conduct in violation of a duty under the Constitution or laws of the United States, the lawyer must, both as a matter of federal statutory law and traditional ethics rules, disclose such otherwise confidential information to the appropriate officer or official of the U.S. government, to the extent necessary to rectify the violation of law.⁷ Usually, that step will be sufficient to discharge the lawyer's ethical duties, but, in some circumstances, he or she may need to disclose such information to persons outside the Executive Branch.

In either case, the government lawyer must not in any way counsel or assist the President or other officer in the commission of the unlawful act. The government lawyer's duty of loyalty is to the U.S. government as an entity, acting lawfully through its lawfully elected and appointed executive officials, and not to any governmental official personally, not even the President.⁸ When the unlawful actions of a governmental official constitute a clear violation of a duty to the United States, a lawyer for the United States is ethically bound to pursue the interests of the U.S. government in thwarting and punishing such unlawful conduct, not the interests of the governmental official who has placed himself or herself at odds with the laws of the United States.

6. See *id.* Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . ."); see also *id.* Rule 1.2(e) ("When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct."). The standard formula for when a lawyer has engaged in forbidden "assistance" of a client's criminal or fraudulent conduct is (1) the existence of an underlying violation of law (2) of which the lawyer has "knowledge" (meaning actual knowledge, but such knowledge may be inferred from the circumstances) (3) for which the lawyer has provided substantial assistance (which may include otherwise "ordinary lawyering" activities, when done with knowledge of the underlying substantive offense which such lawyering activities assist). See Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 682-83 (1981); see also *infra* note 32 (collecting cases).

7. See 28 U.S.C. § 535(b) (1994); see also *infra* text accompanying notes 34-37; cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1983).

8. See *In re Bruce R. Lindsey* (Grand Jury Testimony), 148 F.3d 1100, 1108 (D.C. Cir. 1998): [Government attorneys'] duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. The constitutional responsibility of the President, and all members of the Executive Branch, is to 'to take Care that the Laws be faithfully executed. . . .' Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.

B. The Situation

The Souter scenario clearly fell into the first category. President Bush's nomination of David Souter clearly involved no violation of the law. It was his legitimate policy choice as President whom to appoint to the Court.

Allow me to set the scene. I was a young attorney in the Office of Legal Counsel ("OLC") in the Department of Justice in the first two years of the Bush Administration (1989-91). One of OLC's tasks in those years was to conduct background research and draft memoranda on the opinions and apparent judicial philosophies of a fairly large number of potential candidates for U.S. Supreme Court appointments, most of whom were judges in the lower federal and state courts. These were low-priority, "fun" research assignments, compared to some of the intense, high-profile, time-sensitive research projects or the other, more tedious work. It was heady stuff to prepare a twenty- to sixty-page memorandum that could form the basis for whether a particular candidate became a Supreme Court nominee.⁹

On July 21, 1990, the morning after William Brennan announced his retirement late on a Friday evening, OLC, along with the White House Counsel's office, sprang into high gear. New memoranda were prepared for new candidates. Existing memoranda were quickly updated. Shorter, leaner memoranda summarizing the views and major opinions of the leading ten to fifteen candidates were prepared quickly, nearly a dozen OLC lawyers working continuously from Saturday morning until 2:00 a.m. Sunday, so that the packet of short memoranda could be given to President Bush to read at Camp David on Sunday.

By late Sunday morning, many of us were back in the office again, handling further research tasks on the prospective nominee front. By that time, it was becoming clear which candidates were the most serious contenders. Every opinion certain judges had written was reviewed with a fine-tooth comb. The "Final Four" began to take shape, and two were clearly the most likely candidates. One could tell this from who was being assigned to do the fine-tooth combing and how many bodies were being thrown at the task. The leading two contenders, as press accounts shortly after the nomination accurately reflected, were Judge Edith Jones of the Fifth Circuit and Judge David Souter of the First Circuit, a relative unknown who had spent most of his judicial career in the New Hampshire state courts and had been on the federal bench for only a very few months.¹⁰

9. I have considered carefully whether any of the facts stated in the narrative that follows are covered by an ongoing duty of confidentiality to my former client, and have concluded that they are not. Everything stated here, other than my personal thoughts and emotions, was publicly reported at the time or has been subsequently reported in the press. It would belabor the presentation unduly to provide an elaborate footnote apparatus in support of the points that are matters of public record or public report, and I accordingly do not do so here.

10. Press reports immediately after the Souter appointment identify the two other key finalists as Judge Laurence Silberman and Judge Clarence Thomas, both of the D.C. Circuit. See Ann Devroy, *In the End, Souter Fit Politically*, WASH. POST, July 25, 1990, at A1. The press reports state that Presi-

The office scuttlebutt among some OLC line attorneys on Saturday had been that Souter was probably being “worked up” as a kind of political obligation to certain constituencies within and without the Administration—Chief of Staff John Sununu (New Hampshire’s former Governor) and Senator Warren Rudman (who had once been Souter’s boss and predecessor as Attorney General of New Hampshire)—and that Souter was not really a serious candidate. (There were a few other “candidates” who seemed to be of this type. “What? Are they seriously considering *him*?” “Probably not, but somebody important either mentioned the name and we have to look like we gave it serious consideration, or there’s some other political reason to be able to say that this person was on the ‘short list.’”)

By Sunday, however, Souter was obviously a serious contender. Several of us recognized that there was a very real danger—*danger*—that Souter could be nominated. From the perspective of those of us line lawyers who favored a tried-and-true judicial conservative, there were warning signs that Souter would not be what we called “solid,” but might well turn out to be “squishy” or, far worse, might “grow in the job” (a humorous euphemism for drifting leftward, in response to media, legal academic, and Washington-hothouse pressures and stroking; such “growth,” we thought, was more likely with persons who had never worked in the Washington milieu, whose judicial philosophy was not already clearly defined, who appeared to have less strongly defined personal characters, or who might have pretensions about their place in history).

We were concerned with Souter’s general lack of a clear conservative judicial philosophy, after numerous years and numerous cases decided as a New Hampshire Supreme Court Justice. We were concerned that what judicial philosophy appeared was one of a reasonably smart, but plodding, careful, precedentalist or incrementalist, who lacked any particular vision or any critique of Warren Court-era judicial activism.

Particularly troubling were two noteworthy New Hampshire Supreme Court cases, significant in part because there were so few good indications of Souter’s judicial philosophy. First, there was the opinion we dubbed “Kiddie *Miranda*,” in which Souter had joined a (mildly) activist interpretation of the New Hampshire Constitution in creating expanded *Miranda* warnings in juve-

dent Bush and his advisers thought that Clarence Thomas, who had just been confirmed to the D.C. Circuit, should get some time to “settle in, to get some experience.” *Id.* (quoting “two senior officials”). (Curiously, Souter had just recently been confirmed to the First Circuit, but no similar point is reported to have been raised in the discussions.) Reportedly, President Bush struck Judge Silberman’s name from the list without explanation. Press reports noted that Silberman had very recently—within a matter of days—joined the opinion of the D.C. Circuit (written by Judge David Sentelle) overturning Oliver North’s conviction. At the time, an Independent Counsel investigation of Iran-Contra was still very much in high gear. Press reports seemed to suggest that this might have been a factor in Bush’s decision to strike Silberman. To the extent press reports cite Administration officials’ desires to avoid controversy with the appointment as a reason for Bush’s ultimate choice of Souter over Jones, this may well have been a factor in the decision to strike Silberman from consideration. It is publicly known (and was mentioned in press speculation at the time) that many conservative lawyers in the Bush Administration regarded Silberman as an outstanding candidate—perhaps the best of the names being discussed—but that Jones was equally conservative and likely to be more politically defensible.

nile matters.¹¹ *Miranda*,¹² of course, was an extremely activist, policy-becomes-law opinion, one of the icons of the Warren Court and an exemplar of Warren-era judicial liberalism. Many judicial conservatives had criticized *Miranda* severely.¹³ For a lower court judge to follow *Miranda* could of course be construed as “conservative” or “restrained” in the sense of following the course of precedent marked out by superior courts in the appellate hierarchy. But extending *Miranda* an additional step, in a quasi-legislative manner as a matter of tendentious interpretation of state law (and in a manner clearly not compelled by the federal constitution), was truly eyebrow-raising.

But even worse was *Smith v. Cote*.¹⁴ In that case decided in 1986, Souter joined the opinion of the New Hampshire Supreme Court creating a new tort cause of action—thus making new law—for “wrongful birth,” but declining to create an additional cause of action for “wrongful life.” Wrongful birth is a cause of action in favor of parents, against doctors, for damages for the economic and emotional injury suffered by parents as a consequence of their child’s being born, where the parents assert that, had the doctor not been negligent in failing to diagnose and advise the parents of their unborn child’s disability (in *Smith v. Cote*, heart disabilities, hearing impairment, cataracts, and motor retardation, resulting from the mother’s rubella), the parents would have terminated their child’s life by “obtain[ing] a eugenic abortion,” and thereby would have avoided having to pay for medical and child-rearing costs.¹⁵ The negligence theory was that the doctor, by failing to test for and advise the parents about possible birth defects resulting from exposure of the unborn child to rubella, deprived the mother “of the knowledge necessary to an informed decision as to whether to give birth to a potentially impaired child.”¹⁶

The “wrongful birth” tort theory is obviously controversial and obviously untraditional. The New Hampshire Supreme Court, while not alone in recognizing the theory, was unquestionably engaged in judicial lawmaking, through explication of what it understood to be New Hampshire common law. Though the opinion asserted that the New Hampshire court’s outcome was required by *Roe v. Wade* and that that decision had “resolved” the abortion controversy and was “controlling” on the issue before the New Hampshire court,¹⁷ in no sense was such an assertion even plausibly defensible. *Roe*, which remained sharply contested in 1986, the same year the U.S. Supreme Court had just barely reaffirmed it in the *Thornburgh* case, by a vote of five to four,¹⁸ held that

11. See *State v. Benoit*, 490 A.2d 295 (N.H. 1985).

12. *Miranda v. Arizona*, 384 U.S. 436 (1966).

13. See, e.g., Joseph G. Grano, *The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REFORM 395, 400 (1989) (discussing conservative criticisms of *Miranda*); Edwin Meese, III, *Square Miranda Rights with Reason*, WALL ST. J., June 13, 1986, at A23.

14. 513 A.2d 341 (N.H. 1986).

15. *Id.* at 343.

16. *Id.* at 355.

17. See *id.* at 344, 346.

18. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

government could not prohibit abortions; *Roe* in no way required state tort law to provide a cause of action for negligence against doctors—*private* parties—who are asserted to have breached a “duty of care” to assure that pregnant women under their care be provided with information that might support a decision to have a “eugenic abortion.” Indeed, at that time, the law of abortion was clear that states were not constitutionally obliged to provide financial support for the abortion choice.¹⁹ To find that state tort law required a remedy for “wrongful birth” was thus a huge extension beyond what the federal constitutional law of abortion has ever required.

Souter did not write the opinion for the majority, but he did join it. What is more, his decision to join was considered and reflective. In what apparently was intended as a moderating caveat, Souter wrote separately in *Smith v. Cote* to note his opinion that a doctor conscientiously opposed to abortion should be able to discharge the new tort duty by referring the parents to physicians who would have no moral qualms about testing for birth defects with an eye toward recommending abortion; the conscientiously opposed doctor need not do any of this himself or herself. For Souter, the new tort duty might be satisfied by warning the woman of the doctor’s conscientious scruples concerning eugenic abortion and by referring the woman to a doctor who would have none.²⁰

Some conservatives (and some Souter opponents) took Souter’s concurrence as a signal of anti-*Roe* sympathies, but such a reading was obviously strained. Souter concurred in the creation of the new cause of action. Moreover, almost as revealing as what Souter’s concurrence said was what it did not say. Souter chose to take issue with this one point not raised by the questions certified to the New Hampshire Supreme Court. He did not take issue with anything else in the rather Orwellian opinion of the Court. And what Souter did say was almost ridiculously naïve: Only a person thoroughly unfamiliar with the thinking of those who oppose abortion on moral or religious grounds would think that a physician holding such views would be relieved by the finding that the new duty might—*might!*—be discharged by fulfillment of a duty to disclose such views to patients as an expression of the “limits” of his or her professionalism plus a duty to refer the patient to a physician who lacked such scruples.²¹

19. See *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

20. Souter wrote:

It does not follow, however, and I do not understand the court to hold, that a physician can discharge the obligation of due care in such circumstances only by personally ordering such tests and rendering such advice. The court does not hold that some or all physicians must make a choice between rendering services that they morally condemn and leaving their profession in order to escape malpractice exposure. The defensive significance, for example, of timely disclosure of professional limits based on religious or moral scruples, combined with timely referral to other physicians who are not so constrained, is a question open for consideration in any case in which it may be raised.

Smith, 513 A.2d at 355 (Souter, J., concurring).

21. One common criticism of Souter’s nomination at the time made was that he was something of an “intellectual hermit”—an unmarried man with no children, little broad life experience, few social ties, and no professional life outside of New Hampshire. See, e.g., Ruth Marcus & Joe Pichirallo,

In short, although Souter was shortly thereafter dubbed the “stealth candidate”—chiefly by those fearful that he might prove a staunch conservative and vote to overrule *Roe*—*Smith v. Cote* was a “smoking gun” that revealed, for all with eyes to see, that David Souter was likely to be a vote to uphold *Roe*, with mild reservations at best. Souter clearly was not “pro-life” in his personal or jurisprudential outlook. Nor was he apparently opposed to judicial activism or judicial lawmaking in principle. He was, rather, a devotee first and foremost of precedent and the common law method, willing to follow precedent not only in controlling specific holdings, but also in pointing the direction for future extensions and expansions of judge-made law (even in constitutional law fields). His judicial philosophy was, fairly obviously, that of a go-with-the-flow moderate, incrementalist, status quo judge—“conservative” only in the most generous sense of the term.

All of this was known within the Justice Department and the White House by late Sunday afternoon, July 22, 1990. Press reports accurately recounted that Judges Jones and Souter were being flown into town late that afternoon, as the two finalists who would meet with President Bush the next day. Although I did not know that Jones and Souter were on their way or just how quickly Bush’s decision would come, I did know that they were the two leading finalists, that President Bush had publicly expressed his desire to move very quickly, and that I had worked fourteen hours on Saturday and five on Sunday on the appointments decision (and I was scarcely the lead dog on the issue—the candidates whom I was charged with researching, and whose names confidentiality still prohibits me from disclosing, were distant also-rans by Sunday afternoon). It was clear the nomination would come very soon.

I went home around 5:00 p.m. on Sunday. There was nothing much more to do. The decision would be made by the White House. If need be, we would receive further marching orders on Monday, but the sense was that there would not be the need. President Bush would pick one of the persons we had already researched, most likely Jones or Souter.

I was deeply distressed by the prospect of Souter, both because I believed his judicial philosophy was too weakly “conservative,” and, more particularly, because I believed he was quite likely to vote to uphold *Roe*—a case I personally found morally and jurisprudentially criminal. I began to consider leaking his name to friends of mine in pro-life legal circles, or to a prominent conservative columnist who attended the same church as I. I called long-distance information seeking the home number of a friend in the Chicago area whom I believed would be able to galvanize the pro-life forces on short notice, but he had recently moved and I could not find the right suburb.

Seeking Out the Essential David Souter; Bookish, Insular Justice-Designate to Face Senate Panel This Week, WASH. POST, Sept. 9, 1990, at A1 (“The insular nature of Souter’s life in New Hampshire, and the narrowness of his life experiences, have prompted some observers to question whether the little-known judge has the range of human understanding necessary for a justice.”). The *Smith v. Cote* concurrence is certainly Exhibit A in support of such a view of Souter.

All the while, I was agonizing over whether to make the call even if I got the number: Souter's name had been mentioned in at least one press report, so, in a sense, I would just be kibitzing with a friend about one of the possible names. But I did have inside information, the purpose of the call would be to convey it (whether directly or subtly), and it was clear that my client, the Executive Branch of the U.S. government (acting through the President and his subordinates, acting lawfully and within the scope of their powers), intended the information to remain confidential so President Bush could make the choice before issue-group pressures could be brought to bear (which would have been precisely what my call would be designed to thwart). To reveal the information would have been a violation of my duties as a lawyer and as a government employee. It might even have been a crime. (I did not wish to consult anyone else in my office about this last aspect, or about the decision generally, for I would then have implicated them in my conduct.)

At the same time, I was uncertain about "causation." The President might well choose Jones, and, even if Souter were chosen, one could not be certain he would be terrible. The Supreme Court might overrule *Roe* in any event. (*Webster*²² had just been decided, and there appeared already to be a slender majority to distinguish *Roe* into oblivion.) And, after all, it was the President's decision to make, not mine. Who was I to substitute my judgment for that of older, more seasoned hands, who knew Souter personally, who had interviewed him for the Court of Appeals appointment, and who also had read his opinions?

I did nothing. Souter's nomination was announced the next afternoon, Monday, July 23, 1990. Just as Bush's press conference announcing Souter was about to begin, I received a phone call from my friend in Chicago. He wanted to chat about the nomination. I told him what was going to be secret for only about another forty-five seconds.

"What?!" he said. "Souter?! He's got a wrongful birth opinion!" We cut the conversation short. I walked down to the OLC conference room as the television announcement was starting, but after a few seconds, I could not watch any more. Depressed and bitterly angry with myself, yet still conflicted, I left the office for the day. I felt I probably should have leaked the information.

Shortly after the nomination had been announced, I ended up speaking again with my friend in Chicago. Pro-life leaders had met with Chief of Staff Sununu and others at the White House. He shared my dissatisfaction with Souter. I suggested that the pro-life groups should "go nuclear" against Souter. He said that the refrain from the White House was, as he put it, "trust and obey." The pro-life groups had been reassured that the White House thought Souter would be just fine. *Smith v. Cote* signaled Souter's sensitivity to the pro-life stance. The pro-life groups were skeptical, but felt they had few options. They did not wish to oppose a pro-life President or forfeit their influence for

22. *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

later appointments. I suggested to my friend that opposing Souter would not hurt Souter's confirmation chances, and that the strong opposition of pro-life groups might both help in Souter's confirmation (ironically) and help obtain a more satisfactory nominee for a future vacancy, should one occur. But this was a "too little, too late" discussion. Based on this phone conversation, I took some solace in the possibility that, even if I had leaked the confidential information of Souter's likely nomination, it would not have stopped the Souter train from leaving the station.

Did I, through indecision and cowardice—or through an uneasy, almost unintended, triumph of principle over personal politics—do the right thing by doing nothing? With 20/20 hindsight, and in view of the consequences, I believe I did the *wrong* thing. There are few issues about which I believe strongly enough to violate the duty of loyalty and confidentiality owed by a government attorney to the administration he or she serves—duties that in themselves have substantial moral weight. Abortion is one of those very few issues. (A generalized lack of comfort with a candidate's perceived judicial philosophy would clearly not be sufficient.) I was personally convinced, largely from my own reading of the Souter record, that there was a huge risk—indeed, a substantial likelihood—that Souter would be a complete disaster on what I regard as the most important, life-and-death issue to confront the legal system in my lifetime. That should have justified leaking.

My worst fears were fully realized just two years later. Souter was confirmed, sat silently on the Court for a year and a half, and then was instrumental in the Court's decision in *Casey*, reaffirming *Roe*.²³ Souter was co-author, with Justice O'Connor and Justice Kennedy (two Justices who had been in the *Webster* majority, but shifted or outright changed their positions), of the "Joint Opinion" reaffirming *Roe*, largely on grounds of *stare decisis* and the asserted need for the Court to preserve public respect for the Court as an institution, by adhering to "watershed" precedents, even if erroneous. The Joint Opinion is vintage, *Smith v. Cote*-style David Souter: precedent, *stare decisis*, moderate substantive due process, and "tradition" projected thirty years further down the path marked by prior activist decisions.

What if? Had Bush nominated Edith Jones, I believe the Court would have overruled *Roe*, perhaps by as much as 7-2. Clarence Thomas's appointment came the year after Souter's. With Jones and Thomas replacing Brennan and Marshall, there would have been five solid votes to overrule *Roe*: Rehnquist, Scalia, White, Jones, and Thomas.²⁴ With those five in place, it is highly un-

23. For a short critique of *Casey*, see Michael Stokes Paulsen, Book Review, 10 CONST. COMM. 221 (1993) (reviewing ROBERT BURT, *THE CONSTITUTION IN CONFLICT* (1992)). For a short parody of *Casey*, see Michael Stokes Paulsen & Daniel N. Rosen, Brown, *Casey-Style: The Shocking First Draft of the Segregation Opinion*, 69 N.Y.U. L. REV. 1287 (1994). For a comprehensive critique of *Casey*, see Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15 (1993).

24. Of course, this is necessarily a bit speculative. It is not absolutely certain that Jones would have voted to overrule *Roe* or would have hacked it to bits (though I think it a good bet). Moreover,

likely that Kennedy would have switched sides as he did in *Casey*. The five votes would have shielded him from the political consequences of voting to overrule (which apparently was important to his thinking), and probably would have led him to be concerned to justify the Court's institutional prestige by not overruling *Roe* by just a slim margin.²⁵ Justice O'Connor, the lone woman on the Court when *Casey* was decided and the object of intense academic, political, and media pressure to reaffirm *Roe*, would have been even more shielded. The appointment of Edith Jones, another conservative woman, would have been the scale-tipping event, not O'Connor's shaky fifth vote. O'Connor could have joined a carefully crafted, seven-member majority opinion reaching the opposite result of the one reached in *Casey*. After all, *Casey* did overrule two earlier abortion cases, sustain much of the Pennsylvania statute, and cut back somewhat on the standard of constitutional protection given to abortion. The possibility was certainly there that O'Connor would have voted to scrap *Roe* entirely. Both Kennedy and O'Connor, somewhat more squeamish, media-sensitive, and tractable than strong judicial personalities like Justice White or Justice Scalia (and Judge Jones), would have been buttressed in their previously expressed views by the presence of strong reinforcements. *Casey* would have gone the other way.

But Souter was never a vote to overrule *Roe*. His publicly expressed commitment to having not decided the issue was, I think, genuine.²⁶ Indeed, the "confirmation conversion" (if any) was that Souter became more committed to *being uncommitted*. The Joint Opinion in *Casey* is in some sense Souter's coming-out statement to the world that he really was not the "stealth candidate;" that he really was more committed to "process values" and "craft values" than to any particular reading of the Constitution, and that he was telling the truth at his confirmation hearing.

With Souter on the Court rather than Jones, that left either Kennedy or O'Connor with the role of being the decisive fifth vote, each probably waiting for the other to commit. Along came Souter with his attractive approach to provide the political cover that was lacking because of the lack of safety in numbers. The rest is history—probably the historically most important constitutional decision of the Supreme Court in decades.

C. Moral and Legal Dilemmas

Causation and prediction are always questions of judgment—best guesses about the future, based on imperfect information. About the only two propositions of which I am certain are one of law and one of morality. First, as a matter of law, my nondisclosure of confidential government-attorney information

had Jones been named in 1990, and provoked a confirmation fight, who is to say that Bush would have appointed Thomas in 1991? He might well have appointed Souter.

25. See Paulsen, Book Review, *supra* note 23, at 225-33.

26. See *Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 189 (1990).

was proper and obligatory. To be sure, the controlling ethics rules seem frequently to be honored in the breach, especially in Washington political circles. That, however, does not vitiate the *legal* responsibility to obey the law.

Yet perhaps such widespread disregard bears on my second conclusion: In certain instances, one's moral commitments must trump one's obligation to obey the law. The bare fact of a legal obligation to remain silent does not mean that I acted properly, in a moral sense, in remaining silent. There are circumstances when silence equals death, and when adherence to role-obligations results in complicity with clear moral wrong, even if such complicity is expected by the legal regime and non-compliance is likely to be futile, ineffective, and punished.

The latter point is a theme of one of my earliest published writings on the law, with specific reference to the issue of the law's treatment of abortion. My thinking on this point has been influenced not only by religious conviction, but also by the compelling work of one of my teachers and mentors in law school (with whom I otherwise shared nothing but disagreements), the late Professor Robert M. Cover of Yale Law School. Cover's book *Justice Accused*,²⁷ concerning the moral/formal dilemma confronting anti-slavery judges called on to enforce pro-slavery law, was the subject of my 1989 review essay²⁸ in the *Journal of Law & Religion*, in a symposium issue honoring Cover's life.²⁹ At about the time of the Souter nomination, I had just completed that essay, which argued that a pro-life judge should resign or endure impeachment rather than apply *Roe v. Wade* against conscience and against the Constitution. I noted that few judges probably had the fortitude to take such a stand. It is a sad irony that I failed to take action consistent with such a stance, when an arguably analogous situation arose in my capacity as government attorney.

What of the other lawyers in the Bush Administration? Is my argument here on attack on them, too? In part, yes, but it is mostly a reflection on different perceptions of duty and loyalty, of cause and responsibility, and of what is or is not a moral imperative.

President Bush, I believe, was pro-life but not strongly committed to such a position. It was more important to Bush not to ask—and thus not to know—about a potential nominee's position, because of process concerns about the independence of the judiciary³⁰ and because of political concerns about confirmability and plausible deniability (no matter which way the nominee voted

27. ROBERT M. COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975).

28. See Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's JUSTICE ACCUSED*, 7 J.L. & RELIGION 33 (1989).

29. See Symposium, 7 J.L. & RELIGION 1 (1989).

30. In other writing, I have criticized the view that the notion of an "independent judiciary" counsels against, or prohibits, inquiry into a prospective judicial appointee's judicial philosophy or opinion about prior cases. As long as a prospective judge is not asked to, and does not, commit himself or herself to voting in a particular manner on a particular case or a particular issue, there is no interference with the constitutional independence of the judiciary. See Michael Stokes Paulsen, *Straightening out THE CONFIRMATION MESS*, 105 YALE L.J. 549 (1995) (reviewing STEPHEN CARTER, *THE CONFIRMATION MESS* (1994)).

on *Roe*). Bush wanted a no-fingerprints, generic, nondescript “conservative” jurist, and that is what he got. There was a large risk that such a jurist would not vote to overrule *Roe v. Wade*, but on this issue presidential deniability was more important than judicial reliability. Thus, in presenting the choice of Souter to the President, Bush’s most senior legal advisers probably served him faithfully.

Still, there were others, less high in the hierarchy but still important to the decisionmaking process, who strongly subscribed to the Administration’s unstated commitment to appointing judges who would likely vote to overturn *Roe v. Wade*, and who could be expected to be strong textualist/originalist jurists. Among this group, there were some who, in my view, either incompetently did not recognize the red flags about Souter, who foolishly ignored them, or who deliberately disregarded them out of a desire to go along with the perceived wishes of their superiors. As far as I know (though I do not pretend to possess anything near full knowledge on this point), no one in a position to persuade the President argued vigorously against the nomination of David Souter on the ground that Souter’s apparent judicial philosophy and prior record as a New Hampshire Supreme Court justice made him unacceptable—even though I am convinced that several critical persons within the Justice Department and White House were strongly committed to the appointment of true judicial conservatives and recognized the evidence that Souter was not such a candidate.

For these persons, it would have been no violation of the duty of loyalty to press the case against Souter within the Administration. It might have posed some risk to career advancement, but loyalty does not require sycophancy. In the end, however, even these persons might simply have been unsure. At least they were not sure enough of their concerns about Souter to argue more strenuously against him, in opposition to powerful political advisers and patrons within the White House who appeared strongly to favor Souter.

III

WAG THE LAWYERS?³¹: WHERE LOYALTY LIES

I wonder—I have no first-hand knowledge—if something similar might have occurred (or be occurring today) among government lawyers serving in the upper echelons of the Clinton Administration, in the White House and in the Department of Justice, who quite likely have had knowledge of probable illegal conduct by high officials within the Administration, including President Clinton himself. The situation of Clinton’s government lawyers is in many ways the reverse of the Souter situation: The law governing the lawyers’ conduct in the Clinton case appears to require disclosure of otherwise confidential information concerning government officials’ actions, whereas the law governing my

31. *Cf.* WAG THE DOG (New Line Cinema 1998). *Wag The Dog* is a fictional film, predating the public revelation of the Monica Lewinsky affair by only a matter of weeks, in which the President’s “fixers” seek to divert the public’s attention from the President’s molestation of a teenager by staging a fake war in Albania.

conduct forbade disclosure of government officials' contemplated actions. But, in certain respects, the basic matrix of questions, the likely influences on government lawyers' actual behavior, the possibility of a "conscientious objection" to one's legal duty under the circumstances, and the central question of where loyalty lies are remarkably similar.

I assume for the sake of argument what appears as of the date of this writing (late summer 1998) most probably to be the case: President Clinton, and perhaps others within and without the government acting with President Clinton's knowledge and support, conspired to give and did give false sworn testimony in a federal judicial proceeding, in felony violation of several provisions of the U.S. Code, and then took steps to delay and prevent such violations from being discovered and prosecuted. I further assume that it is at least likely (given the vigorous resistance to subpoenas by such persons) that government lawyers—especially those in the Office of Counsel to the President—possessed for some time (and continue to possess) knowledge of probable criminal conduct, some completed and some arguably ongoing, by the President and his associates.

What, then, explains the failure of these government lawyers to disclose such information to the appropriate public official (normally, the Attorney General; here, the Independent Counsel authorized to investigate these matters on behalf of the United States), or to Congress or the public? Is it a perception that the lawyer's true ethical duty is to keep such information confidential? Is it a mistaken understanding of who the government lawyer's "client" is? Is it a belief that some moral imperative requires the lawyer to maintain confidentiality, in order to prevent political damage to President Clinton, even if the law's requirements are to the contrary? Do key lawyers in the Department of Justice or the White House Counsel's office believe that the moral imperative of maintaining Bill Clinton in office and of avoiding embarrassments to his Administration, or of resisting what they believe to be a malicious prosecution, trumps their obligation to obey the law and to adhere to the ethical responsibilities of an attorney?

There appear to be four basic possibilities (with variations within each category). The first three are possible "dodges," but each has serious analytical flaws. The fourth frames the basic question of the limits of an executive branch lawyer's loyalty to the incumbent administration, where what is involved is not a policy disagreement (as was the case with my dilemma concerning the Souter nomination) but a question of the violation and evasion of the law by powerful officials within the administration.

The first possibility is that an administration lawyer simply might not have knowledge of any facts concerning criminal conduct by government officials. While this unquestionably describes a large number of administration lawyers, there doubtless are some who knew or should have known enough facts to draw inferences of likely criminal conduct. Pretended or contrived ignorance—deliberately closing one's eyes to facts one has a duty to see—does not count as

lack of knowledge. To the contrary, it is a violation of an in-house lawyer's duties to the entity she represents, in this case the U.S. government. A see-no-evil, "don't-ask-don't-tell" posture does not shield a government lawyer from her ethical responsibilities on the theory that she does not "know" of law violations.³²

The second possibility, as incredible as it might sound, is that the government lawyer might not know what her ethical and legal responsibilities are or might misunderstand who her client is. The governing law on this point is quite clear, however: The lawyer's client is the government, not any individual officeholder, and the duty of loyalty therefore requires the government lawyer to disclose his knowledge of criminal acts by other government officials or employees to the highest authority authorized to act on behalf of the government, which is the Attorney General (or an Independent Counsel, where the matter falls within an Independent Counsel's jurisdiction). Further (but more problematic), the lawyer may also have a duty to make such information public if the Attorney General or Independent Counsel insists upon action on behalf of the United States, including a refusal to act, that constitutes a clear violation of law.³³

The affirmative duty of government lawyers to report suspected violations of the federal criminal code by other federal officials is set forth in 28 U.S.C. § 535(b), and extends to any "information, allegation, or complaint" received by any department or agency of the Executive Branch "relating to" known violations of title 18 of the U.S. Code "involving government officers and employees." The report is to be made to the Attorney General, unless "the responsibility to perform an investigation with respect thereto is specifically assigned

32. "Knowledge" here is used in the same sense in which attorney ethics rules and cases applying criminal and regulatory law employ the term: "Knowledge" denotes actual knowledge, but such knowledge may be inferred from circumstances. It is well-established in the law of lawyering that a lawyer acting as a legal counselor may not escape criminal or civil liability, or ethical responsibility, by deliberately turning a blind eye to facts she has a duty to see. Nor may an attorney remain silent about known unlawful conduct where there exists a duty to speak, without becoming complicit in or assisting the illegality. See MODEL RULE OF PROFESSIONAL CONDUCT 1.2(d) (1983); see also *United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964); *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978); *In re Am. Continental Corp./Lincoln Savings & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992).

The attentive reader may have noted that I have shifted to the pronoun "she" in this paragraph. The shift is only partly stylistic. The failure of Attorney General Janet Reno, the highest-ranking legal official and adviser in the Executive Branch of the United States government, to press President Clinton and others for full disclosure of facts, her silence in the face of powerful evidence of criminal wrongdoing within the Administration, and her willingness to be used as a pawn in *resisting* disclosure of these facts to the Independent Counsel (or to her), marks a shameful dereliction of duty on her part. Attorney General Reno is the archetype of the corporate in-house counsel who looks the other way as corporate officials violate the law, and who through studied inaction arguably has assisted such officials in their attempts to prevent disclosure of their wrongdoing.

33. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1983) (setting forth principles for the representation of organizational clients in general).

otherwise by another provision of law," the most obvious example being an Independent Counsel investigation.³⁴

Even in the absence of this statute, the ethics rules that apply to all lawyers require the same result.³⁵ The situation of White House Counsel (and other government lawyers) is directly analogous to that of in-house counsel for a corporation. The lawyer represents the entity, not present management of the entity. This is so even though the lawyer may owe her position to present management and feel a sense of personal loyalty to the CEO or to certain members of the board of directors. To be sure, an organizational client (like the government) operates through its duly constituted management, and, as noted above, lawyers for organizations are expected to represent and further the (lawful) policies of present management, and to keep its confidences. But the in-house lawyer has an affirmative duty to the corporation (here, "USA, Inc.") not to remain silent about violations of law by corporate officials that breach the officer's duty to the corporation and that are likely to result in substantial injury to its interests.³⁶

In this context, where federal officials likely have violated federal law, the officials' breach of a duty to the entity ("USA, Inc.") is established by the fact of the violation of the laws of the entity (the U.S. Code). Practically by definition, federal officials' violations of federal criminal laws constitute a substantial injury to the interests of the federal government. (I address presently the question of whether the law violations implicated by the Clinton affair involve no substantial injury to the interests of the United States, on the theory that the law violations were inconsequential.³⁷) Thus lawyer ethics rules, quite apart from 28 U.S.C. § 535(b), require a government lawyer, at a minimum, to disclose information concerning the violation of federal law by federal officials to the highest authority authorized to act on behalf of the entity—here, by statute,

34. See 28 U.S.C. § 535(b) (1994) (imposing reporting duty); 28 U.S.C. § 594(a) (1994) (stating that the Independent Counsel exercises the full power and responsibilities of the Attorney General in matters that are within the Independent Counsel's jurisdiction).

35. The D.C. Circuit recently construed 28 U.S.C. § 535(b) as not applying to the Office of the President. See *In re Bruce R. Lindsey* (Grand Jury Testimony), 148 F.3d 1100, 1110 (D.C. Cir. 1998) (noting that the statute "does not clearly apply to the Office of the President" but also noting that the Office of the President "has traditionally adhered" to the policy of the statute).

36. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1983). That is not to say that an organization, including the federal government, might not legitimately deem it an appropriate use of the organization's resources to pay for, or provide, legal representation to individual officers, to represent those individuals' personal legal concerns that arise from their work in connection with the organization. It is common, for example, for corporations to provide (separate) representation to directors or officers who are sued personally in connection with their activities as directors or officers, or to provide reimbursement for legal expenses in unsuccessful derivative suits brought against them. The U.S. government has detailed regulations providing for representation (or reimbursement for legal expenses) of government employees who are sued, subpoenaed, or charged in connection with conduct taken in their capacity as government officers or employees. See 28 C.F.R. § 50.15-.16 (1998). At present, however, it is clear that the relationship of White House Counsel to the Office of the President is not one of attorney for the President personally, but for the Office of the President as part of the U.S. government.

37. See *infra* text accompanying notes 39-40.

the Attorney General or her authorized designee (such as the Independent Counsel acting within the scope of his jurisdiction).³⁸

Is it really possible that government lawyers at the highest levels of the U.S. government do not understand this? The analogy to corporate counsel is so clear, and the command of 28 U.S.C. § 535(b) so basic, that one would expect that lawyers of a caliber to be considered for such important posts as senior positions in the Office of Counsel to the President or in the Department of Justice would know or be expected very quickly to learn the basics of the attorney-client relationship that govern their roles.

Nonetheless, my experience and observation, both while in the government and as an outside observer, suggest that it is indeed possible that some executive branch lawyers either do not know the law that governs their conduct or “know” it only in the abstract and have not internalized its standards into their own behavior. The positions of Counsel to the President and of Attorney General, and many subordinate posts in the White House Counsel’s office and the Justice Department, are fundamentally *political* posts, in addition to being legal positions. While some men and women holding these positions are terrific lawyers, they are typically not selected for their knowledge of legal ethics, or even for their technical legal skills generally, but for other attributes deemed important by the President. Persons holding such political/legal positions within the Executive Branch operate within a work environment and ethical milieu in which political loyalty is valued highly and in which scrupulous attachment to legal ethics, in a manner that challenges the conduct of others within the administration, may be viewed at best with irritation (though perhaps grudging acceptance) and at worst as a symptom of political disloyalty.

In addition, “Counsel to the President” is an especially heady and potentially misleading label. The Counsel to the President is not counsel to the President *personally* in his personal capacity, but a government lawyer whose duties run to the U.S. government. The title “Counsel to the President” describes that office’s area of job responsibilities—its portfolio—and that portfolio is much more comprehensive and significant than any other legal office within the government (save for Attorney General and perhaps a few other positions in the Department of Justice). Yet “Counsel to the President” is still a law office *within the government of the United States*. Nonetheless, it is obviously true that many persons who have held this job title in recent years have viewed their “client” as the President, as CEO of the United States; that is, they incorrectly view themselves as representing the officer, rather than the office,

38. Constitutionally, the President is the highest official of the Executive Branch. Therefore, 28 U.S.C. § 535(b) should be understood as making the Attorney General the President’s designee for these purposes, always subject to the President’s direction and control. This structure presents a difficulty when the President is one of the persons whose conduct potentially violates the law. In such an event, § 535(b) operates as a mechanism for informing the Attorney General of possible presidential illegality and commits to that officer the responsibility of representing the interests of USA, Inc., in assuring that government officers conduct themselves in conformity with the law.

and ignore or forget that the President's conduct, and that of other executive branch officials, must also conform to the laws of the United States.

Thus, though it is somewhat embarrassing to say it, it is quite likely the case that a good many lawyers operating at the highest levels of the U.S. government do not know for whom they work or what legal and ethical duties govern their work relationships, and they do not care to learn. They have a mistaken sense of loyalty because they have a mistaken understanding of, or little regard for, the law that governs their own conduct.³⁹

This brings us to the third possible reason for the failure of government lawyers to disclose violations of federal law—where the lawyer knows of unlawful conduct, understands the content of his ethical duties, but judges the unlawful conduct to be insubstantial and thus concludes that there exists no legal obligation to disclose it. This quite possibly describes the views (or at least the public posture) of some highly placed lawyers in the Clinton Administration. The problem with this view is that the role of evaluating the significance of the law violation is assigned to the Attorney General (or Independent Counsel). As a legal matter, it is not for the government lawyer, in the White House or elsewhere, to judge, even in good faith, that the law violation at issue is not material, not substantial, not important, or not worth the damage to the President or his administration. The government lawyer—other than the Attorney General or an Independent Counsel—is a mere subordinate, without authority to substitute his or her judgment for that of the duly constituted authority within the government.

Finally, there is the intriguing and somewhat disturbing fourth possibility—namely, that the government lawyer believes that, notwithstanding knowledge of the facts and the law governing his conduct, he should remain silent about possible criminal wrongdoing by other federal officials because he believes that some other, superior moral principle should lead him to violate the law and his ethical duties as an attorney. In the Clinton Administration, specifically, have government lawyers who know about illegal conduct, and know of their legal and ethical duty to disclose information to the Attorney General or Independent Counsel concerning such conduct, deliberately violated the law out of a sense that some higher ethical or moral duty requires them to protect the Administration, or President Clinton personally, from political damage?

39. Indeed, only such a fundamental misconception concerning the role of a government attorney can explain the apparent belief of lawyers in the Clinton Administration that government lawyers in the White House Counsel's office may invoke attorney-client privilege to attempt to prevent disclosure to the Office of Independent Counsel (exercising the powers of the Attorney General in this matter) of communications between government lawyers and the President relevant to an investigation of possible criminal activity in which federal officials may be involved. As this article goes to press, two circuits of the U.S. Courts of Appeals have emphatically rejected such claims of privilege. See *In re Bruce R. Lindsey* (Grand Jury Testimony), 148 F.3d 1100 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), cert. denied *sub nom.* Office of the President v. Office of Independent Counsel, 117 S. Ct. 2482 (1997). For a fuller discussion, see Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?* MINN. L. REV. (forthcoming 1998).

One could imagine circumstances in which a national crisis, foreign or domestic, or some overriding policy imperative leads a government official (including a government lawyer) knowingly to violate the law in order to preserve the President's political power or an Administration policy. This seems to have been the ethical stance of many within the upper echelons of the Nixon Administration, when Watergate was raging: War (both Vietnam and the Cold War), domestic violence, vigorous resistance to Administration policies—enemies abroad and “enemies” at home—along with the large number of foreign crises in the world, apparently led some of “the President's men” to conclude that President Nixon needed to remain in office, no matter what.

It is harder to believe that a similar calculation is at work with government lawyers in the Clinton Administration. No great, immediate national crisis currently besets the United States. The nation is at peace. The Cold War is over. The economy is strong. Domestic tranquility prevails. To be sure, the world remains a dangerous place and foreign affairs constantly require vigorous and immediate attention.⁴⁰ Yet there is no extraordinary circumstance that is even believably available as an asserted reason for preserving the President's political power or an Administration policy at all costs.

One could imagine—it is easy for me to imagine—a government lawyer feeling so strongly about some issue of policy (like abortion) that he is willing to violate his legal and ethical duties in order to further it. One could even imagine a lawyer acting in complicity with the illegal conduct of others, in order to advance (or preserve) a deeply felt policy imperative.⁴¹ Again, however, it is difficult to imagine what such policies might be with respect to the Clinton Administration.⁴²

40. A notorious example is the August 1998 terrorist bombing of two American embassies in Africa, causing hundreds of deaths. President Clinton responded by ordering (within days of his personal appearance before a federal grand jury to address allegations of perjury and obstruction of justice) retaliatory bombings of suspected terrorist bases and support networks in Afghanistan and Sudan.

It is possible that a government lawyer, aware of such events, might be reluctant to disclose information that would expose the President of the United States or other high administration officials to charges of violation of federal criminal law. But the basic facts concerning President Clinton's involvement in probable crimes were available to key government lawyers for many months before the embassy bombings. Crisis could at most excuse delay in making disclosure, but it does not obviate a government lawyer's legal and ethical duties entirely.

41. Such a moral posture appears to have been taken by at least some of the principal players in the Iran-Contra affair during the Reagan Administration. With respect to some individuals, there may have existed sound arguments that their conduct did not in fact violate any law, or at most constituted a technical violation of non-criminal prohibitions on particular uses of appropriated funds. However, there appears to have been substantial evidence that some other individuals knowingly presented false, sworn testimony to other branches of government, in order to keep secret from Congress an “off-the-books” covert operation deemed by the persons involved to be vital to the interests of the United States. To the extent attorneys knew of such conduct (or were personally involved), the analysis in the text would apply to their conduct as well.

42. The most likely domestic issue of this sort is, oddly enough, abortion—though from the opposite perspective of the one I held while serving in the Bush Administration. About the only major domestic policy issue on which President Clinton has proved to be consistently committed during his tenure in office is his uncompromising support of abortion-on-demand. Some persons, holding legal and moral views the opposite of my own, believe that maintenance of unrestricted legal abortion is a high moral imperative. Perhaps such persons, perceiving an ethical conflict that is the mirror image of the

It is more probable that some Clinton Administration lawyers sense a rather different form of moral/legal conflict. If one assumes that the Administration's attacks on Independent Counsel Kenneth Starr's investigation are something more than cynical (that is, are more than tactical attempts to thwart Starr's investigation and prevent the truth from being disclosed), but proceed from the sincere belief that Starr's investigation was itself an abuse of power with improper partisan motives, then a government lawyer legitimately might feel a moral obligation to resist illegitimate attacks on the President by such an evil prosecutor. While I do not share this view on the merits,⁴³ I understand that some persons might sincerely hold this view. For such persons, the moral/legal dilemma they perceive is akin to the one I felt with respect to the Souter appointment: There is a moral duty to resist a clear-and-present evil (abortion; an evil prosecutor), and there is a legal duty inconsistent with one's perception of where the moral imperative lies in the particular situation (confidentiality; disclosure of evidence in a criminal investigation).

Resolving such a conflict is one of the most difficult problems a government lawyer (or any lawyer, for that matter) can face, and the difficulty cuts across partisan affiliations. If one accepts that moral duties can sometimes trump legal/ethical obligations, then leaking information about Souter or resisting disclosure of evidence to Starr stand, in principle, on the same moral ground. Reasonable people can and do disagree about whether the moral values motivating the attorney are correct in each case, about the weight to be accorded such moral values when compared to the competing moral values embodied in the legal rule to be violated, and about whether the facts support the invocation of the asserted moral belief in the case at hand. Is overruling *Roe* a compelling moral objective or a bad one? Does the goal of overruling *Roe* justify disclosure of confidences concerning the lawful policy intentions of the President one serves? Is defeating David Souter really the key to reversing *Roe* (and would that really stop legal abortion)? Is Starr's investigation truly evil or are such assertions in fact rationalizations or themselves an attempt to obstruct justice?

one I had, believe that President Clinton's support for abortion rights justifies acquiescence in unlawful obstruction of justice as a regrettable but necessary lesser evil. Given the intensity of the commitment that exists on the part of both strong pro-lifers and strong advocates of abortion rights, it is not unimaginable that this might explain some Clinton Administration lawyers' (and others') tolerance of unlawful conduct that they otherwise would condemn if performed by persons not sharing their political agenda.

43. I think the attacks on Starr are cynical and tactical. Though politically difficult, it lies within the power of the Administration, acting through the Attorney General, to fire an Independent Counsel if the Administration believes justifiable cause exists to do so (which would certainly include evidence that an Independent Counsel's investigation is politically motivated or constitutes an abuse of power on the Independent Counsel's part). See 28 U.S.C. § 596(a)(1) (1994). While the Independent Counsel could seek judicial review of his discharge, see *id.* § 596(a)(3), presumably any evidence of misconduct by the Independent Counsel would compel the judicial conclusion that the discharge must be sustained as a matter of law. The Clinton Administration has been aggressive, though largely unsuccessful, in pressing legal challenges against Independent Counsel Kenneth Starr. It would seem that the question of disobedience to one's legal/ethical duties, on the ground that it is morally imperative to resist an evil prosecutor, only becomes ripe when the legal channels for discharging such a prosecutor—channels clearly open to the upper echelon of Administration lawyers, but for political concerns—have been exhausted.

Unless one is prepared to say that moral considerations never trump legal obligations, then, depending on the facts and the true motives of the persons involved, leaking Souter and covering for Clinton might occupy the same moral ground. At the very least, they contest for the same ground.

It is more likely, I think, that the refusal by the most knowledgeable and powerful government lawyers in the Clinton Administration to reveal information concerning President Clinton's possible criminal wrongdoing is motivated not by policy concerns (like abortion or antiterrorism) or by a genuine, supportable belief that the Independent Counsel's investigation represents a moral evil that justifies violation of one's legal duties, but by simple personal loyalty to Bill Clinton. In other words, the government lawyer has concluded he will violate the law not because some independent moral principle requires it, but simply to advance the personal interests of individual lawbreakers within the Administration to whom he feels personally loyal. To be sure, personal loyalty to others is a moral principle in its own right, but it is not usually recognized as one of sufficient weight to justify cooperation in the moral and legal wrongs of others. The technical term for government lawyers who take such a stance is "co-conspirators." Sadly, it is possible that this describes some lawyers in the Clinton Administration. Such a position, I think, cannot be justified in moral terms on the known facts about the Clinton situation, and it certainly cannot be justified in legal terms.

IV

CONCLUSION: INERTIA AND ETHICS

Midpoints and mixtures of course exist within all of these categories, making ethical dilemmas often very difficult to sort out for the government lawyer. Knowledge of key facts may be incomplete. Understanding of the law governing the government lawyers' conduct may be incomplete or uncertain, and might be contradicted by the apparent opinion or conduct of other lawyers in the administration, including superiors. The professional environment within which the government lawyer works may not be conducive to patient ethical reflection and deliberation, or be unsupportive of questioning in this regard. The lawyer may feel isolated in his ethical qualms and may not have readily available other attorneys, not otherwise implicated in the matter, with whom to consult for a detached "second opinion."⁴⁴

44. How does a government lawyer ask anyone except outside, private counsel whether his or her conduct is legal and ethical? Another government lawyer, even a designated agency ethics official, represents the government, and would have an obligation to disclose the underlying factual information about possible criminal wrongdoing—and almost certainly the inquiring lawyer's inquiry as well—to the Attorney General. The outside counsel route is the only one available. (It is quite possible that this exact dilemma is what led former Deputy White House Counsel Vincent Foster, Jr. to seek private legal advice shortly before his suicide.) Even that route may be problematic, if the matter in question is one on which the lawyer arguably is forbidden to communicate with persons outside the government, is highly classified, or is one in which sensitive or expert knowledge is required of the outside, non-governmental attorney and few persons are readily available who are qualified to provide the type of expert ethics advice.

In addition, the lawyer may feel uncertain about where the moral imperative lies in a given situation. The lawyer may hold political beliefs supportive of the administration, and feel a sense of personal loyalty to personnel within it. Conversely, the lawyer may suspect the motivations or good faith of the person to whom the legal duty of loyalty runs. Finally, the lawyer may be worried about his personal self-interest: Most government lawyers are not independently wealthy. The chief "capital" they possess is in the form of their law degrees, licenses, resumes, and professional reputation. All of that capital is put at risk when a government lawyer takes action contrary to the desires of the persons who have hired him. Rightly or wrongly, the ethos of silence runs deep in the legal profession. Violation of that norm, even for legitimate legal or moral reasons, creates risks that many government lawyers are not comfortably in a position to take.

All of this may cause even ethically sensitive lawyers to hesitate. Uncertainty, moral confusion, cowardice, or some mixture of these, lead to indecision and, consequently, to inaction. Why was it so hard for me to violate the duty not to disclose the impending Souter nomination, even when I thought there were morally compelling reasons to do so? And why has it seemingly been so easy for attorneys in the Clinton Administration (apparently) to violate the duty to disclose information about unlawful conduct? In both situations, inertia favors silence and inaction, and many of the above factors can contribute to inertia. It is always easier not to act than to act, especially when affirmative action creates personal risks and must be taken in the presence of incomplete information or uncertainty about the correctness of such a course of conduct.

Inertia pointed in opposite directions in the two situations discussed in this essay. In the Souter scenario, inertia weighed in favor of compliance with my legal ethics duty (and against my own moral sense). In the case of Clinton Administration attorneys, inertia may have weighed in favor of noncompliance with legal ethics duties.

In addition, personal loyalties to the President, to the Administration, or to particular individuals within the government—the real world of people and their inevitable influence over, and sometimes distortion of, ethical reasoning—favored nondisclosure and inaction in both situations. Personal loyalties also pointed in opposite directions in the two different situations. For me, "loyalty" in this sense meant deferring to the views of others whom I respected, against my own judgment, as I was required to do by the law. For administration lawyers in 1998, "loyalty" quite possibly has meant violation of ethical rules and complicity in criminal conduct, out of respect for, deference toward, or friendship with, the Administration officials who likely have engaged in such conduct.

In both cases, however, such loyalty was misguided. A government lawyer's duty of loyalty to the administration in which he serves necessarily has both legal and moral limits—legal limits lest the lawyer become an accomplice in wrongdoing prohibited by law, and moral limits lest the lawyer become an accomplice in wrongdoing protected by law. The legal lines are usually clearer

than the moral ones (or, at least, less subject to honest disagreement), and ambiguities obviously exist in both categories. But lines exist. An attorney for the United States unquestionably owes a duty of loyalty to the administration within which he or she serves. But when that administration wants to take the country "to hell in a handbasket," legally or illegally, there are some circumstances in which the government attorney simply must not be a compliant handmaiden.