

## BECAUSE THEY ARE LAWYERS FIRST AND FOREMOST: ETHICS RULES AND OTHER STRATEGIES TO PROTECT THE JUSTICE DEPARTMENT FROM A FAITHLESS PRESIDENT

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*During the Trump presidency, Americans were reminded that the nation relies on norms or custom—not laws alone—to protect the Department of Justice and the rule of law from improper political interference. The Justice Department is an agency within the Executive Branch and the Supreme Court has told us that the executive power—“all of it”—resides in the President alone, implying that the President can use the Department anyway he wishes limited only by the Constitution and by laws that do not violate separation of powers principles. Which laws are those? This Article concludes that Congress can do only a little to constrain executive power but enough to prevent some of the worst abuses.*

*Another check on the President’s executive power is the third branch of government—the judiciary. A proper exercise of judicial power will not violate separation of powers principles even if it prevents the President from acting as he may wish. This is obvious, of course, for decisions in cases within a court’s jurisdiction, but courts do more than decide cases. As relevant here, they also write professional conduct (or ethics) rules for lawyers whom they license or who appear before them. Authority to do so is an exercise of their inherent power. Those rules govern all lawyers including lawyers at the Department of Justice. And the rules are not limited to the conduct of lawyers who go to court. They apply whenever a lawyer represents a client. Justice Department lawyers must refuse to*

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*follow a President's instructions that do not faithfully execute the laws or if doing so would otherwise violate a court rule.*

*In a clash between the executive and the judiciary—where a federal or state court rule imposes a duty that may interfere with a goal the President wishes to accomplish—who wins? This Article argues that the judiciary wins. Its victory is further assured because the court's authority to require obedience to its ethics rules does not rely on inherent judicial power alone, although that would suffice. The judicial authority has also been endorsed in congressional legislation. This Article analyzes certain provisions in the Model Rules of the American Bar Association and the professional conduct rules of the District of Columbia Court of Appeals (which govern many Justice Department lawyers, including the Attorney General and inferior officers who work in the District) and explains how each rule may be a check on executive power.*

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## I. INTRODUCTION

“[W]hen the President does it, that means that it is not illegal.”<sup>1</sup>

“I have absolute right to do what I want to do with the Justice Department.”<sup>2</sup>

Imagine that,<sup>3</sup> after the President appeared to have lost his reelection bid but before the electoral votes were counted in Congress, as the law requires, he instructed the Justice Department to file declaratory and injunctive actions against four states where he lost, but where the popular vote was close. If those states’ electoral votes were switched to the President or not counted, or even if their results were put in doubt while the actions proceeded, the Vice President, who presides at the electoral vote count, would be able to declare the President to have won the election. At the President’s request, an election law lawyer gave the President a legal memorandum that supported the President’s position. The President gave the memorandum to the Attorney General, who disagreed with it. The President instructed the Attorney General to

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<sup>1</sup> Brian Stelter, *David Frost, Interviewer Who Got Nixon to Apologize for Watergate, Dies at 74*, N.Y. TIMES (Sept. 1, 2013), <https://www.nytimes.com/2013/09/02/world/europe/david-frost-known-for-nixon-interview-dead-at-74.html> (quoting Richard Nixon).

<sup>2</sup> Michael S. Schmidt & Michael D. Shear, *Trump Says Russia Inquiry Makes U.S. “Look Very Bad,”* N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-interview-mueller-russia-china-north-korea.html> (quoting Donald Trump).

<sup>3</sup> This hypothetical draws on Michael S. Schmidt & Maggie Haberman, *The Lawyer Behind the Memo on How Trump Could Stay in Office*, N.Y. TIMES (Oct. 3, 2021), <https://www.nytimes.com/2021/10/02/us/politics/john-eastman-trump-memo.html> (explaining a memo provided to President Donald Trump outlining a path to retaining the presidency); see also STAFF OF S. COMM. ON THE JUDICIARY, 117TH CONG., SUBVERTING JUSTICE: HOW THE FORMER PRESIDENT AND HIS ALLIES PRESSURED DOJ TO OVERTURN THE 2020 ELECTION (2021) [hereinafter SUBVERTING JUSTICE], <https://www.judiciary.senate.gov/subverting-justice-how-the-former-president-and-his-allies-pressured-doj-to-overtake-the-2020-election> (explaining steps taken by Trump based on a memo outlining possible avenues to retain power and containing testimony before the January 6 select committee of the House of Representatives); Warren Rojas, *The Latest Transcripts from the January 6 Select Committee’s Public Hearings*, BUS. INSIDER (Jul. 12, 2022, 6:01 PM), <https://www.businessinsider.com/january-6-committee-hearing-transcripts-liz-cheney-bennie-thompson-2022-6> (providing full transcripts of all January 6 select committee hearings and testimony). Quotations are invented.

file the actions and rely on the memorandum's analysis and whatever additional research supported the President's position. When the Attorney General refused, the President reminded him that the Department of Justice was part of the Executive Branch of government and worked for him. The President quoted a provision of the United States Code, which the election lawyer had given him: "The Department of Justice is an executive department of the United States at the seat of Government."<sup>4</sup> The President then quoted Chief Justice John Roberts's 2020 opinion in *Seila Law LLC v. Consumer Financial Protection Bureau*<sup>5</sup>: "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,'"<sup>6</sup> "All of it," the President emphasized. "You work for me, and I can fire you."

"You can fire me," the Attorney General replied, "but the lawyers here don't work for you. We work for the United States by helping you faithfully execute the laws. We can't do what you ask because it is not the faithful execution of the laws, and because we are lawyers first and foremost."

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An interpretation of the Constitution that purports to give the President total or near total power over the work of the Executive Branch including the Department of Justice was not inevitable. It rests on a perceived relationship between two clauses in Article II of the Constitution, which creates the presidency. Nearly a century ago, in *Myers v. United States*, the Supreme Court rejected a congressional effort to give an Executive Branch officer protection against removal, citing the Appointments and the Take Care Clauses of Article II.<sup>7</sup> Now, the current Court has doubled down. "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed,'"<sup>8</sup> Chief Justice Roberts wrote in explaining why the

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<sup>4</sup> 28 U.S.C. § 501.

<sup>5</sup> 140 S. Ct. 2183 (2020).

<sup>6</sup> *Id.* at 2191 (citing U.S. CONST. art. II, § 1, cl. 1).

<sup>7</sup> See 272 U.S. 52, 117–18 (1926) (finding the lack of explicit limits on removal in the Appointments and Take Care Clauses to be a "convincing indication that none was intended"). The Court also cited the Vesting Clause. *Id.* at 108.

<sup>8</sup> *Seila Law*, 140 S. Ct. at 2191 (quoting U.S. CONST. art. II, § 1, cl. 1; *id.* § 3).

President could remove the Director of the Consumer Financial Protection Bureau (CFPB) before his term expired and without the showing of “cause” that the legislation creating the position required.<sup>9</sup> Under the Appointments Clause<sup>10</sup> and the Vesting Clause,<sup>11</sup> it must be thus, Roberts told us, so that the President could fulfill his constitutional duty under the Take Care Clause.<sup>12</sup> The President is elected; executive department officers and employees are not.<sup>13</sup> There are, Roberts seemed to imply, no checks and balances *within* the Executive Branch, a perspective that has received academic attention and concern.<sup>14</sup> So viewed, the President holds all the cards within the Executive Branch.<sup>15</sup> Or, as President George W. Bush put it, anticipating Roberts by fourteen years, one

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<sup>9</sup> See *id.* at 2192 (holding that the structure of the Consumer Financial Protection Bureau violated the Constitution, thus allowing the President to remove the Director at will).

<sup>10</sup> Article II, Section 2 provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. CONST. art. II, § 2, cl. 2.

<sup>11</sup> Article II, Section 1, provides: “The executive Power shall be vested in a President of the United States of America.” *Id.* art. II, § 1, cl. 1.

<sup>12</sup> See *Seila Law*, 140 S. Ct. at 2191 (“Article II provides that ‘[t]he executive Power shall be vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’ The entire ‘executive Power’ belongs to the President alone.” (quoting U.S. CONST. art. II, § 1, cl. 1; *id.* § 3)). The Take Care Clause requires that the President “shall take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3.

<sup>13</sup> See *Seila Law*, 140 S. Ct. at 2203 (noting that only the President and Vice President are elected by the entire nation while highlighting that the Director of the Consumer Financial Protection Bureau is not). A year later, the Court was explicit in tying the removal power to the postulate of democratic government. See *infra* notes 117–124 and accompanying text.

<sup>14</sup> See, e.g., Neal K. Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006) (recognizing the scope of executive power and proposing “a set of mechanisms that create checks and balances within the Executive Branch”).

<sup>15</sup> See *Seila Law*, 140 S. Ct. at 2203 (“[I]ndividual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President.”).

person had to be the “decider” and that person was he.<sup>16</sup> The “buck” stopped at the Oval.<sup>17</sup>

Roberts was unequivocal. He cited *Myers*, among other decisions, that did not speak quite so absolutely (“all of it”) and could be read less so. In fact, cases Roberts cited have impressive dissenters, including Justices Brandeis and Holmes in *Myers* itself, each of whom differently interpreted the combined effect of the Appointments Clause, the Take Care Clause, and Article II’s vesting of “executive Power” in the President.<sup>18</sup>

But it is what it is. I accept these decisions and the reading of the Appointments and Take Care Clauses as applied to the facts of the cases construing them. But I argue that “all of it,” despite its rhetorical flourish, is not now and never was a correct description of the President’s power over the Executive Branch. Nor was so absolute a description necessary or even helpful to answer the narrow questions that have come to the Court.<sup>19</sup> To be sure, the President’s power is broad, but there is power in Congress to contain it. Article II itself envisions two roles for Congress in staffing the government. The President has the power to appoint “all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law,” which means by Congress.<sup>20</sup> And Congress can choose to “vest” the

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<sup>16</sup> Explaining why he would not fire Defense Secretary Donald Rumsfeld, Bush said, “I hear the voices and I read the front page and I hear the speculation. But I’m the decider, and I decide what’s best. And what’s best is for Don Rumsfeld to remain as the secretary of defense.” Sheryl G. Stolberg, *The Decider*, N.Y. TIMES (Dec. 24, 2006), <https://www.nytimes.com/2006/12/24/weekinreview/the-decider.html>.

<sup>17</sup> On President Harry S. Truman’s desk was a nameplate reading “The Buck Stops Here.” *The Buck Stops Here*, HARRY S. TRUMAN LIBRARY & MUSEUM, <https://www.trumanlibrary.gov/photograph-records/64-1563> (last visited Sept. 14, 2020).

<sup>18</sup> See 272 U.S. 52, 264 (1926) (Brandeis, J., dissenting) (“The assertion that the mere grant by the Constitution of executive power confers upon the President as a prerogative the unrestricted power of appointment and of removal from executive offices . . . is clearly inconsistent also with those statutes which restrict the exercise by the President of the power of nomination.”); *id.* at 177 (Holmes, J., dissenting) (“The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”).

<sup>19</sup> *Seila Law* itself addressed only the constitutionality of job protection for the director of the Consumer Protection Financial Bureau. 140 S. Ct. at 2192; see also *infra* notes 69, 115–117 and accompanying text.

<sup>20</sup> U.S. CONST. art. II, § 2, cl. 2.



appointment of “inferior Officers” in the “Courts of Law” and “Heads of Departments” instead of the President.<sup>21</sup>

So “all” is either wrong or at best an exaggeration. And “all of it” tells us nothing about the “it.” “Executive power,” of course, but what is that? For example, if Congress, acting under its Article II power, were to create an Executive Department of the Weather to enforce the Weather Laws, which Congress then enacts, could Congress specify the educational and experiential requirements of the principal and inferior officers, thereby limiting whom the President could appoint? Or are qualifications of those officers part of the “it”—the “Executive Power”—that the President has “all of?”<sup>22</sup>

Focusing specifically on the Department of Justice, I ask: Can we protect against improper political interference with the work of the Department of Justice without restricting the President’s Article II powers as Supreme Court cases have broadly defined them? By “improper political interference,” I mean a presidential (or Executive Branch) instruction to take or refrain from action that violates the President’s duty to “faithfully” execute the laws, as the lawyers receiving the instruction know or should know, and which will in turn require them to disobey the instruction or at least

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<sup>21</sup> *Id.*

<sup>22</sup> *See infra* Part IV.

further investigate.<sup>23</sup> Or are Nixon and Trump correct?<sup>24</sup> Should we read Roberts's *Seila Law* opinion to agree with them?

During the Trump presidency, we learned that the norms that long defined the border between politics and the administration of justice were merely assumptions, merely tradition, not mandatory and not law.<sup>25</sup> And so it is important now to ask whether and how we can fortify those norms while also respecting the President's vast power over the Executive Branch.

This Article will offer several ways to prevent improper political (i.e., faithless) interference with the Department of Justice's work. None is foreclosed by the Court's holdings, beginning with *Myers*. The first strategy is through legislation that sets the qualifications for nominees for officer positions in the Department of Justice and describes the commitments they should be required to make as a condition of confirmation.<sup>26</sup> Although the Attorney General must be appointed by the President, Congress, as a second strategy, can give the Attorney General the power to appoint (and remove) the

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<sup>23</sup> For the duty to "faithfully" execute the laws, see *infra* text accompanying note 271 (citing the constitutionally required presidential oath of office which contains the "faithful[]" execution of duties directive). Other federal employees also take an oath to "faithfully discharge the duties" of their office. See 5 U.S.C. § 3331 (requiring government employees who are "elected or appointed to an office of honor or profit in the civil service or uniformed services" to take an oath to "faithfully discharge the duties" of that office). An example of improper political interference may be the conduct of Mark Meadows, Trump's Chief of Staff, during events leading up to the January 6, 2021, invasion of the Capitol: "[A]ccording to documents provided by the Department of Justice, while you [Meadows] were the President's Chief of Staff, you directly communicated with the highest officials at the Department of Justice requesting investigations into election fraud matters in several states." Letter from Rep. Bennie G. Thompson, Chairman of the Select Comm. to Investigate the January 6th Attack on the United States Capitol, 117th Cong. (Sept. 23, 2021).

Another example of improper political interference may be the conduct of acting Assistant Attorney General Jeffrey Clark, who reportedly met with Trump without the knowledge and against the orders of the acting Attorney General "as part of a plot . . . to wield the department's power to try to alter the Georgia election outcome." Katie Benner & Charlie Savage, *Jeffrey Clark Was Considered Unassuming. Then He Plotted with Trump*, N.Y. TIMES (Jan. 24, 2021), <https://www.nytimes.com/2021/01/24/us/politics/jeffrey-clark-trump-election.html>.

<sup>24</sup> See *supra* notes 1–2.

<sup>25</sup> David Montgomery, *The Abnormal Presidency*, WASH. POST (Nov. 10, 2020), <https://www.washingtonpost.com/graphics/2020/lifestyle/magazine/trump-presidential-norm-breaking-list/>, (listing "the 20 most important norms that Trump has ignored or undermined," including refusing oversight by Inspectors General and "interfering in department of justice investigations").

<sup>26</sup> See *infra* text accompanying notes 127–160.

Department's inferior officers, especially where the risk of improper political interference is greatest.<sup>27</sup> Third, Congress can pass legislation to prevent the Department from refusing congressional demands for information, or certain categories of information, by citing attorney-client privilege.<sup>28</sup>

A fourth strategy looks to rules of professional conduct for lawyers ("ethics rules").<sup>29</sup> State and federal courts adopt professional conduct rules to govern the lawyers they license or who appear before them.<sup>30</sup> Justice Department lawyers, like all lawyers, have a second master in addition to their client—the courts. The President, I argue, cannot order them to violate the ethics rules of their licensing jurisdiction or where they "engage[] in [their] duties,"<sup>31</sup> even if those rules interfere with how the President may wish to execute the law. In every American jurisdiction, for example, rules forbid lawyers to lie to a judge or suborn perjury. If they later discover that their own or a witness's statement was false, they may need to correct it (even if the statement though false was not a lie).<sup>32</sup> The President cannot instruct a government lawyer to

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<sup>27</sup> See *infra* text accompanying notes 161–166.

<sup>28</sup> See *infra* text accompanying notes 249–254.

<sup>29</sup> See *infra* Part VII. I will use the term "ethics rules" for convenience, recognizing that the rules are not about ethics in the conventional sense. In this Article, the word "Rule" followed by a number refers to both the ABA's Model Rules of Professional Conduct and the Washington, D.C. Rules of Professional Conduct where they are the same or substantially the same. References to the "ABA rules" mean the Model Rules. Where the Washington, D.C. rules substantially differ, the citation will specifically identify the "Washington, D.C. Rule."

<sup>30</sup> See Katherine M. Lasher, Comment, *A Call for a Uniform Standard of Professional Responsibility in the Federal Court System: Is Regulation of Recalcitrant Attorneys at the District Court Level Effective?*, 66 U. CIN. L. REV. 901, 901 (1998) (outlining how the "ABA models serve only as guidelines to state rules governing professional conduct" and that the states each have separate rules relating to professional conduct, which federal courts may adopt or fashion after the ABA Model Rules); MODEL RULES OF PRO. CONDUCT r. 8.4(a)–(b) (AM. BAR ASS'N 2020) (describing the disciplinary authority of a court and the rule that the court will apply, which may not be its own); D.C. RULES OF PRO. CONDUCT r. 8.4(a)–(b) (D.C. BAR 2022) (describing the same).

<sup>31</sup> See *infra* text accompanying notes 167–179.

<sup>32</sup> See MODEL RULES OF PRO. CONDUCT r. 3.3(a) (AM. BAR ASS'N 2020) (establishing that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law" and "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal" in the event that the lawyer, the lawyer's client, or a witness called by the lawyer offers evidence the lawyer later comes to know was false).

violate these and other professional conduct rules, just as he cannot instruct a lawyer to bribe a juror.<sup>33</sup>

Perhaps Congress could override some state court ethics rules as they apply to federal lawyers, but it has not. In fact, it has done the opposite. It has endorsed them through legislation.<sup>34</sup> Perhaps a particularly aggressive congressional effort to restrict how federal lawyers represent the United States would succumb to the President's take care authority, but so far Congress has merely required that federal lawyers comply with the same federal and state court rules that bind all lawyers in the jurisdiction where they are licensed or work.<sup>35</sup> And perhaps a state court's ethics rule would be invalid if it were found to substantially interfere with the President's take care authority. That has also not happened.

Part II looks at the ways the fifty states and the District of Columbia have chosen to protect their Attorneys General from improper political interference. The near unanimity of their choices should influence, even though it does not control, consideration of proposals to protect federal lawyers from improper political interference, including the proposals in this Article. Part III addresses the Court's interpretation of the Appointments and Take Care Clauses, including with regard to the work and staff of the Department of Justice. It describes what Congress cannot do because it would interfere with the President's take care duty and, conversely, what Congress is able, or may be able, to do to prevent improper political interference with the Department, without encroaching on that duty. Part IV proposes adopting statutory qualifications and conditions for appointment of the Attorney General and the Department of Justice's inferior officers. The single most important safeguard against the success of improper political interference may be the character of the people appointed to lead the Department.<sup>36</sup> Part V identifies the source of authority for applying the professional conduct rules of state and federal courts to the work of federal lawyers. Part VI then looks at what those

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<sup>33</sup> See *id.* r. 3.5(a) ("A lawyer shall not . . . seek to influence a judge, juror, or prospective juror or other official by means prohibited by law.").

<sup>34</sup> 28 U.S.C. § 530B(a) provides that: "An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." See also *infra* text accompanying note 142.

<sup>35</sup> See 28 U.S.C. § 530B(a) (subjecting government attorneys to local laws and rules).

<sup>36</sup> See *infra* notes 127–131 and accompanying text.

rules have to say about government lawyers in particular. Part VII explains how state and federal court ethics rules that govern the Department's lawyers can help protect against improper political interference with their work. These rules can be amended to reinforce that protection. The ability of current and proposed professional conduct rules to prevent improper political interference with the work of the Justice Department has received some academic attention<sup>37</sup> but deserves much more.

## II. LESSONS FROM THE STATES

The federal government is an outlier among United States jurisdictions in how it protects the rule of law from improper political interference. Only two states give their Governors as much power over their Attorneys General as the President has over the Attorney General of the United States.

In forty-three states and Washington, D.C., voters elect the Attorney General.<sup>38</sup> Tennessee's Supreme Court picks its Attorney General,<sup>39</sup> and in Maine, the legislature does.<sup>40</sup> That leaves five states—Alaska, Connecticut, Hawaii, New Jersey, and Wyoming—where the Governor appoints the Attorney General.<sup>41</sup> But three of these states do not allow the Governor to fire the Attorney General at will. Instead, they provide various protections that enable the

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<sup>37</sup> See, e.g., Bruce Green & Rebecca Roiphe, *Can the President Control the Department of Justice*, 70 ALA. L. REV. 1 (2018) (arguing that professional norms insulate the Department of Justice from the rest of the Executive Branch); Andrew McCanse Wright, *The Take Care Clause, Justice Department Independence, and White House Control*, 121 W. VA. L. REV. 353, 358 (2018) (arguing that the President's bad faith interference in the Department of Justice would violate the Take Care Clause); W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 284 (2017) (proposing "a constructive ethical vision of the responsibilities of government lawyers as having fiduciary duties including loyal client service, creative problem-solving, competence and independence in advising, and respect for the rule of law").

<sup>38</sup> See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 n.3 (2006) ("The Attorney General is independently elected in forty-three states."); Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973, 982 (2014) (same); Zukerberg v. D.C. Bd. of Elections & Ethics, 97 A.3d 1064, 1065 (D.C. 2014) ("In 2010, the District of Columbia Charter was amended to allow District residents to elect their Attorney General.").

<sup>39</sup> Marshall, *supra* note 38, at 2448 n.3.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Attorney General to act independently. In Hawaii, the Attorney General cannot be removed without the State Senate's consent.<sup>42</sup> In New Hampshire, removal requires the Governor to provide a statement of cause.<sup>43</sup> The New Hampshire Attorney General is entitled to be heard "in his defense by a joint committee of both houses of the legislature."<sup>44</sup> In New Jersey, the Attorney General must be given notice of the charges and "an opportunity to be heard at a public hearing," with "the right of judicial review, on both the law and the facts."<sup>45</sup>

The lesson here is that Washington, D.C. and all states but two give their Attorney General job protection, either outright, by taking the Governor out of the selection process, or in other ways. Only Wyoming and Alaska adopt the federal model.

I do not cite arrangements at the state and local levels to argue that the Constitution should be amended to allow for the popular election of the United States Attorney General or as a reason to restrict the President's power to fire an Attorney General. While those are interesting ideas, neither is about to happen. Given events during the Trump presidency, my interest is in more immediately achievable ways to prevent improper political interference with the Department of Justice. But the near unanimity of state choices should have some bearing on whether congressional efforts to protect Department lawyers against improper political interference is consistent with the nation's values and the President's authority under the Take Care Clause.

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<sup>42</sup> See HAW. CONST. art V, § 6, cl. 2 ("[T]he removal of the chief legal officer of the State shall be subject to the advice and consent of the senate.").

<sup>43</sup> See N.H. CONST. pt. 2, art. 73 ("The governor with the consent of the council may remove any commissioned officer for reasonable cause."); see also N.H. REV. STAT. ANN. § 4:1 ("The attorney general, the governor, any member of the executive council, or the appointing authority of such official, may petition the governor and council for the removal of such official setting forth the grounds and reasons therefor.").

<sup>44</sup> N.H. CONST. pt. 2, art. 73.

<sup>45</sup> N.J. CONST. art. V, § 4, ¶ 5. Local prosecutors are elected in the great majority of jurisdictions. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1550 (2020) ("Alaska, Connecticut, Delaware, and New Jersey appoint their local prosecutors. New Jersey is the only state whose appointment process resembles the federal model: County prosecutors are appointed by the governor with the advice and consent of the state senate. In Alaska and Delaware, the attorneys general appoint local prosecutors. Connecticut creates a commission to select and appoint a State's Attorney for each district." (footnotes omitted)).

### III. THE APPOINTMENTS CLAUSE, THE TAKE CARE CLAUSE, AND THE EXECUTIVE POWER

In the Supreme Court's nomenclature for the Constitution's semi-opaque Appointments Clause, Executive Branch officers are either principal or inferior officers. One Article II clause uses the term "inferior Officers"<sup>46</sup> and another clause in Article II refers to the "principal Officer in each of the executive Departments."<sup>47</sup> The Supreme Court has chosen to use "principal" to designate those officers of the United States who must be appointed by the President.<sup>48</sup> By contrast:

Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: Whether one is an "inferior" officer depends on whether he has a superior. . . . [W]e think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.<sup>49</sup>

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<sup>46</sup> See U.S. CONST. art. II, § 2, cl. 2 ("[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

<sup>47</sup> See *id.* art. II, § 2, cl. 1 ("[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.").

<sup>48</sup> See *Edmond v. United States*, 520 U.S. 651, 659 (1997) ("By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches.").

<sup>49</sup> *Id.* at 662–63.

Everyone who is not a principal or inferior officer is an employee.<sup>50</sup> The difference turns on the manner of appointment, not the nature of the work.<sup>51</sup>

In *Myers*,<sup>52</sup> a first-class postmaster, an “inferior officer”<sup>53</sup> whom the President had appointed with the consent of the Senate, challenged the President’s power to remove him before expiration of his term without the Senate’s consent, which the governing statute required.<sup>54</sup> Construing the Appointments Clause, the Take Care Clause, and the Constitution’s vesting of the “Executive Power” in the President, the Court held that the President had constitutional removal authority that a statute could not limit.<sup>55</sup> Because the President had the appointment authority under the statute creating the position, he also had the removal authority.<sup>56</sup> Congress could, however, deny the President the power to remove inferior officers by giving the appointment power to the head of the Department or the courts, as Article II permits.<sup>57</sup> The Court wrote:

[B]y the specific constitutional provision for appointment of executive officers with its necessary incident of removal, the power of appointment and

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<sup>50</sup> See *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) (“‘Officers of the United States’ does not include all employees of the United States, but there is no claim made that the Commissioners are employees of the United States, rather than officers. Employees are lesser functionaries subordinate to officers of the United States . . . .” (first citing *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890); and then citing *United States v. Germaine*, 99 U.S. 508, 512 (1879))).

<sup>51</sup> See *Burnap v. United States*, 252 U.S. 512, 516 (1920) (“The distinction between officer and employee in this connection does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto.”).

<sup>52</sup> 272 U.S. 52 (1926).

<sup>53</sup> *Id.* at 158.

<sup>54</sup> See *id.* at 107 (“By the sixth section of the Act of Congress . . . under which Myers was appointed . . . ‘[p]ostmasters . . . may be removed by the President by and with the advice and consent of the Senate . . . .’”).

<sup>55</sup> See *id.* at 176 (holding that the provision of the Tenure of Office Act of 1867 denying the President unrestricted removal power of first-class postmasters is constitutionally invalid).

<sup>56</sup> See *id.* at 126 (“In the absence of any specific provision to the contrary, the power of appointment to executive office carries with it, as a necessary incident, the power of removal.”).

<sup>57</sup> See *id.* at 127 (noting that Congress is empowered “to limit and regulate” removal of inferior officers when it exercises constitutional appointment powers).



removal is clearly provided for by the Constitution, and the legislative power of Congress in respect to both is excluded save by the specific exception as to inferior offices in the clause that follows. This is “but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” These words, it has been held by this Court, give to Congress the power to limit and regulate removal of such inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them. [At this point in the text of the opinion, the Court cited *United States v. Perkins*, 116 U. S. 483 (1886).] Here then is an express provision, introduced in words of exception for the exercise by Congress of legislative power in the matter of appointments and removals in the case of inferior executive officers.<sup>58</sup>

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<sup>58</sup> *Id.* at 126–27 (first quoting U.S. CONST. art. II, § 2, cl. 2; and then citing *United States v. Perkins*, 116 U.S. 483, 485 (1886)). The Court in *Myers* later reiterated that Congress could limit the President’s removal power for inferior officers by giving others the power to appoint them:

Our conclusion on the merits . . . is that Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate’s consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President’s power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate’s power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed.

272 U.S. at 163–64.

In *United States v. Perkins*, the Secretary of the Navy sought to discharge an officer whom the Secretary had appointed under a statute that gave the officer job security.<sup>59</sup> The Court of Claims ruled for the officer:

We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.<sup>60</sup>

The Supreme Court unanimously “adopt[ed] these views, and affirm[ed] the judgment of the Court of Claims.”<sup>61</sup> In its discussion of *Perkins*, the *Myers* Court again recognized the power of Congress, when it lodges the appointment power of inferior officers in “Heads of Departments,” to impose limits on the appointing authority’s power to remove them.<sup>62</sup> The Court wrote:

The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this Court has recognized that power. The Court also has recognized in the *Perkins* Case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations

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<sup>59</sup> See 116 U.S. 483, 483–84 (1886) (interpreting statutory language that “[n]o officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect or in continuation thereof”).

<sup>60</sup> *Id.* at 485.

<sup>61</sup> *Id.*

<sup>62</sup> 272 U.S. at 161.

controlling and restricting the latter in the exercise of the power of removal.<sup>63</sup>

In addition to giving removal authority over inferior officers to the person who had the power of appointment and permitting some job security when that person is not the President,<sup>64</sup> the *Myers* Court also addressed the question of congressionally imposed qualifications for officers whom either the President or others are empowered to appoint:

It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation.<sup>65</sup>

*Myers* and *Perkins* provided (and still provide) at least three ways in which Congress may seek to protect Justice Department lawyers and the Department itself from improper political interference.<sup>66</sup> The first is by giving appointing and removal power to an inferior officer or the courts, rather than to the President. The second is by establishing qualifications for the Department's officers, including the Attorney General.<sup>67</sup> Third, Congress can "prescribe incidental regulations"<sup>68</sup> that give inferior officers whom the President does not appoint job security—a term of office, for example, or a requirement of cause for removal. Later Supreme Court decisions do not always discuss these options, focusing instead on the President's unqualified power to remove those officers that the

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<sup>63</sup> *Id.*

<sup>64</sup> See *supra* note 58.

<sup>65</sup> 272 U.S. at 128.

<sup>66</sup> Of course, these options are available to advance other policies, too.

<sup>67</sup> See *Myers*, 272 U.S. at 129 (contending that while Congress does not have full power to "make or withhold provision for removals of all appointed by the President," it retains power to prescribe "reasonable and relevant qualifications and rules of eligibility of appointees . . . except as otherwise provided by the Constitution").

<sup>68</sup> *Id.* at 161.

President is authorized to appoint. For example, in *Seila Law*, Roberts wrote:

The Court recognized the President's prerogative to remove executive officials in [*Myers*]. Chief Justice Taft, writing for the Court, conducted an exhaustive examination of the First Congress's determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point. He concluded that Article II “grants to the President” the “general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers.” Just as the President's “selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. [T]o hold otherwise,” the Court reasoned, “would make it impossible for the President . . . to take care that the laws be faithfully executed.”<sup>69</sup>

The Court gave *Perkins* only brief mention.<sup>70</sup> A decade earlier Roberts was more respectful. In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court considered “the removal of inferior officers, whose appointment Congress may vest in heads of departments. If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal . . . This Court has upheld for-cause limitations on that power as well.”<sup>71</sup> Putting aside the ambiguous and unexplained adverb “ordinarily,” as recently as 2010, the Court wrote that the President could not remove an inferior officer appointed by the head

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<sup>69</sup> *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 2198–99 (2020) (alterations in original) (citations omitted) (quoting *Myer*, 272 U.S. at 117, 163–64) (rejecting statutory job protection for a principal officer).

<sup>70</sup> See *id.* at 2192 (“[I]n [*Perkins*] . . . we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.”); *id.* at 2199 (“In *Perkins*, we upheld tenure protections for a naval cadet-engineer.”); *id.* at 2236 (noting that the *Perkins* Court “allowed Congress to restrict the President’s removal power over inferior officers”) (Kagan, J., concurring).

<sup>71</sup> *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 493 (2010).

of a department.<sup>72</sup> Quoting *Perkins*, the Court wrote that Congress “may limit and restrict the power of removal as it deems best for the public interest.”<sup>73</sup> These propositions have never been limited. Consequently, a President who wishes to fire an inferior officer appointed by the head of a department must instruct the latter to do so or, if they will not, the President must fire the department head and choose someone who will, assuming that doing so will not violate the job security Congress may have provided.

At this point, it makes sense to step back from a strict chronology and look at cases where the inferior officer was a prosecutor. The authority of three high profile prosecutors was challenged between 1974 and 2019.<sup>74</sup> In each, two from the Supreme Court and one from the Court of Appeals for the District of Columbia, the Courts rejected a challenge to a prosecutor’s authority.

In *United States v. Nixon*, the President, citing executive privilege, challenged a subpoena from a Special Prosecutor, Leon Jaworski, to whom the acting Attorney General had delegated criminal enforcement powers pursuant to his statutory authority.<sup>75</sup> Jaworski was given power as a Special Prosecutor including:

“[P]lenary authority to control the course of investigations and litigation related to “all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters

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<sup>72</sup> See *id.* at 483 (“[T]he Court sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors.”).

<sup>73</sup> *Id.* at 494.

<sup>74</sup> See *United States v. Nixon*, 418 U.S. 683, 684 (1974) (holding that “power to contest the invocation of executive privilege in seeking evidence” was validly conferred to the Special Prosecutor by the Attorney General); *Morrison v. Olson*, 487 U.S. 654, 654 (1988) (noting that the constitutional question before the Court was the authority of the government’s Independent Counsel under the Ethics in Government Act to compel production of documents); *In re Grand Jury Investigation*, 916 F.3d 1047, 1049–51 (D.C. Cir. 2019) (affirming the lower court’s finding of civil contempt for an individual’s failure to produce documents requested by Special Counsel).

<sup>75</sup> *Nixon*, 418 U.S. at 686; see also 28 U.S.C. § 510 (“The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.”).

which he consents to have assigned to him by the Attorney General.” In particular, the Special Prosecutor was given full authority, *inter alia*, “to contest the assertion of ‘Executive Privilege’ . . . and handl[e] all aspects of any cases within his jurisdiction.” The regulation then goes on to provide [that] . . . “The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions . . . . In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.”<sup>76</sup>

In upholding this broad grant of executive power, the Court wrote that the Attorney General's regulation “has the force of law” and that the “Executive Branch is bound by it” as “long as [it] is extant.”<sup>77</sup> The Attorney General could, of course, “amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so.”<sup>78</sup> The Court relied on *United States ex rel. Accardi v. Shaughnessy*,<sup>79</sup> which held that “so long as the Attorney General's regulations [which delegated authority to the Board of Immigration Appeals] remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations.”<sup>80</sup> The Court also cited *Vitarelli v. Seaton*<sup>81</sup> which held that since “the Secretary [of the Interior] gratuitously decided to

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<sup>76</sup> *Nixon*, 418 U.S. at 694 n.8 (alterations in original) (citations omitted) (quoting 39 Fed. Reg. 30739).

<sup>77</sup> *Id.* at 695–96.

<sup>78</sup> *Id.* at 696.

<sup>79</sup> 347 U.S. 260 (1954).

<sup>80</sup> 418 U.S. at 695 (citing the holding in *Accardi*).

<sup>81</sup> 359 U.S. 535 (1959).

give a reason [for discharging an employee], and that reason was national security, he was obligated to conform to the procedural standards he had formulated . . . for dismissal of employees on security grounds;”<sup>82</sup> and *Service v. Dulles*,<sup>83</sup> which held that, having created discharge regulations, the Secretary of State “could not, so long as the Regulations remained unchanged, proceed without regard to them.”<sup>84</sup>

In other words, the Executive Branch could do to itself what Congress may have lacked the power to do. It could tie its own hands.<sup>85</sup>

While Jaworski’s executive authority was broad, it was also provisional. The Attorney General could withdraw his power at any time, without a finding of cause, by revoking the underlying regulation.<sup>86</sup> In this way, the Attorney General retained control over the Special Prosecutor’s investigation and prosecution.<sup>87</sup> And the President did as well because he could instruct the Attorney General to revoke the regulation and fire the Special Prosecutor, as happened to Jaworski’s predecessor, Archibald Cox.<sup>88</sup> The Court did not say whether the President himself could revoke the regulation

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<sup>82</sup> *Id.* at 539.

<sup>83</sup> 354 U.S. 363 (1957).

<sup>84</sup> *Id.* at 388.

<sup>85</sup> But later Presidents could untie them. “Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the view of individual Presidents . . . nor on whether the ‘encroached-upon branch approves the encroachment.’” *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010).

<sup>86</sup> See *United States v. Nixon*, 418 U.S. 683, 695 (1974) (“So long as this regulation is extant it has the force of law. . . . [I]t is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor’s authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.”); JARED P. COLE, CONG. RSCH. SERV., R44857, SPECIAL COUNSEL INVESTIGATION: HISTORY, AUTHORITY, APPOINTMENT AND REMOVAL 20–21 (2019) (“The Department could . . . likely rescind the special counsel regulations without going through notice and comment procedures, meaning that the regulations could likely be repealed immediately. Once repealed, a special counsel would no longer be protected by a for-cause removal provision.”).

<sup>87</sup> And, in this case, the Attorney General, William Saxbe, agreed with the regulation and stated that he would not discharge the Special Prosecutor absent “gross impropriety.” See *Nixon*, 418 U.S. at 696 n.10.

<sup>88</sup> See Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, at A01 (explaining how the acting Attorney General, Robert Bork, carried out President Nixon’s orders and fired Cox).

and fire the Special Prosecutor directly, eliminating the middleman.<sup>89</sup> But fairly read, *Myers* and *Perkins* say he could not.

Matters became more complicated in *Morrison v. Olsen*.<sup>90</sup> The Ethics in Government Act of 1978 gave power to appoint an Independent Counsel to a special court on application of the Attorney General.<sup>91</sup> The court appointed Alexia Morrison.<sup>92</sup> She had broad authority to investigate and prosecute Executive Branch officers.<sup>93</sup> Morrison was an inferior officer.<sup>94</sup> Under the Act, she could be removed only for cause,<sup>95</sup> protection that neither the Attorney General, nor even the President, could withdraw because unlike *Nixon*, it rested on legislation giving appointing authority to a special court, not on a Justice Department regulation.<sup>96</sup> That protection might have been seen as unconstitutional because it interfered with the President's take care responsibility, as the Court

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<sup>89</sup> The Court called Jaworski a "subordinate officer," not an "inferior officer." *Nixon*, 418 U.S. at 694. The Attorney General's authority to appoint him did not rely on a congressional grant under the Appointments Clause, but instead on a statute that authorized the Attorney General to delegate criminal law enforcement powers. *Id.* at 684 (citing 28 U.S.C. §§ 509, 510, 515, 533). The statute had the same effect as would congressional action explicitly creating Jaworski's position and giving the Attorney General the power to appoint him. The statute's delegation of this authority would seem to empower the Attorney General to appoint inferior officers without need for additional congressional action. The appointee need not be described as an "inferior officer," as Jaworski was not.

<sup>90</sup> 487 U.S. 654 (1988).

<sup>91</sup> See 28 U.S.C. § 592(c)(1)(A) (allowing the Attorney General to file for Independent Counsel if "there are reasonable grounds to believe further investigation is warranted").

<sup>92</sup> See *Morrison*, 487 U.S. at 667 (replacing former Independent Counsel, James McKay, to determine if the subjects of the investigation had violated any laws in their sworn testimonies).

<sup>93</sup> See *id.* (recognizing Independent Counsel's authority to investigate and determine whether the subjects of investigation had violated any laws in their sworn testimony and granting power to prosecute any such violation).

<sup>94</sup> See *id.* at 671 (noting that the line between "inferior" and "principal" officers is difficult to discern, but that Morrison "clearly falls on the 'inferior office'" side of that line).

<sup>95</sup> See *id.* at 663 (citing 28 U.S.C. § 596(a)(1), providing that Independent Counsel appointed under this statute may be removed "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties").

<sup>96</sup> See *id.* at 664 ("[T]he Special Division, acting either on its own or on the suggestion of the Attorney General, may terminate the office of an independent counsel at any time if it finds that 'the investigation of all matters within the prosecutorial jurisdiction of such independent counsel . . . have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions.'" (quoting 28 U.S.C. § 596(b)(2))).



recognized.<sup>97</sup> But the Court held that the appointment was nonetheless lawful.<sup>98</sup> The Attorney General retained sufficient power. He alone decided whether an Independent Counsel should be appointed.<sup>99</sup> The court defined her jurisdiction “with reference to the facts submitted by the Attorney General.”<sup>100</sup> Once appointed, the Independent Counsel was required to “abide by Justice Department policy unless it is not ‘possible’ to do so.”<sup>101</sup>

The Court credited the congressional purpose behind the Act’s interference with the President’s take care authority.<sup>102</sup> In upholding the statute’s provision for judicial appointment of an Independent Counsel, the Court cited the congressional concern with “conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers.”<sup>103</sup> And it characterized the “for cause” removal limitation as “essential, in the view of Congress, to establish the necessary independence of the office [of the Attorney General].”<sup>104</sup> Recognition of that interest would also support a fixed term, job protection, or both, for the Justice Department’s Inspector General, as is proposed in legislation that would also return to the Inspector General the

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<sup>97</sup> See *id.* at 689–90 (identifying the need to ensure that Congress does not interfere with the President’s duty to take care that the laws be faithfully executed). The Court added a caution:

We do not mean to say that Congress’ power to provide for interbranch appointments of “inferior officers” is unlimited. In addition to separation-of-powers concerns, which would arise if such provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches, *Siebold* itself suggested that Congress’ decision to vest the appointment power in the courts would be improper if there was some “incongruity” between the functions normally performed by the courts and the performance of their duty to appoint.

*Id.* at 675–76 (citing *Ex parte Siebold*, 100 U.S. 371, 398 (1880)).

<sup>98</sup> *Id.* at 659–60.

<sup>99</sup> See *id.* at 660–61 (outlining the process of Independent Counsel appointments and emphasizing the Attorney General’s role in initiating contact with the Special Division).

<sup>100</sup> *Id.* at 696.

<sup>101</sup> *Id.*

<sup>102</sup> See *id.* at 692–93 (finding that the Act did not “impermissibly burden the President’s power” under Article II to remove executive officials as it balanced limitations on this power with Congress’s strong interest in maintaining the “necessary independence of the office” of the Attorney General).

<sup>103</sup> *Id.* at 677.

<sup>104</sup> *Id.* at 693.

authority to investigate allegations of misconduct by Department attorneys.<sup>105</sup>

In the final case in this trilogy, the acting Attorney General appointed Robert Mueller as a “Special Counsel” with job security.<sup>106</sup> Like Jaworski but unlike Morrison, whom a court appointed under a statutory grant of authority,<sup>107</sup> the appointment of Mueller relied on a statute authorizing the Attorney General to delegate law enforcement authority.<sup>108</sup> Mueller was charged to “investigate the Russian Government’s efforts to interfere in the 2016 presidential election and ‘related matters’ and to prosecute any federal crimes uncovered during the investigation.”<sup>109</sup> Because the Supreme Court had upheld the appointment of Morrison as an Independent Counsel pursuant to a statute that gave the Attorney General even less control over her than the acting Attorney General had over Mueller, it would seem to follow that the Department’s regulations and Mueller’s appointment should also be upheld, which is what the D.C. Circuit did.<sup>110</sup> Mueller, the court wrote, was “subject to greater executive oversight” than was Morrison.<sup>111</sup> Congress had given the acting Attorney General the power to appoint Mueller just as it had authorized the acting Attorney General to appoint Jaworski in *Nixon*.<sup>112</sup> Because the Attorney General could rescind the appointment or amend it to eliminate the “for cause” limitations on removal, Mueller, an inferior officer, “effectively serves at the pleasure of an Executive Branch officer

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<sup>105</sup> In 1988, Congress had required the Inspector General to refer those allegations of misconduct involving Department of Justice personnel to the Department’s Office of Professional Responsibility. 5 U.S.C. app. § 8E(b)(3). House Bill 2662 would eliminate this requirement and give Inspectors General job security. H.R. 2662, 117th Cong. (2021).

<sup>106</sup> See *In re Grand Jury Investigation*, 916 F.3d 1047, 1051 (D.C. Cir. 2019) (noting that the Special Counsel may be removed by the Attorney General for “good cause”).

<sup>107</sup> *Morrison*, 487 U.S. at 661.

<sup>108</sup> See *Grand Jury Investigation*, 916 F.3d at 1054 (“Because binding precedent establishes that Congress has ‘by law’ vested authority in the Attorney General to appoint the Special Counsel as an inferior officer, this court has no need to go further to identify the specific sources of this authority.”).

<sup>109</sup> *Id.* at 1051.

<sup>110</sup> See *id.* at 1056 (holding that a challenge to the appointment of Mueller as Special Counsel failed).

<sup>111</sup> *Id.* at 1052.

<sup>112</sup> See *id.* at 1053 (stating that the question of whether Congress had “by law” vested the power to appoint a Special Counsel in the Attorney General had already been decided by the Supreme Court in *Nixon*).

who was appointed with the advice and consent of the Senate.”<sup>113</sup> That satisfied the Appointments Clause.<sup>114</sup>

I return now to the chronology of cases that do not concern prosecutors. In *Seila Law LLC v. Consumer Financial Protection Bureau*,<sup>115</sup> the Court distinguished *Morrison*. Morrison was an inferior officer with limited powers. The Director of the CFPB was a presidential appointee with broad powers.<sup>116</sup> Consequentially, the Court concluded that legislation giving the Director job security violated the Appointments Clause, explaining that:

[I]n *Morrison*, we upheld a provision granting good-cause tenure protection to an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials. . . . [W]e viewed the ultimate question as whether a removal restriction is of “such a nature that [it] impede[s] the President’s ability to perform his constitutional duty.” Although the independent counsel was a single person and performed “law enforcement functions that typically have been undertaken by officials within the Executive Branch,” we concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because “the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority.”<sup>117</sup>

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<sup>113</sup> *Id.* at 1052.

<sup>114</sup> *Id.* at 1054.

<sup>115</sup> 140 S. Ct. 2183 (2020).

<sup>116</sup> *See id.* at 2200 (establishing that the role of the CFPB director “brings coercive power of the state to bear on millions of private citizens and businesses” unlike the Independent Counsel in *Morrison* “who lacked policy-making or administrative authority”).

<sup>117</sup> *Id.* at 2199 (alterations in original) (citations omitted) (quoting *Morrison v. Olson*, 487 U.S. 654, 691 (1988)). Because the Independent Counsel was “a single person,” her tenure protection could not rest on the holding in *Humphrey’s Executor v. United States*, 295 U.S. 602, 629 (1935), which “permitted Congress to give for-cause removal protections to a multimember body of experts.” *Seila Law*, 140 S. Ct. at 2199.

A year later, in *Collins v. Yellen*, the Court explained yet again the reasons behind its interpretation of executive power.<sup>118</sup> Any effort to protect the independence of Justice Department officers must respect this explanation.<sup>119</sup> The question in *Collins*, as in *Seila Law*, was whether job protection for the Director of the Federal Housing Finance Agency (FHFA), a presidential appointee, was constitutional. It was not, the Court held, because the Director was a principal officer whom the President had to be able to fire at will. Justification for this holding again relied on the Court's view of what democracy required:

The President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies. The removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote. In addition, because the President, unlike agency officials, is elected, this control is essential to subject Executive Branch actions to a degree of electoral accountability. At-will removal ensures that "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."<sup>120</sup>

The Court rejected the argument that a different rule should apply in *Collins* because the authority of the FHFA Director was more limited than the authority of the CFPB Director in *Seila Law*.<sup>121</sup> "These purposes are implicated whenever an agency does

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<sup>118</sup> *Collins v. Yellen*, 141 S. Ct. 1761, 1784–87 (2021).

<sup>119</sup> *See id.* at 1784 (citing the President's interest in a degree of control of subordinates to carry out his duties and that this control is essential to accountability to the electorate and explaining that "[t]hese purposes are implicated whenever an agency does important work").

<sup>120</sup> *Id.* at 1784 (citations omitted) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010)).

<sup>121</sup> *See id.* at 1785 ("Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies, and we do not think that the constitutionality of removal restrictions hinges on such an inquiry.").

important work, and nothing about the size or role of the FHFA convinces us that its Director should be treated differently from the Director of the CFPB.”<sup>122</sup>

*Collins* also rejected an amicus argument that tenure protection for the FHFA Director was weaker than it was for the CFPB Director, giving the President greater removal authority than was true of equivalent language that the Court had held invalid in *Seila Law*.<sup>123</sup> Apparently, any restriction was too much:

[A]s we explained last Term, the Constitution prohibits even “modest restrictions” on the President’s power to remove the head of an agency with a single top officer. The President must be able to remove not just officers who disobey his commands but also those he finds “negligent and inefficient,” those who exercise their discretion in a way that is not “intelligen[t] or wis[e],” those who have “different views of policy,” those who come “from a competing political party who is dead set against [the President’s] agenda,” and those in whom he has simply lost confidence. *Amicus* recognizes that “‘for cause’ . . . does not mean the same thing as ‘at will,’” and therefore the removal restriction in the Recovery Act violates the separation of powers.<sup>124</sup>

What remains of *Perkins* and *Myers* today? Or perhaps the question is better asked this way: With regard to the appointment and removal of principal and inferior officers, what can Congress now do and not do to limit or control how Presidents exercise their power? A good deal, as it happens. The case law should not be read to impose greater limits on the constitutional powers of Congress than their reasoning and facts fairly warrant. Certainly, Congress cannot override the President’s ability to remove any officer it or the Constitution authorizes him to appoint or give to itself the power to

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<sup>122</sup> *Id.* at 1784.

<sup>123</sup> *See id.* at 1786–87 (explaining that while the removal provisions for the FHFA Director were less restrictive from ones previously assessed, it did not equate to “at will” employment and therefore was unconstitutional).

<sup>124</sup> *Id.* at 1787 (alterations in original) (citations omitted).

appoint and remove executive officers.<sup>125</sup> But there are other ways to protect the Justice Department from an unfaithful President in addition to those noted earlier,<sup>126</sup> most prominently, as discussed in Part VI, through the obligations lawyers have under rules of professional conduct in the jurisdictions in which they are admitted or in which they practice.

#### IV. CONGRESS CAN IMPOSE QUALIFICATIONS AND CONDITIONS FOR THE APPOINTMENT OF PRINCIPAL AND INFERIOR OFFICERS

Ideally, government lawyers will resist a President's faithless instructions before they cause harm. This may be another way of saying that "[c]haracter is destiny," an insight attributed to Heraclitus.<sup>127</sup> But how do we legislate character? Because the Senate must confirm an Attorney General nominee and may need to confirm inferior officers, it can demand persuasive assurance that nominees will resist improper political interference even if it means the loss of a job. But that check is weak if the President's party controls the Senate.<sup>128</sup> Even when the opposite party controls the Senate, it may hesitate to create a precedent that frustrates a future President of its own.<sup>129</sup> And assurances cannot be enforced. Compliance relies on the nominee's good character and perhaps capacity for shame if she ignores the assurances.<sup>130</sup>

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<sup>125</sup> See *Bowsher v. Synar*, 478 U.S. 714, 726–27, 734 (1986) (explaining that the Constitution does not grant Congress the power to intrude upon inherent or legislatively granted independent agencies of the Executive Branch).

<sup>126</sup> See *supra* text accompanying notes 60–71 (discussing congressional methods to insulate Department of Justice officials from political pressures, including establishing qualifications for an office, giving the power to appoint and remove inferior officers to the head of a department, and giving those appointees some measure of job protection).

<sup>127</sup> See Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 82 (2012) (quoting HERACLITUS, ON THE UNIVERSE fragment 1, 121 (W.H.S. Jones trans., Loeb Classical Library 1931)) (arguing that virtue and character should be foundational values in corporate governance).

<sup>128</sup> See Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1204 (1988) (arguing, among other things, that the nomination process experiences significant political pressures from the President, where the President uses resources like "party discipline, ideology, and various carrots and sticks" to ensure party-aligned voting).

<sup>129</sup> See *id.* at 1207 (noting the Senate's tendency to engage in various political and social considerations in its decision-making during appointment).

<sup>130</sup> For a discussion on the importance of character in, but not limited to, the law, see generally DEBORAH L. RHODE, *CHARACTER: WHAT IT MEANS AND WHY IT MATTERS* (2019).

So it would make sense to legislate qualifications for the Attorney General and inferior officers that will encourage the appointment of people of good character. Congress, exercising its power under the Appointments Clause, established the office of the Attorney General: “The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.”<sup>131</sup> Yet Congress has gone further. In many ways, discussed below,<sup>132</sup> Congress has established the structures through which the President executes the laws. Presidents implicitly accept those structures when they nominate principal and inferior officers and then, after confirmation, execute the laws through them.<sup>133</sup>

Congress can yet do more. It can, without trespassing on the President’s take care authority, identify the qualifications for the Attorney General and the inferior officers whose positions Article II authorizes Congress to establish.<sup>134</sup> So the Supreme Court told us in *Myers v. United States*.<sup>135</sup>

Congress has in fact prescribed qualifications for some Justice Department positions and for Executive Department officers elsewhere.<sup>136</sup> The qualifications and other conditions described below are general. They are not “in effect legislative designation[s].”<sup>137</sup> While legislation will not bind a future Congress, repeal will require a majority of both Houses.<sup>138</sup> Repeal would mean that Congress is eliminating nonpartisan conditions that benefit the country and that an earlier Congress thought important enough to require.

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<sup>131</sup> 28 U.S.C. § 503.

<sup>132</sup> See *infra* text accompany notes 142–159.

<sup>133</sup> An interesting question is whether a President could seek to execute the laws through officers other than those whose positions were established by Congress.

<sup>134</sup> Article II provides for the appointment of “all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” U.S. CONST art. II, § 2, cl. 2.

<sup>135</sup> See *supra* text accompanying note 65.

<sup>136</sup> See *infra* text accompanying notes 142–159 (highlighting the various formal and informal qualifications imposed by Congress on Justice Department and other officials).

<sup>137</sup> *Myers v. United States*, 272 U.S. 52, 128 (1926).

<sup>138</sup> See U.S. CONST. art I, § 7 (requiring a majority of both houses to create new statutes, including statutes which repeal older statutes); *Dorsey v. United States*, 567 U.S. 260, 274 (2012) (“[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified.”).

The qualifications for all Justice Department lawyers should include, most obviously, bar membership for a minimum number of years and no serious professional discipline or judicially imposed sanctions. Congress should also exclude anyone who within a prior number of years (five seems reasonable) was an elected official, a party official, or a candidate for political office; anyone who was active in the presidential election contest whether or not as part of a campaign; anyone within a certain degree of familial relationship to the President; and anyone who was a business or law partner of the President within a prior number of years (five seems reasonable here, too).<sup>139</sup>

Beyond these qualifications, Congress should require that a nominee acknowledge that the Justice Department's client is the United States acting through its officers and employees.<sup>140</sup> It can declare the same in legislation. Nominees should be required to acknowledge that they are subject to court imposed professional conduct rules of a specified jurisdiction (more on this in Part V). Congress can legislate—and can ask the nominee to commit to—limits on communications between others in the Executive Branch and Department personnel and require that the Department preserve and produce defined categories of intradepartmental communications if requested by the House and Senate judiciary committees or their chairs and ranking members.<sup>141</sup> Congress can ask nominees to say what they would do in specific situations where the President's instructions appear to conflict with the Department's responsibility for the administration of justice and the interests of the United States. Nominees can be asked for their views on the meaning of "faithfully" in Article II and to give examples of conduct that would be the unfaithful execution of the laws. None of these qualifications and requirements interferes with the President's take care authority as defined by the cases in Part III. They no more intrude on that authority than much else Congress has done and said. In the McDade Amendment (discussed

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<sup>139</sup> Each of these criteria is capable of unambiguous definition except the status of having been "active" in the election contest. Congress will have to establish a common understanding through its confirmation decisions.

<sup>140</sup> See *infra* text accompanying note 189 (noting parallel language in Model Rule 1.13, whose focus is lawyers for organizations including a government).

<sup>141</sup> For a historical context of limitations on communications in presidential administrations, see SUBVERTING JUSTICE, *supra* note 3, at 7–8.



in Part V), Congress has prescribed the ethics rules that govern all federal lawyers, including at the Justice Department.<sup>142</sup> Congress has, with limited exceptions, designated the Department as the Agency that will represent the United States in court.<sup>143</sup> While the President is authorized to appoint a Deputy and an Associate Attorney General,<sup>144</sup> he is required to appoint a Solicitor General and eleven Assistant Attorneys General.<sup>145</sup> The President must designate one of the mandated Assistant Attorneys General to be the Assistant Attorney General for National Security, whose duties Congress has described.<sup>146</sup> Congress has created a “National Security Division of the Department of Justice” and defined its mission.<sup>147</sup> Congress has also prescribed a section within the Department’s criminal division “with responsibility for enforcement of laws against suspected participants in serious human rights offenses.”<sup>148</sup> Congress has instructed the Attorney General to adopt certain conflict of interest rules for Department lawyers.<sup>149</sup>

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<sup>142</sup> See 28 U.S.C. § 530B (applying state and federal ethics rules to “attorney[s] for the Government”).

<sup>143</sup> See 28 U.S.C. § 516 (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”).

<sup>144</sup> See 28 U.S.C. §§ 504, 504a (explaining that the President “may appoint, by and with the consent of the Senate,” both a Deputy Attorney General and an Associate Attorney General).

<sup>145</sup> See 28 U.S.C. §§ 505–506 (the President “shall appoint” a Solicitor General and eleven Assistant Attorneys General to assist the Attorney General).

<sup>146</sup> See 28 U.S.C. § 507A(b) (“The Assistant Attorney General for National Security shall: (1) serve as the head of the National Security Division of the Department of Justice under section 509A of this title; (2) serve as primary liaison to the Director of National Intelligence for the Department of Justice; and (3) perform such other duties as the Attorney General may prescribe.”).

<sup>147</sup> See 28 U.S.C. § 509A (“The National Security Division shall consist of the elements of the Department of Justice (other than the Federal Bureau of Investigation) engaged primarily in support of the intelligence and intelligence-related activities of the United States Government . . .”).

<sup>148</sup> 28 U.S.C. § 509B.

<sup>149</sup> 28 U.S.C. § 528 provides:

The Attorney General shall promulgate rules and regulations which require the disqualification of any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney’s staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof. Such rules and regulations may provide

Congress has specified the required domicile of United States Attorneys and Assistant United States Attorneys.<sup>150</sup> The Department is directed to file several annual, or more frequent, reports.<sup>151</sup> For example, by April 1 of each year, the Attorney General must “report to Congress on the Department of Justice's business for the preceding fiscal year,”<sup>152</sup> report annually on a host of detailed information dealing with public corruption and grants,<sup>153</sup> and report within prescribed time limits certain other information about Department decisions.<sup>154</sup>

There's more. Congress has also decided how vacancies in the office of the Attorney General will be filled. In the event of a vacancy, specified inferior Department officers assume the duties of the Attorney General without Senate confirmation until the President nominates and the Senate confirms a new Attorney General.<sup>155</sup> The President may also fill a vacancy from outside the Department with a person previously confirmed by the Senate and that person can continue in an “acting” capacity for as many as three 210-day periods.<sup>156</sup> The Justice Department is not alone in this regard. Congress has chosen to describe the responsibilities of officials in other executive departments or the structures of other departments, including the Department of State,<sup>157</sup> the Federal

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that a willful violation of any provision thereof shall result in removal from office.

<sup>150</sup> See 28 U.S.C. § 545 (requiring United States Attorneys to reside in the district for which they are appointed, with minimal exceptions).

<sup>151</sup> See 28 U.S.C. §§ 522, 529 (detailing the Attorney General's reporting duties).

<sup>152</sup> 28 U.S.C. § 522.

<sup>153</sup> See 28 U.S.C. § 529 (identifying criminal violations by specified persons and grant information that the Attorney General must include in the report).

<sup>154</sup> See *id.* (setting deadlines for the Attorney General's report).

<sup>155</sup> See 28 U.S.C. § 508 (explaining who takes responsibility if the Attorney General office is vacant and noting that the replacement during such a vacancy “may exercise all the duties of that office”).

<sup>156</sup> See 5 U.S.C. §§ 3345–3346 (discussing how the functions of a vacant office can be performed, by whom, and for what specified time periods while awaiting Senate confirmation or in the aftermath of a Senate rejection). To ensure compliance with the qualifications and conditions proposed in this Article, the vacancy statutes should be amended to impose the same qualifications and conditions for officials who fill a vacancy in the office of the Attorney General or the Department's inferior offices, unless those officials have already subscribed to them in their own confirmation hearings.

<sup>157</sup> See 22 U.S.C. § 2651a (describing the organizational structure and duties of personnel within the Department of State, including the Secretary of State, Under Secretaries, and Assistant Secretaries).

Emergency Management Agency,<sup>158</sup> and the Department of the Treasury.<sup>159</sup>

In short, the nation has, through its actions, rejected the idea that the Department of Justice or other executive departments in some sense “belong” to the President lock, stock, and barrel, undermining the argument that the President possesses “all of it” (i.e., Executive Power). Or, that once Congress has legislated the Department and its officers into existence, the President can do with them as he wishes or even ignore them. The line of cases from *Myers* to the present holds only that the take care duty prevents Congress from giving Executive Branch officers whom the President appoints a fixed term or for cause job protection.<sup>160</sup>

Congress could also minimize improper political interference by giving the authority to appoint inferior officers to the Attorney General. Both *Nixon* and *In re Grand Jury Investigation* read the Attorney General’s statutory delegation of authority as sufficient to allow appointment of an inferior (or in *Nixon* a subordinate) officer.<sup>161</sup> Where the President does not appoint inferior officers, he will not have the authority to remove them.<sup>162</sup> It is an open question, however, whether the Court would let Congress give authority to appoint all or most Justice Department inferior officers to the Attorney General or the courts, despite the absence of any limitation on the congressional power in Article II, or whether it would see such a move as too great an intrusion on the President’s take care responsibility.<sup>163</sup> The President could, of course, always order an Attorney General to remove his or her own appointees, although the Attorney General would need to have cause if the

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<sup>158</sup> See 6 U.S.C. § 313(c)(2) (“The Administrator [of the Federal Emergency Management Agency] shall be appointed from among individuals who have, (A) a demonstrated ability in and knowledge of emergency management and homeland security; and (B) not less than 5 years of executive leadership and management experience in the public or private sector.”).

<sup>159</sup> See 31 U.S.C. § 321 (outlining the duties and powers that comprise the general authority of the Secretary of the Treasury).

<sup>160</sup> See *supra* Part III (addressing the Court’s interpretation of the Appointments Clause, the Take Care Clause, and Executive Power).

<sup>161</sup> See *supra* text accompanying notes 74, 106.

<sup>162</sup> See *supra* text accompanying notes 60, 70–71.

<sup>163</sup> The decisions upholding the non-presidential appointments of Leon Jaworski and Alexia Morrison as, respectively, a Special Prosecutor and an Independent Counsel, suggest that the Court is willing to accept the appointment of inferior officers with significant powers. See *supra* notes 74, 90.

position so requires.<sup>164</sup> The Attorney General could then either refuse and resign, or the President could remove the Attorney General and appoint a more compliant one.<sup>165</sup> But that course can have negative political consequences. After engineering the removal of Archibald Cox, Nixon was forced to accept the appointment of Leon Jaworski as a Special Prosecutor charged to investigate the President and others, setting in motion a series of events culminating in Nixon's resignation.<sup>166</sup>

## V. THE PROFESSIONAL CONDUCT RULES THAT GOVERN FEDERAL LAWYERS

My premise is that it would not be the faithful execution of the laws to direct Justice Department lawyers to violate professional conduct rules of state and federal courts where the lawyers are admitted or where they practice.<sup>167</sup> So we must identify the jurisdictions whose rules govern department lawyers.

Following his acquittal on federal criminal charges, Representative Joseph McDade of Pennsylvania returned to Congress and introduced a bill to prescribe the ethics rules governing lawyers for the federal government, including prosecutors.<sup>168</sup> The law passed and has come to be known as the McDade Amendment. It provides:

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent

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<sup>164</sup> See *supra* text accompanying note 71.

<sup>165</sup> See *supra* text accompanying notes 70–73.

<sup>166</sup> Daniel Bush, *The Complete Watergate Timeline (It Took Longer Than You Realize)*, PBS NEWS HOUR (May 30, 2017), <https://www.pbs.org/newshour/politics/complete-watergate-timeline-took-longer-realize> (providing a chronological order of the events leading to Nixon's resignation).

<sup>167</sup> We might question the validity of a court rule that limited the work of Justice Department lawyers without appreciably advancing any judicial interest. Such a rule might be said to impermissibly clash with the President's constitutional powers. But the general rules discussed in Part VI do not do that.

<sup>168</sup> See CHARLES DOYLE, CONG. RSCH. SERV., MCDADE-MURTHA AMENDMENT: LEGISLATION IN THE 107TH CONGRESS CONCERNING ETHICAL STANDARDS FOR JUSTICE DEPARTMENT 1–2 (2001) (discussing proposed amendments to the Justice Department appropriations act requiring litigators to adhere to jurisdictional ethical standards).

and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term “attorney for the Government” includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.<sup>169</sup>

The Justice Department, which previously had unsuccessfully claimed that it had the authority to write the ethics rules for its own lawyers,<sup>170</sup> then adopted regulations to implement the McDade Amendment.<sup>171</sup> There is discrepancy between the McDade Amendment and the Department’s regulations. The regulations say that where there is no case pending in court, the attorney should comply with “the rules of ethical conduct that would be applied by the attorney’s state of licensure.”<sup>172</sup> The McDade Amendment says nothing about the rules of the state of licensure, referring instead to the place “where such attorney engages in that attorney’s duties.”<sup>173</sup> So Justice Department lawyers admitted only in New York but who engage in their duties in Washington, D.C., which the

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<sup>169</sup> 28 U.S.C. § 530B.

<sup>170</sup> See *United States ex rel. O’Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) (“The district court correctly concluded that nothing in any of these [Title 28] sections expressly or impliedly gives the Attorney General the authority to exempt lawyers representing the United States from the local rules of ethics which bind all other lawyers appearing in that court of the United States.”).

<sup>171</sup> See 28 C.F.R. § 77.1 (“The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to implement 28 U.S.C. 530B [the McDade Amendment] and to provide guidance to attorneys concerning the requirements imposed on Department attorneys by 28 U.S.C. § 530B.”).

<sup>172</sup> 28 C.F.R. § 77.2(j)(1)(ii).

<sup>173</sup> 28 U.S.C. § 530(B)(a) (referring to “where such attorney engages in that attorney’s duties”).

District's rules permit,<sup>174</sup> would be governed by the District's rules in all matters whether or not in court.

What did the McDade Amendment actually accomplish apart from expressing McDade's own displeasure with the conduct of the lawyers who prosecuted him? The Amendment seems to be a choice of rule provision. Once it was established that the Justice Department could not promulgate its own ethics rules for Department lawyers, there remained only a decision about the choice of governing rule. No one argued that these lawyers operated in an ethics free universe. Rules from somewhere were going to govern them. But where? The McDade Amendment tells us that it will be the rules where the lawyers are working even if they are not admitted there. Justice Department lawyers, including Department officers based in Washington, D.C., must comply with the ethics rules promulgated by the Court of Appeals for the District of Columbia, regardless of where they are admitted.

And what if they don't? The McDade Amendment has no enforcement provision. It implicitly defers to traditional disciplinary authorities for when lawyers violate ethics rules.<sup>175</sup> If the matter is before a court, the court's rules will apply if the jurisdiction in which the lawyers work has adopted the ABA choice of rule provision, which Washington D.C. has.<sup>176</sup> (A court can also respond to misconduct through its inherent or other statutory power.<sup>177</sup>) If a matter is not in court—and the Attorney General and

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<sup>174</sup> See D.C. APP. R. 49(c)(1) ("A person who is not a D.C. Bar Member may provide legal services to the United States as an employee of the United States and may hold out as authorized to provide those services.").

<sup>175</sup> See Hopi Costello, Note, *Judicial Interpretation of State Ethics Rules Under the McDade Amendment: Do Federal or State Courts Get the Last Word?*, 84 FORDHAM L. REV. 201, 224 (2015) (noting that while legislative history shows that this enforcement issue was raised, there is no indication of "congressional intent as to which court system has ultimate interpretative authority under the Act").

<sup>176</sup> See MODEL RULES OF PRO. CONDUCT r. 8.5(b)(1) (AM. BAR ASS'N 2020) (outlining the ABA choice of rule provision); D.C. RULES OF PRO. CONDUCT r. 8.5(b) (D.C. BAR 2022) (explaining the Washington, D.C. choice of rule provision).

<sup>177</sup> See, e.g., 28 U.S.C. § 1927 (creating sanction power by the court to require parties who "unreasonably and vexatiously" multiply proceedings to pay excess costs, expenses, and attorneys' fees because of such conduct); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42 (1991) (discussing a court's reliance on its inherent power to impose sanctions, a power that is most appropriate to wield when a fraud has been perpetrated on the Court); *Crowe v. Smith*, 151 F.3d 217, 240 (5th Cir. 1998) (explaining a court's inherent power to impose sanctions

the inferior officers at the Justice Department other than lawyers who work in the office of the Solicitor General and the United States Attorney are less likely to appear in court—the governing rules will be those “of the jurisdiction in which the lawyer’s conduct occurred” or where the “predominant effect” of the lawyer’s conduct occurs.<sup>178</sup>

It may be overly optimistic to expect that local disciplinary committees and courts, especially state courts, would be willing to investigate and sanction senior Justice Department officials.<sup>179</sup> But even if the McDade Amendment does not appreciably increase or decrease the risk of discipline of federal lawyers by local authorities, and instead merely identifies the source of the rules that govern them, it does do something else that can prove more consequential. Backed now by a congressional mandate that does not aggrandize power for Congress but rather invokes judicial power, it gives the Department’s lawyers a judicially and congressionally backed reason to reject White House instructions that would put them in violation of, or preempt their judicially granted discretion under, governing professional conduct rules.

## VI. WHAT THE MODEL RULES AND WASHINGTON, D.C. RULES NOW SAY ABOUT GOVERNMENT LAWYERS

Preliminarily, it will be useful to identify what guidance the Model Rules of Professional Conduct and the Washington, D.C. Rules of Professional Conduct offer government lawyers. Surprisingly little, as it happens. Later, I will propose a variation to

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consisting of fines, reprimands, and suspensions in a “quasi-criminal” fashion as opposed to restrictions on imposing criminal fines).

<sup>178</sup> MODEL RULES OF PRO. CONDUCT r. 8.5(b)(2) (AM. BAR ASS’N 2020).

<sup>179</sup> Or maybe not optimistic. Lower federal and state courts have held that federal prosecutors must comply with professional conduct rules of their licensing state and with local federal court rules incorporating them unless there is a superior federal interest. *United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993) (“[I]t appears that Congress intended federal lawyers to be subject to regulation by the state bars of which they are members.”); *In re Howe*, 940 P.2d 159, 164 (N.M. 1997) (“We are not persuaded that an attorney’s employer, even though that employer may be an attorney or an arm of the United States government, can create an ‘arguable question of professional duty’ . . . by the simple mechanism of unilaterally declaring that a particular rule of conduct is burdensome and should not apply to its employees.”).

Rule 1.13 of the Model Rules to address the situation of the government lawyer.<sup>180</sup>

#### A. THE MODEL RULES

Most provisions in the Model Rules do not distinguish among practice areas. They treat all lawyers the same. For instance, Rule 1.7(a)(1) forbids all lawyers to represent a client who is “directly adverse” to another current client.<sup>181</sup> Rule 4.2 forbids all lawyers who represent a client in a matter to communicate with another lawyer’s client about the matter, with two exceptions.<sup>182</sup> Rule 5.1 imposes the same obligations on all lawyers “having direct supervisory authority over another lawyer.”<sup>183</sup>

Some rules, however, do address a lawyer’s practice setting. Rule 5.4(d), for example, forbids a lawyer to practice law in a for-profit “professional corporation or association” if nonlawyers have managerial or ownership interests in it.<sup>184</sup> Other rules focus on certain types of practice. Rule 1.13 governs lawyers for organizations.<sup>185</sup> Rule 3.3 applies to all lawyers who appear before a tribunal.<sup>186</sup> Rule 3.8 defines the “Special Responsibilities of a Prosecutor.”<sup>187</sup> Rule 1.11 contains the post-departure conflict rule for lawyers who leave government jobs, whether or not as lawyers, and the conflict rules for lawyers who move from private practice to government jobs.<sup>188</sup>

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<sup>180</sup> See *infra* text accompanying notes 283–285 (describing proposed Model Rule 1.13A for government lawyers).

<sup>181</sup> See MODEL RULES OF PRO. CONDUCT r. 1.7(a)(1) (AM. BAR ASS’N 2020) (defining simultaneous representation of directly adverse clients as an impermissible conflict of interest); see generally Stephen Gillers, “Directly Adverse” Means Directly Adverse: How Courts Have Misread Rule 1.7(a)(1) and Why It Matters, 98 DENVER. L. REV. 59 (2020) (outlining guidelines for the correct application of Rule 1.7(a)(1) to determine whether a representation should be considered directly adverse to a current client).

<sup>182</sup> See MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS’N 2020) (stating that lawyers cannot communicate with clients who are represented by another lawyer absent the lawyer’s consent or as authorized by law).

<sup>183</sup> See *id.* r. 5.1 (explaining the responsibilities of supervisory lawyers to ensure compliance with the Model Rules).

<sup>184</sup> *Id.* r. 5.4(d).

<sup>185</sup> See *id.* r. 1.13 (containing ethical rules for lawyers who represent organizations).

<sup>186</sup> See *id.* r. 3.3 (describing the obligations of lawyers who appear in tribunals).

<sup>187</sup> See *id.* r. 3.8 (describing ethical duties of prosecutors including the duty to disclose information that tends to negate the guilt of the defendant).

<sup>188</sup> See *id.* r. 1.11 (containing conflict rules for current and former government lawyers).



Some comments in the Rules mention government lawyers. Most notable is comment 9 to Model Rule 1.13, which discusses lawyers for organizations.<sup>189</sup> The comment states that the rule “applies to governmental organizations.”<sup>190</sup> It recognizes the challenge in identifying the client of the government lawyer. Important for the current inquiry are these two sentences:

[I]n a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.<sup>191</sup>

The Scope section of the Rules also addresses the singular role of government lawyers. It recognizes that the law may give government lawyers “authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships,” including “to decide upon settlement or whether to appeal from an adverse judgment.”<sup>192</sup> Both comment 9 to Rule 1.13 and the Scope are careful to identify “applicable law” or “various

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<sup>189</sup> See *id.* r. 1.13 cmt. 9.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> MODEL RULES OF PRO. CONDUCT Scope ¶ 18 (AM. BAR ASS'N, 2020). The Scope provides in full that:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

*Id.*

legal provisions,” respectively, as a basis for different obligations between a lawyer for a private organization and a government lawyer.<sup>193</sup>

#### B. THE WASHINGTON, D.C. RULES OF PROFESSIONAL CONDUCT.

Because the McDade Amendment requires United States government lawyers working in Washington, D.C. to comply with the local professional conduct rules, regardless of their state of admission and to the same extent as other lawyers in the District, we seem to have what might be called a “legal wag the dog” situation. By operation of the Amendment, when the D.C. Court of Appeals adopts professional conduct rules for local lawyers, it thereby prescribes the ethics rules for all Justice Department lawyers practicing in the District, including the Attorney General.<sup>194</sup>

In addition to the omission of comment 9 of Model Rule 1.13, the Washington, D.C. Rules differ with regard to government lawyers in a second way. They purport to identify the government lawyer’s client.<sup>195</sup> Rule 1.6(k) states that “[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.”<sup>196</sup>

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<sup>193</sup> MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 9 (AM. BAR ASS’N 2020); MODEL RULES OF PRO. CONDUCT Scope ¶ 18 (AM. BAR ASS’N 2020). A 2004 opinion by the New York City Bar’s Professional Ethics Committee construed the Code of Professional Responsibility and offered an extended analysis of how the conflict rules apply differently to government lawyers and lawyers for private entities. See N.Y.C. Bar Ass’n Pro. Ethics Comm., Formal Op. 2004-03 (2004) (addressing “conflicts of interest that government lawyers encounter in the exercise of their official duties in the context of civil litigation”).

<sup>194</sup> See 28 C.F.R. § 77.2(a) (“[A]ttorney for the government means the Attorney General.”); see also *supra* note 171 and accompanying text (noting that this CFR regulation implements the McDade Amendment for the Department of Justice).

<sup>195</sup> See D.C. RULES OF PRO. CONDUCT r. 1.6(k) (D.C. BAR 2022) (identifying the client as the government agency).

<sup>196</sup> *Id.* Comment 38 to the Rule explains the reason for the rule:

The term “agency” in paragraph (j) includes, inter alia, executive and independent departments and agencies, special commissions, committees of the legislature, agencies of the legislative branch such as the Government Accountability Office, and the courts to the extent that they employ lawyers (e.g., staff counsel) to counsel them. The employing agency has been designated the client under this rule to provide a commonly understood and easily determinable point for identifying the government client.

*Id.* r. 1.6 cmt. 38.

That designation may be sensible for most federal lawyers because it identifies who in government has the authority to instruct the lawyer and is consistent with recognizing the United States as the ultimate client.<sup>197</sup> For the Department of Justice, however, it does not work so well. Literally read, it would make the Justice Department (i.e., “the agency” that employs the Department’s lawyers) the client of Department lawyers even when they represent other agencies of the Executive Branch.<sup>198</sup> It would be like saying that the client of law firm lawyers is their own law firm even though their work is on behalf of the firm’s clients. It may not affect the analysis of the responsibilities of a Department lawyer in any particular situation, but the United States, not the Justice Department or the Attorney General, is better understood to be the client of the Justice Department lawyer.<sup>199</sup> That view also comports with Model Rule and Washington, D.C. Rule 1.13, both of which state that an employed or retained lawyer for an organization “represents the organization acting through its duly authorized constituents.”<sup>200</sup>

## VII. HOW PROFESSIONAL CONDUCT RULES CAN PROTECT JUSTICE DEPARTMENT LAWYERS FROM A FAITHLESS PRESIDENT

Lawyers answer to two masters: Their clients and the courts where they are licensed or practice. The rules limit what lawyers may do for clients no matter how helpful it may be to achieve the client’s goal.<sup>201</sup> Courts have rejected claims that federal or state court rules cannot bind federal prosecutors.<sup>202</sup> Executive power is

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<sup>197</sup> See, e.g., MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 9 (Am. Bar Ass’n, 2020) (“[T]he client may be . . . the government as a whole.”).

<sup>198</sup> In court, where the United States is a party, Justice Department lawyers appear for the United States.

<sup>199</sup> See, e.g., Michael Stokes Paulsen, *Who “Owns” Government’s Attorney Client Privilege?*, 83 MINN. L. REV. 473, 474 (1998) (arguing that “the United States government possesses, as a matter of common law, the same attorney-client privilege that exists for a corporation” so the United States is the client of the Justice Department).

<sup>200</sup> MODEL RULES OF PRO. CONDUCT r. 1.13(a) (AM. BAR ASS’N 2020); D.C. RULES OF PRO. CONDUCT r. 1.13(a) (D.C. BAR 2022); see *infra* text accompanying note 256.

<sup>201</sup> See, e.g., MODEL RULES OF PRO. CONDUCT r. 8.5 (AM. BAR ASS’N 2020) (noting that lawyers providing legal services in a jurisdiction are subject to the disciplinary authority of that jurisdiction, regardless of admission status).

<sup>202</sup> See *supra* note 179 and accompanying text.

subordinate to the judicial power to regulate the bar.<sup>203</sup> Or to put it starkly, nothing in the Supreme Court's decisions construing the President's take care or other powers permits him to instruct government lawyers to violate rules of professional conduct, including to lie to a judge;<sup>204</sup> introduce false testimony in a tribunal;<sup>205</sup> prosecute "a charge that the prosecutor knows is not supported by probable cause;"<sup>206</sup> file a frivolous claim;<sup>207</sup> or assert any claim or defense in a civil case, even if not frivolous, "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."<sup>208</sup> Some of these prohibitions are also in statutes or procedural rules,<sup>209</sup> but they are all in the rules of professional conduct. The President's duty to faithfully execute the laws presupposes the existence of laws. Professional conduct rules promulgated and enforced by state or federal courts should be understood to constitute law in that sense. They come from a branch of government with inherent authority to regulate the lawyers they license or who appear before them<sup>210</sup> and, for federal courts, a co-equal branch of government.<sup>211</sup> They are not

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<sup>203</sup> See, e.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 23 (1986) ("[T]he majority of American courts have claimed unusual and sometimes sweeping regulatory powers when dealing with the legal profession.").

<sup>204</sup> See MODEL RULES OF PRO. CONDUCT r. 3.3(a) (AM. BAR ASS'N 2020) (stating that a lawyer shall not "make a false statement of fact").

<sup>205</sup> See *id.* ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.").

<sup>206</sup> *Id.* r. 3.8.

<sup>207</sup> See *id.* r. 3.1 (stating that a lawyer shall not bring a proceeding or assert an issue that is frivolous).

<sup>208</sup> FED. R. CIV. P. 11(b)(1).

<sup>209</sup> *Id.*; see also 28 U.S.C. § 1927 (creating authority for court to sanction parties for vexatiously multiplying litigation); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42 (1991) (recognizing that a federal court has inherent fee-shifting authority, even where the conduct at issue does not come within a statute or court rule providing for sanctions).

<sup>210</sup> See *J. H. Marshall & Assocs., Inc. v. Burleson*, 313 A.2d 587, 591 (D.C. 1973) ("No one denies that a court has an inherent right to make rules governing the practice of law before it."); *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995) ("As old as the judiciary itself, the inherent power enables courts to protect their institutional integrity and to guard against abuses of the judicial process with contempt citations, fines, awards of attorneys' fees, and such other orders and sanctions as they find necessary, including even dismissals and default judgments.").

<sup>211</sup> See *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (identifying the principle of "separated powers" and the corresponding "appropriate relationship among the three coequal Branches").

advisory. Violations can have serious legal consequences. It would not be the faithful execution of the law for a President to instruct a government lawyer to violate a court's procedural rules, evidence rules, bankruptcy rules, or professional conduct rules. And even if we assume that a court's professional conduct rules are not law in the same way that legislation is law, the McDade Amendment is a law, and it requires obedience to a jurisdiction's rules.<sup>212</sup>

Depending on the circumstances, professional conduct rules and Rule 11 of the Federal Rules of Civil Procedure (among other court rules) can empower and require Justice Department lawyers to reject White House efforts to instruct Department lawyers on how to represent the United States. Under the Supreme Court's current view of Article II, nothing can prevent the President in the exercise of his take care power from removing the Attorney General and those inferior officers whom the President chooses.<sup>213</sup> But can he do so when his reason is a lawyer's insistence on compliance with the law governing lawyers and the rules of professional conduct? This may not be a realistic question because the President's motive may be near impossible to identify. At the least, however, the existence of these rules and law, and a lawyer's explicit reliance on them, should make it politically more difficult to remove her.

#### A. RULE 1.2(A)

Model Rule 1.2(a) allocates authority for decisions between lawyers and clients. It provides:

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case,

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<sup>212</sup> See 28 U.S.C. § 530B ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules . . .").

<sup>213</sup> See, e.g., *Myers v. United States*, 272 U.S. 52, 163–64 (1926) (holding that Article II grants to the President the power of appointment and removal of executive officers without the approval of a legislative body).

the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.<sup>214</sup>

When read in conjunction with comment 1, the rule envisions a division between goals and means, with the client authorized to identify the goals of a representation and the lawyer authorized to choose how to achieve them.<sup>215</sup> The line between goals and means will not always be clear, as can be seen in the rule itself. For example, a criminal defendant's right to decide whether to testify and whether to waive a jury trial are means decisions to further the goal of acquittal, but Rule 1.2(a) gives both decisions to the client, as does the Sixth Amendment.<sup>216</sup>

Rule 1.2(a) can help Department lawyers resist improper political interference. Lawyers are authorized to make many means decisions, even over a client's objection, but they are instructed to "reasonably consult with the client about the means by which the client's objectives are to be accomplished."<sup>217</sup> Washington, D.C. Rule 1.2 adds: "A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by [paragraph (a)]."<sup>218</sup>

A pending litigation will always have a goal. Rule 1.2(a) gives lawyers the power to decide how to achieve it. At the trial stage, that includes their professional judgment of the motions to make,

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<sup>214</sup> MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020).

<sup>215</sup> See *id.* r. 1.2 cmt. 1 ("Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.").

<sup>216</sup> See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018) ("When a client expressly asserts that the objective of 'his defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt."); see also *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) (finding the right to testify to be implicit in the Sixth Amendment's compulsory process clause).

<sup>217</sup> MODEL RULES OF PRO. CONDUCT r. 1.4(a)(2) (AM. BAR ASS'N 2020).

<sup>218</sup> D.C. RULES OF PRO. CONDUCT r. 1.2(d) (D.C. BAR 2022).

the witnesses to call, the facts and law to argue, and how to cross-examine adverse witnesses. At the appellate stage, it includes the arguments to make or exclude.<sup>219</sup> These are not among the decisions that may attract political interference. Harder questions are how the rule operates when deciding (1) whether to file a case in the first place; (2) what settlements to offer and accept in civil cases; and (3) what pleas to offer or sentencing recommendations to make in criminal cases. In public or private civil litigation, the decisions in (1) and (2) belong to the client.<sup>220</sup> By analogy to civil settlement authority, the decisions in (3) should also be for the client because they ask how the dispute should be resolved. Of course, the President ordinarily leaves these decisions to the Justice Department.<sup>221</sup>

Decisions on what legal arguments to make in a particular case would initially appear to belong to the Department because they are decisions about *how* to achieve a goal, not what the goal is.<sup>222</sup> But that is not so clear. Consider an argument to the Supreme Court on the meaning of the Due Process Clause or the Sherman Act. Choices must be made from among two or three plausible positions. (If the United States is not a party, it must decide whether to intervene and the arguments to make if it does.) A President's claim of authority to make these decisions is strong. The President may be content to leave the decision to the Solicitor General, but perhaps

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<sup>219</sup> See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“[B]y promulgating a per se rule that the client, not the professional advocate, must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation.”).

<sup>220</sup> See MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020) (mandating that the lawyer abides by the client's decisions regarding the objectives of the representation, including whether to settle).

<sup>221</sup> See Patrick E. Longan & James P. Fleissner, *Partisanship and the Attorney General of the United States: Timely Lessons from Edward Levi and Griffin Bell about Repairing a Politicized Department of Justice*, 72 MERCER L. REV. 731, 745–46 (2021) (discussing different presidential administrations' views on the independence of the Department of Justice from White House).

<sup>222</sup> See, e.g., Robert Burns & Steven Lubet, *Ethics 2000 and Beyond Reform or Professional Responsibility as Usual?: Division of Authority Between Attorney and Client: The Case of the Benevolent Otolaryngologist*, 2003 U. ILL. L. REV. 1275, 1290 (“[I]n practice, the most salient aspect of Rule 1.2 itself is the contrast between objectives, where the professional is obligated to ‘abide by’ the client's decision, and means, whereas there is only a requirement that the professional ‘consult’ with the layman. Most professionals would draw the conclusion that the ultimate decision as to means is theirs.”).

the President is a lawyer, maybe even a former law professor who taught the very issue. He may want the Solicitor General to make a particular argument about what the Due Process Clause requires in one case because he thinks it will be in the best interest of the United States in future cases. Maybe he wants to argue the case himself. The President may view the Department's position on the meaning of a law, the Constitution, or precedent as one additional way in which the law can be faithfully executed.

The same dynamic could emerge in private litigation. In a commercial case, a corporate litigant may be thinking about the long-term consequences of a particular interpretation of copyright, antitrust, or securities law. It may want its counsel to argue for the narrowest construction that is most likely to succeed, or, anticipating the reappearance of the issue, it may want counsel to argue for the broadest construction even if a narrower one may have a better chance to prevail. The resolution of these questions should be for the client because the decision partakes of both means—how to prevail in the particular matter—and goals—the creation of precedent favorable to the organization's commercial interests.

More broadly, the claim may be made that because “all” executive authority resides in the President,<sup>223</sup> and because civil and criminal litigation brought in the name of the United States is an exercise of executive authority,<sup>224</sup> the President is empowered to make not only the decisions in (1), (2), and (3) above, if he chooses, but also to make or countermand every decision that arises in the work of the Justice Department, no matter how trivial. In other words, the President's take care duty may be seen to override the allocation of decision making in Rule 1.2(a) or elsewhere, including in the law of agency and fiduciary duty, and without regard to the effect on the rule of law and the value of consistency in its application. That would mean that the President can instruct the Department *not* to investigate, sue, or indict a particular person or company regardless of the strength of the evidence of culpability and even if Department

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<sup>223</sup> See *supra* notes 5–6 and accompanying text.

<sup>224</sup> See *United States v. Cox*, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring) (“The prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General.”); see also *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (“There is no real dispute that the functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.”).



policies dictate the opposite; conversely, it would mean that the President can instruct the Department to investigate, sue, or indict a particular person, in contravention of Department policies, so long as the facts and law can support the decision; and that the President can decide the terms for any civil settlement, plea bargain, or sentencing recommendation even if they contravene Department policies. The President's motive, in this expansive view, would be irrelevant as long as his instruction was not unlawful or based on "race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights."<sup>225</sup> The only check on this power would be the political cost of invoking it and possibly a Department official's refusal to comply, choosing instead to quit or be fired.

Scholars have asked, however, whether there is some constitutionally grounded doctrine that would restrict the President's take care authority over the Justice Department's decisions solely to questions of resource allocation, such as a direction to focus on environmental violations or white collar crime, and to exclude presidential authority to instruct the Department on decisions in specific matters.<sup>226</sup> Answers may focus on history and norms and the word "faithfully" in Article II, while recognizing the absence of a primary legal authority.<sup>227</sup> While various efforts to give content to the requirement that the President "faithfully" execute the law may or may not be persuasive, the word must have some meaning because the Court has told us that every word in the Constitution does<sup>228</sup> and because the framers believed that

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<sup>225</sup> *Wayte v. United States*, 470 U.S. 598, 608 (1985); *see also* *United States v. Goodwin*, 457 U.S. 368, 381 (1982) (illustrating that due process would be violated if a charge results from prosecutorial vindictiveness).

<sup>226</sup> *See, e.g.*, Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2119 (2019) (proposing a fiduciary theory of Article II). *But see* Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1479 (2020) (critiquing suggestions of fiduciary status deriving from the Constitution).

<sup>227</sup> *See, e.g.*, Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction from the President?*, 87 FORDHAM L. REV. 1817, 1832 (2019) ("Traditionally, the president's role in executing criminal law has been limited to setting criminal justice policy and hiring and firing the Attorney General and other high-ranking prosecutors, and so there is no settled understanding of what it means for the president to faithfully execute the criminal law in making decisions in individual criminal cases.").

<sup>228</sup> *See* *Williams v. United States*, 289 U.S. 553, 572–73 (1933) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate

“faithfully” was a limitation on the exercise of power.<sup>229</sup> It would not, for example, be the faithful execution of the law to use executive power in order to enrich a President’s friends and relatives or to violate the law.<sup>230</sup>

I approach these questions not from the perspective of a legal historian seeking to identify the most likely meaning of “faithfully,” but rather from the perspective of the professional responsibility of Justice Department lawyers whose client is the United States. Department lawyers have a professional duty to ask, when circumstances warrant, whether an instruction from the President

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meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.”).

<sup>229</sup> “Oaths of office in general were discussed as real and meaningful checks on official behavior by figures such as Hamilton in a *Federalist* essay, the influential essayist ‘Brutus’ (likely Melancton Smith), and others. There was some, but not much, dissent from that theme. And ‘no objection [was] made,’ Hamilton wrote in another *Federalist* essay, ‘nor could [it] possibly admit of any,’ to the requirement that the President faithfully execute the laws.” Kent et al., *supra* note 226, at 2130 (footnotes omitted).

<sup>230</sup> Professor Kent and his co-authors write:

Our history supports three core original meanings of the Constitution’s commands of faithful execution. First, the Faithful Execution Clauses clarify how important it was to constitutional designers that the President stay within his authorizations and not act *ultra vires*. This meaning of the clauses may have implications for the relationship between the Executive and the legislature. Second, the President is constitutionally prohibited from using his office to profit himself and engage in financial transactions that primarily benefit himself. Although the Compensation Clause and the Emoluments Clause in Article II (as well as the Foreign Emoluments Clause for all officers in Article I) can be said to reinforce this intuitive conclusion, the history of the language of faithful execution suggests this reading, too. The faithful execution requirement in the Presidential Oath Clause, which appears right after the Compensation and Emoluments Clauses, may be seen, perhaps, as a belt-and-suspenders effort to help police conflicts of interests and proscribe self-dealing. More generally, faithful execution demands that the President act for reasons associated primarily with the public interest rather than his self-interest. Third, the Faithful Execution Clauses reinforce that the President must act diligently and in good faith, taking affirmative steps to pursue what is in the best interest of his national constituency. Whereas the prohibitions on self-dealing sound in proscription, the command of diligence, care, and good faith contain an affirmative, prescriptive component.

*Id.* at 2178–79 (footnotes omitted).

(or anyone else in the Executive Branch) constitutes the faithful execution of the laws because if it does not, they cannot obey it. Sometimes it may depend on motive and require lawyers to ask the reasons for the instruction. At the same time, Department lawyers must recognize the breadth of executive authority and ordinarily assume, in the first instance, that an instruction is the faithful execution of the laws regardless of their views of its wisdom. This conclusion accords with Model Rule 1.13, which describes the duties of lawyers who represent an organization, expressly including government organizations, when they learn of misconduct by the organization's constituents.<sup>231</sup>

#### B. RULE 1.2(D)

Rule 1.2(d) forbids a lawyer to “assist a client, in conduct the lawyer knows is criminal or fraudulent.”<sup>232</sup> Rule 1.2(d) can help Department lawyers resist improper political interference. By definition, an instruction from an executive official, including the President, to commit a crime or fraud is not the faithful execution of the laws but the opposite. Rule 1.2(d) limits what lawyers may do only if they know that the client's conduct is criminal or fraudulent, and “knows” is defined to mean “actual knowledge,” including knowledge that “may be inferred from the circumstances.”<sup>233</sup> But a “lawyer who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under Rule 1.2(d). Failure to make a reasonable inquiry is willful blindness punishable under the actual knowledge standard of the Rule.”<sup>234</sup>

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<sup>231</sup> See *infra* text accompanying notes 255–260 (introducing Rule 1.13).

<sup>232</sup> MODEL RULE OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2020); see also D.C. RULE OF PRO. CONDUCT r. 1.2(e) (D.C. BAR 2022) (containing a rule comparable to Model Rule 1.2(d)).

<sup>233</sup> MODEL RULE OF PRO. CONDUCT r. 1.0(f) (AM. BAR ASS'N 2020).

<sup>234</sup> ABA Comm. on Ethics & Pro. Resp., Formal Op. 20-491 (2020).

## C. RULE 1.6(B)

Rule 1.6(b) describes seven settings in which a lawyer has the authority to disclose a client's confidential information.<sup>235</sup> Three could apply to government lawyers in the circumstances described in this Article. The first permits disclosure of confidences to "prevent" a client's "crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another."<sup>236</sup> The second permits disclosure to "prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted" from a client's crime or fraud.<sup>237</sup> In either instance, the client must have "used the lawyer's services," unbeknownst (one hopes) to the lawyer, to further the crime or fraud.<sup>238</sup> The Washington, D.C. Rules have parallel provisions.<sup>239</sup> A third exception to a lawyer's duty to maintain confidentiality (in the Model Rules) permits disclosure to "comply with other law or a court order"<sup>240</sup> and (in the D.C. Rules) "when . . . required by law or court order."<sup>241</sup> The D.C. Rules also authorize disclosure by "a government lawyer when permitted or authorized by law."<sup>242</sup> For each exception, the lawyer must "reasonably believe" that disclosure is necessary.<sup>243</sup> The Model Rules and the Washington, D.C. Rules have the same definition of fraud: "Fraud" or "fraudulent" denotes conduct that is fraudulent

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<sup>235</sup> See MODEL RULE OF PRO. CONDUCT r. 1.6(b) (AM. BAR ASS'N 2020) (noting that all the situations listed require the lawyer to disclose only to the extent deemed "reasonably necessary").

<sup>236</sup> *Id.* r. 1.6(b)(2).

<sup>237</sup> *Id.* r. 1.6(b)(3).

<sup>238</sup> *Id.* r. 1.6(b)(2)–(3).

<sup>239</sup> See D.C. RULE OF PRO. CONDUCT r. 1.6(d) (D.C. BAR 2022) ("When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary . . ."). Washington, D.C.'s rules differ in another way. They distinguish between "confidences" and "secrets." "Confidences" are protected by the attorney-client privilege. "Secrets" refers to information a lawyer learns in representing the client from persons who are not clients. *Id.* r. 1.6(b).

<sup>240</sup> MODEL RULE OF PRO. CONDUCT r. 1.6(b)(6) (AM. BAR ASS'N 2020).

<sup>241</sup> D.C. RULE OF PRO. CONDUCT r. 1.6(e)(2)(A) (D.C. BAR 2022).

<sup>242</sup> *Id.* r. 1.6(e)(2)(B).

<sup>243</sup> MODEL RULE OF PRO. CONDUCT r. 1.6(b) (AM. BAR. ASS'N 2020) (requiring the lawyer to disclose only to the extent "reasonably necessary").

under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.”<sup>244</sup>

*1. How Rule 1.6(b) Can or Cannot Empower Justice Department Lawyers to Resist Improper Political Interference.* It may be unlikely that a Department lawyer will discover that an Executive Branch officer or employee has committed, is committing, or is about to commit a fraud or crime, but it is possible, including under the broad federal obstruction of justice statutes.<sup>245</sup> This is perhaps most likely to transpire in connection with a litigation, a grand jury proceeding, or an investigation. (If the matter is before a tribunal, the more demanding disclosure requirements of Model Rule 3.3 may apply.<sup>246</sup>) Wherever the crime or fraud occurs or is threatened, the government lawyer cannot assist it but must instead prevent it or its consequences.

The Model Rule exception permitting disclosure to “comply with other law”<sup>247</sup> (or its D.C. equivalent) means that Congress can expand the confidentiality exceptions by requiring disclosure of probable criminal or fraudulent conduct, perhaps to the chairs and ranking members of the Senate and House judiciary committees. While the Rule 1.6(b) exceptions are permissive only,<sup>248</sup> Congress can convert them to mandatory disclosure exceptions through legislation. Congress can also require a federal lawyer to take designated action with a state of mind short of actual knowledge, as is now required.

*2. The Related Issue of the Attorney-Client Privilege for Communications Between Executive Branch Officers or Employees and Executive Branch Lawyers.* The federal attorney-client privilege is statutorily (if implicitly) recognized in Rule 501 of the Federal Rules of Evidence.<sup>249</sup> While Model Rule 1.6(a) forbids a

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<sup>244</sup> *Id.* r. 1.0(d); D.C. RULES OF PRO. CONDUCT r. 1.0(d) (D.C. BAR 2022).

<sup>245</sup> *See, e.g.*, 18 U.S.C. §§ 1503, 1512, 1519 (describing an extensive range of conduct as obstruction violations).

<sup>246</sup> Rule 3.3 requires a lawyer to “take reasonable remedial measures,” possibly including disclosure of a client’s confidential information, to correct false statements to a tribunal by the lawyer or a lawyer’s witness. *See infra* text accompanying notes 296–302.

<sup>247</sup> MODEL RULE OF PRO. CONDUCT r. 1.6(b)(6) (AM. BAR ASS’N 2020).

<sup>248</sup> *See id.* (using the permissive word “may” regarding when it is appropriate to “reveal information relating to the representation of a client”).

<sup>249</sup> “The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the

lawyer to reveal certain information learned in representing a client, regardless of the source, the privilege entitles the lawyer and client to refuse to disclose communications between them, a refusal that might otherwise constitute contempt.<sup>250</sup>

When a federal grand jury sought communications between the President and a witness who was Deputy White House Counsel, the District of Columbia Circuit Court of Appeals rejected the witness's assertion of privilege.<sup>251</sup> For this conclusion, it relied on Rule 501, holding as matter of statutory construction that:

[I]t would be contrary to tradition, common understanding, and our governmental system for the attorney-client privilege to attach to White House Counsel in the same manner as private counsel. When government attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury.<sup>252</sup>

We don't know whether the Supreme Court would read Rule 501 the same way if the subpoena were from a congressional committee

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United States Constitution; a federal statute; or rules prescribed by the Supreme Court." FED. R. EVID. 501.

<sup>250</sup> The difference is recognized in comment 3 to Rule 1.6:

The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 2020).

<sup>251</sup> *In re Lindsey*, 148 F.3d 1100, 1118 (D.C. Cir. 1998) (distinguishing between the personal attorney-client privilege and the government attorney-client privilege).

<sup>252</sup> *Id.* at 1114; *accord In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 925–26 (8th Cir. 1997) (holding that neither the attorney-client privilege nor the work product doctrine applied to the White House when served with a grand jury subpoena).

rather than a grand jury and the communications were otherwise privileged. But Congress can achieve the same result through legislation. It can amend the federal evidence rules to narrow the attorney-client privilege for communications between officers and employees of the Executive Branch and a Department lawyer. Just as the Deputy White House Counsel could not assert privilege before a federal grand jury,<sup>253</sup> Congress can, on a proper evidentiary showing it defines, amend Rule 501 to prevent the assertion of privilege when a government lawyer is subpoenaed to testify in Congress, while preserving the privilege for the same communications in private litigation.<sup>254</sup>

#### D. RULE 1.13

Rule 1.13 addresses lawyers for organizations, most obviously corporations, but both the Model Rules and Washington, D.C. Rules also include “governmental organizations.”<sup>255</sup> They both identify the organization itself as the client.<sup>256</sup> They both provide that, “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”<sup>257</sup> Model Rule 1.13(b) mandates “reporting up” to others within the organization in two circumstances:

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<sup>253</sup> *Lindsey*, 148 F.3d at 1114.

<sup>254</sup> Former Justice Department officer Jeffrey Clark refused to answer questions from the January 6 committee in the House, citing attorney-client privilege for his communications with the President. *See* Luke Broadwater, *Trump Justice Dept. Official Refuses to Answer Jan. 6 House Panel’s Question*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/2021/11/05/us/politics/jeffrey-clark-capitol-riot-committee.html>. Jeffrey Clark’s claim is dubious but an amendment to Rule 501 could defeat it even if it had merit.

<sup>255</sup> *See* MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 9 (AM. BAR ASS’N 2020) (“The duty defined in this Rule applies to governmental organizations.”); D.C. RULE OF PRO. CONDUCT r. 1.13 cmt. 8 (D.C. BAR 2022) (“The duty defined in this rule encompasses the representation of governmental organizations.”).

<sup>256</sup> *See* MODEL RULES OF PRO. CONDUCT r. 1.13(a) (AM. BAR ASS’N 2020) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”); D.C. RULE OF PRO. CONDUCT r. 1.13(a) (D.C. BAR 2022) (same). For the government lawyer, this usually requires identifying the part of government that is the client, but for Justice Department lawyers, the client should be construed as the United States. *See supra* text accompanying notes 196–200 (describing how each rule identifies each client).

<sup>257</sup> MODEL RULES OF PRO. CONDUCT r. 1.13(a) (AM. BAR ASS’N 2020); D.C. RULE OF PRO. CONDUCT r. 1.13(a) (D.C. BAR 2022).

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer *shall* proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer *shall* refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.<sup>258</sup>

This duty requires the organization's lawyer to identify the "higher" and "highest" authorities, "as determined by applicable law."<sup>259</sup> Washington, D.C.'s Rule 1.13(b) is substantively the same as Model Rule 1.13(b).<sup>260</sup>

The Model Rules (but not the Washington, D.C. Rules) then authorize disclosure of certain confidential information to persons outside the organization, known as "reporting out."<sup>261</sup> Here we have another permissive exception to confidentiality under Rule 1.6. It applies if:

- (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

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<sup>258</sup> MODEL RULES OF PRO. CONDUCT r. 1.13(b) (AM. BAR ASS'N 2020) (emphasis added).

<sup>259</sup> *Id.*

<sup>260</sup> See D.C. RULES OF PRO. CONDUCT r. 1.13(b) (D.C. BAR 2022) (using language nearly identical to the Model Rules language).

<sup>261</sup> The duty to disclose outside of the organization outlined in Model Rule 1.13(c) and limited by 1.13(d) has been discussed by commentators as a "reporting out" responsibility. See William H. Simon, *Duties to Organizational Clients*, 29 GEO. J. LEGAL ETHICS 489, 502 (2016) (examining the interconnected rules governing disclosure in the "reporting-out" context).



(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.<sup>262</sup>

*1. How Rule 1.13 Can or Cannot Empower Justice Department Lawyers to Resist Improper Political Interference.* The Rule recognizes the government as an organization within the scope of the rule's requirements and authorities.<sup>263</sup> This makes the United States, not any individual constituent of the federal government, the client. D.C. Rule 1.6 says that the client of government lawyers is the agency for which they work.<sup>264</sup> As noted above, while this may make sense for other agencies, it does not make sense for the Justice Department. Applied literally, it would mean that the client of Justice Department lawyers is the Justice Department itself, essentially their own law firm.<sup>265</sup>

Beyond identifying the client, the Rule's mandatory reporting up obligation should ensure that upper echelon lawyers in the Department, which could include the Attorney General and inferior officers, will learn of constituent conduct described in Model Rule 1.13(b).<sup>266</sup> Such conduct would include the faithless execution of the laws by Executive Department personnel, which would be "a violation of a legal obligation to" the United States.<sup>267</sup> All of this can and should be made clear to employees and officers within the Executive Department. They are constituents of the client whose conduct may create a duty to report up.

In jurisdictions that follow the Model Rules, conduct described in Rule 1.13(c) can be disclosed outside the Department, including to the chairs and ranking members of the judiciary committees of

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<sup>262</sup> MODEL RULES OF PRO. CONDUCT r. 1.13(c) (AM. BAR ASS'N 2020).

<sup>263</sup> See *supra* note 256 and accompanying text.

<sup>264</sup> D.C. RULES OF PRO. CONDUCT r. 1.6 cmt. 38 (D.C. BAR 2022).

<sup>265</sup> See *supra* notes 196–200 and accompanying text.

<sup>266</sup> See MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2020) (defining the lawyer's responsibility as, first, to report up to persons higher within the organization, with authority to report out only if the organization "fails to address" the matter or "refuses to act").

<sup>267</sup> *Id.* r. 1.13(b).

Congress.<sup>268</sup> For paragraph (c) to apply, however, the act must “clearly [be] a violation of law” that the lawyer “reasonably believes . . . is reasonably certain to result in substantial injury to the organization.”<sup>269</sup> Rule 1.13 does not require that the “injury” be monetary. The word can encompass the government’s need for confidence in the administration of justice and the lawful operation of the government’s business.

In fact, disclosure to Congress may also be within the reporting up duty, which is broader than the reporting out authority, as well as mandatory, if Congress is viewed as “the highest authority that can act on behalf of the organization [the United States] as determined by applicable law,” at least within the meaning of Rule 1.13(b). The applicable law can be one Congress can pass specifically for this purpose. Congress “act[s] on behalf of” the United States whenever it legislates or otherwise exercises its Article I powers.

2. *The Interplay Between Rule 1.13 and the Take Care Clause.* The President must take care to execute the laws “faithfully.”<sup>270</sup> “Faithfully” also appears in the oath the Constitution requires the President to take.<sup>271</sup> The adverb must have some meaning.<sup>272</sup> It is a word of limitation.<sup>273</sup> The President cannot execute the laws faithlessly. A faithless act or order violates the Constitution.<sup>274</sup> Imagine that in early January 2021, with no factual basis, the President directed the Attorney General to issue a finding of fraud in the presidential elections in Arizona, Pennsylvania, and Georgia and to file lawsuits invalidating the results in the name of the United States.<sup>275</sup> The Attorney General could have refused and resigned, of course, but could he have refused and not resigned? If so, could the President then have fired him and appointed a more

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<sup>268</sup> See *id.* r. 1.13(c) (outlining the disclosure permitted if reporting up fails).

<sup>269</sup> *Id.*

<sup>270</sup> See *supra* text accompanying note 12.

<sup>271</sup> See U.S. CONST. art. II, § 1, cl. 8 (requiring the President to take this oath before taking office: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States”).

<sup>272</sup> See *supra* text accompanying note 228.

<sup>273</sup> See *supra* note 229 and accompanying text.

<sup>274</sup> See Saikrishna Bangalore Prakash, *Faithless Execution*, 133 HARV. L. REV. F. 94, 96 (2020) (“[T]o actually support the Constitution is to support it faithfully.”).

<sup>275</sup> There was an effort by a Department lawyer in this direction. See Benner & Savage, *supra* note 23 (discussing former President Trump’s efforts to pressure the Attorney General to alter election outcomes).

compliant Attorney General? The Supreme Court has told us that the President must have the power to remove a principal officer to protect his constitutional duty to faithfully execute the law and to honor democratic principles.<sup>276</sup> The President, not his subordinates, is chosen by the people. The President cannot be saddled with officials that, as he sees it, frustrate the policies he was elected to pursue or in whom he lacks confidence.<sup>277</sup> But that justification disappears if the reason for an official's removal is a refusal to violate the Constitution or otherwise act unlawfully, or if the refusal is required by the official's own oath "to support this Constitution,"<sup>278</sup> which in turn requires that officials take a stand on what is and is not the faithful execution of the laws.

Model Rule 1.13 should be amended to specifically address government lawyers. While Rule 1.13 does apply to government lawyers,<sup>279</sup> and comment 9 to Model Rule 1.13 (but not the Washington, D.C. Rule) does say that "a government lawyer may have authority under applicable law to question" a government official's "conduct more extensively than" does a lawyer for a private organization,<sup>280</sup> it would be beneficial to amend Rule 1.13(b) to clarify and expand the government lawyer's duty under the rule. Worthy of consideration is a distinct rule for government lawyers rather than including them in a rule for all organizational lawyers. The reporting up obligation should arise if a government lawyer has "a reasonable basis to believe" that a violation has occurred even if

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<sup>276</sup> See *Myers v. United States*, 272 U.S. 52, 163–64 (1926) ("Our conclusion on the merits, sustained by the arguments before stated, is that article 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . ."); see also *supra* text accompanying note 69.

<sup>277</sup> See *supra* text accompanying note 120.

<sup>278</sup> Article VI clause 3 of the United States Constitution provides:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. CONST. art. VI, cl. 3.

<sup>279</sup> See *supra* notes 255–256 and accompanying text.

<sup>280</sup> MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 9 (AM. BAR ASS'N 2020).

the lawyer lacks actual knowledge that it occurred.<sup>281</sup> Furthermore, the requirement that the conduct be “in a matter related to the representation” should be deleted. Government lawyers should be required to report up if the Rule’s requirements are present even if the misconduct of which they become aware is not related to their representation. Because Rule 1.13(c) (reporting out) builds on Rule 1.13(b) (reporting up), changes to Rule 1.13(b) will also affect Rule 1.13(c). Legislation could create the same authorities and obligations for government lawyers. The advantage of legislation is that it would apply uniformly to government lawyers nationwide whereas Model Rule 1.13 varies among American jurisdictions.<sup>282</sup>

A freestanding rule for government lawyers, drawing on Rule 1.13, might read as follows:

#### **Rule 1.13A: Government Lawyers**

(a) **Unless otherwise provided by law**, a lawyer employed or retained by **[the government] [a government entity]**<sup>283</sup> ~~an organization~~ represents the **government organization** acting through its duly authorized constituents.

(b) If a lawyer for **the government** ~~an organization~~ ~~knows~~ **has a reasonable basis to believe** that an officer, employee or other person associated with the ~~organization~~ **government** is engaged in action, intends to act or refuses to act in a matter ~~related to the representation~~ that is a violation of a legal obligation to the ~~government organization~~, or a violation of law ~~that reasonably might be imputed to the organization, and~~ that is likely to result in substantial injury to the ~~government organization~~, then, pending such investigation as is appropriate, **the lawyer shall**

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<sup>281</sup> “Knows” under Model Rule 1.13(b) means “actual knowledge” as defined in Model Rule 1.0. See *supra* note 233 and accompanying text.

<sup>282</sup> See Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 8 (2005) (“The state rules of professional conduct were crafted by state supreme courts for regulatory use, using the model version proposed by the ABA as a starting point for discussion, and apply to a wide range of settings.”).

<sup>283</sup> These options are presented in the alternative. For simplicity, the draft uses “government” to refer to both.

refuse to assist the officer or employee and explain the lawyer's reason to the officer or employee. If the officer or employee does not desist, the lawyer shall proceed as is reasonably necessary in the best interest of the ~~government organization~~ **government** organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the ~~organization~~ **government** to do so, the lawyer shall refer the matter to higher authority in the ~~government organization~~ **government**, including, if warranted by the circumstances to the highest authority that can act on behalf of the ~~government organization~~ **government** as determined by applicable law. **"Injury" in paragraph (b) and (c) of this rule includes the government's interest in public confidence in its work.**

(c) Except as provided in paragraph (d),<sup>284</sup> if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the ~~government organization~~ **government** insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is ~~clearly~~ a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the ~~government organization~~ **government**, then the lawyer may reveal information relating to the representation **[to \_\_\_\_\_]**<sup>285</sup> whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer

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<sup>284</sup> Paragraph (d) provides:

Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

MODEL RULES OF PRO. CONDUCT r. 1.13(d) (AM. BAR ASS'N 2020).

<sup>285</sup> Identity of those to whom disclosure may be made will depend on the identity of the government client. An obvious choice for federal lawyers will be the chairs and ranking members of the judiciary (or equivalent) committee of each House of Congress.

reasonably believes necessary to prevent substantial injury to the **government organization**.

This text deviates only modestly from what Rule 1.13 now requires of government lawyers. The obligations it imposes, like those that Rule 1.13 now imposes, do not interfere with the President's faithful execution of the laws, as defined by the Supreme Court, but rather protects it.

#### E. RULE 1.16

Rule 1.16 tells lawyers when they may or must withdraw from a representation and how to do so.<sup>286</sup> The Model Rules and D.C. Rules both require withdrawal if “the representation will result in violation of the Rules of Professional Conduct or other law.”<sup>287</sup> Both permit withdrawal “if withdrawal can be accomplished without material adverse effect on the interests of the client.”<sup>288</sup>

A lawyer may also withdraw under the Model Rules if:

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud; [or]

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.<sup>289</sup>

The Washington, D.C. Rules contain paragraphs (2) and (3) but omit paragraph (4).<sup>290</sup> In all circumstances, the lawyer must comply

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<sup>286</sup> See MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS'N 2020) (identifying mandatory and permissive withdrawal).

<sup>287</sup> *Id.* at 1.16(a)(1); D.C. RULES OF PRO. CONDUCT r. 1.16(a)(1) (D.C. BAR 2022).

<sup>288</sup> MODEL RULES OF PRO. CONDUCT r. 1.16(b)(1) (AM. BAR ASS'N 2020); D.C. RULES OF PRO. CONDUCT r. 1.16(b) (D.C. BAR 2022).

<sup>289</sup> MODEL RULES OF PRO. CONDUCT r. 1.16(b)(2)–(4) (AM. BAR ASS'N 2020).

<sup>290</sup> D.C. RULES OF PRO. CONDUCT r. 1.16(b)(1)–(2) (D.C. BAR 2022).

with the withdrawal provisions of a tribunal in which the lawyer has appeared.<sup>291</sup>

Under one or another of these provisions, a Department lawyer may withdraw from a matter even if an attempted White House intervention is lawful. They will be required to withdraw from the particular matter if continued representation would violate a professional conduct rule or is unlawful.<sup>292</sup> In court, the withdrawal will ordinarily appear on the public docket, though not necessarily the reason for withdrawal.<sup>293</sup> But the judge may insist on disclosure of the reason if it is not privileged and can choose to make it public.<sup>294</sup> Here again is where the character of the Department's lawyers is key.<sup>295</sup> A willingness to withdraw from a matter or resign may deter the President from insisting on compliance with his instruction. President Trump reportedly backed away from replacing acting Attorney General Jeffrey Rosen with acting Assistant Attorney General Jeffrey Clark after Trump was told that doing so would lead to mass resignations at the Justice Department.<sup>296</sup> Even with no disclosure of the reasons, that threat should inhibit attempts to replace the Department's leadership with more compliant lawyers.

### F. RULE 3.3

Rule 3.3 of both the Model Rules and the Washington, D.C. Rules forbids lawyers to make false statements to a tribunal.<sup>297</sup> If they do

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<sup>291</sup> See MODEL RULES OF PRO. CONDUCT r. 1.16(c) (AM. BAR ASS'N 2020) ("A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."); D.C. RULES OF PRO. CONDUCT r. 1.16(c) (D.C. BAR 2022) (containing identical language).

<sup>292</sup> MODEL RULES OF PRO. CONDUCT r. 1.16(a)(1) (AM. BAR ASS'N 2020).

<sup>293</sup> See *id.* r. 1.16 cmt. 3 (AM. BAR ASS'N 2020) ("The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.").

<sup>294</sup> *Id.*

<sup>295</sup> See *supra* text accompanying note 127.

<sup>296</sup> See Benner & Savage, *supra* note 23 (reporting on the effect of impending resignations on the President's potentially unlawful action).

<sup>297</sup> See MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2020) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . ."); D.C. RULES OF

so unintentionally and later come to know of the falsity, they have a duty to correct what they said.<sup>298</sup> The Model Rules require correction even if doing so will disclose a client's confidential information.<sup>299</sup> The Model Rules (but not the Washington, D.C. Rules) also require remedial measures, including if necessary through disclosure of confidential information, where lawyers know that their own witness, including their client, has testified falsely, even if not knowingly falsely.<sup>300</sup> Both the Model Rules and the Washington, D.C. Rules permit a lawyer to refuse to introduce testimony (other than testimony of a criminal defendant) that the lawyer reasonably believes is false.<sup>301</sup> Tribunal is a defined term. It can include legislative bodies and agencies.<sup>302</sup>

It may be unlikely that the White House would seek to interfere with trial decisions in a pending matter, but Rule 3.3 (along with

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PRO. CONDUCT r. 3.3(a)(1) (D.C. BAR 2022) ("A lawyer shall not knowingly . . . [m]ake a false statement of fact or law to a tribunal . . .").

<sup>298</sup> See MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 2020) ("If a lawyer . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."); D.C. RULES OF PRO. CONDUCT r. 3.3 cmt. 2 (D.C. BAR 2022) ("If the lawyer comes to know that a statement of material fact or law that the lawyer previously made to the tribunal is false, the lawyer has a duty to correct the statement, unless correction would require disclosure of information that is prohibited by Rule 1.6.").

<sup>299</sup> See MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 2020) ("If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.").

<sup>300</sup> *Id.*

<sup>301</sup> See MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 2020) ("A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."); D.C. RULES OF PRO. CONDUCT, r. 3.3(a)(4) (D.C. BAR 2022) ("A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."). In criminal cases, the accused has a constitutional right to testify over his lawyer's advice but not to commit perjury. See *Harris v. New York*, 401 U.S. 222, 225 (1971) (holding that a criminal defendant may elect to testify or not to testify but has no constitutional right to commit perjury).

<sup>302</sup> See MODEL RULES OF PRO. CONDUCT r. 1.0(m) (AM. BAR ASS'N 2020) ("'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter."); D.C. RULES OF PRO. CONDUCT, r. 1.0(n) (D.C. BAR, 2022) (defining "[t]ribunal" in similar terms to the Model Rules).



Rule 1.2(a))<sup>303</sup> offers some protection if it does. Under both the Model Rules and the Washington, D.C. Rules, a Justice Department lawyer will be in charge of what information is introduced in court. Under the Model Rules, lawyers may have to correct the false (not necessarily perjurious) testimony of their witnesses even if doing so requires disclosure of confidential information.<sup>304</sup> In Washington, D.C., the lawyer's correction may not include disclosure of client confidences as defined in its rules.<sup>305</sup>

#### G. RULE 3.8(A)

Model Rule 3.8(a) requires prosecutors to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”<sup>306</sup> Washington, D.C. Rule 3.8(c) is more demanding of prosecutors in several ways.<sup>307</sup> It forbids prosecuting the case “to trial” if a “prosecutor knows” that the evidence is not “sufficient to establish a prima facie showing of guilt.”<sup>308</sup> This means that even if there was probable cause to file the charge, the trial evidence must also support a finding of guilt beyond a reasonable doubt.<sup>309</sup>

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<sup>303</sup> See MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020) (noting that some decisions, like whether to settle and whether to plea, are ultimately up to the client).

<sup>304</sup> See *id.* r. 3.3(a)(3) (specifying that reasonable remedial measures may require disclosure to the tribunal).

<sup>305</sup> See D.C. RULES OF PRO. CONDUCT r. 3.3 cmt. 2 (D.C. BAR 2022) (clarifying that the Washington, D.C. disclosure rule differs from the Model Rules).

<sup>306</sup> MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 2020).

<sup>307</sup> See D.C. RULES OF PRO. CONDUCT r. 3.8 (D.C. BAR 2022). This Rule provides in part:

The prosecutor in a criminal case shall not:

- (a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;
- (b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause;
- (c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt;
- (d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense.

*Id.* r. 3.8(a)–(d).

<sup>308</sup> *Id.* r. 3.8(c).

<sup>309</sup> For federal criminal trials that occur outside the District of Columbia, the local court equivalent to this rule would govern. See *supra* Part V (discussing how Department of Justice lawyers are subject to the court imposed professional conduct rules of jurisdictions where their conduct occurred).

These rules give prosecutors an unambiguous duty that empowers them to reject White House efforts to instigate or maintain politically motivated prosecutions that violate the rule's conditions.

#### H. RULE 5.1

Model Rule 5.1 describes the duties of lawyers “having direct supervisory authority over” other lawyers.<sup>310</sup> A difference between the Model Rule and the D.C. version is the addition of “government agency” in the latter.<sup>311</sup> Rule 1.0(c) of the Washington, D.C. Rules expressly defines “law firm” to exclude government agencies,<sup>312</sup> so this addition reflects a decision to ensure that the rule includes lawyer managers and supervisors at government agencies.<sup>313</sup> The Model Rules’ definition of “law firm” does not mention government

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<sup>310</sup> MODEL RULES OF PRO. CONDUCT r. 5.1(b) (AM. BAR ASS’N 2020).

<sup>311</sup> The Washington, D.C. Rule states in relevant part:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm *or government agency*, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm [or government agency] in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

D.C. RULES OF PRO. CONDUCT r. 5.1 (D.C. BAR 2022).

<sup>312</sup> *See id.* r. 1.0(c) (“‘Firm’ or ‘law firm’ denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization but does not include a government agency or other government entity.”).

<sup>313</sup> *See id.* r. 5.1(a) (including “government agencies” as entities where supervisors are responsible for assuring subordinate lawyers comply with the professional rules of conduct); ABA Comm. on Ethics & Pro. Resp., Formal Op. 14-467 (2014) (explaining what Rule 5.1 requires of managers and supervisors in a prosecutor’s office).

entities, but a comment does<sup>314</sup> and comment 1 to Rule 5.1 identifies lawyers at government agencies as within the rule's scope.<sup>315</sup> Unlike some of the other rules identified here, this rule does not offer a way directly to resist improper interference. By complying with Rule 5.1 through seminars, lectures, and establishment of procedures through which subordinate Department lawyers can seek guidance, however, the Department reinforces the fact that compliance with the professional conduct rules is an obligation superior to any Executive Branch effort to improperly influence or direct the work of the Department.

#### I. RULE 8.3(A)

Model Rule and Washington, D.C. Rule 8.3(a) both require that a lawyer “who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”<sup>316</sup> In both documents, however, the first lawyer is relieved of the duty to disclose “information otherwise protected by Rule 1.6.”<sup>317</sup> If there is a permissive or mandatory disclosure exception to the confidentiality duty in Rule 1.6(a) or elsewhere,<sup>318</sup> the “information” is not “protected” by the rule, which leaves the mandatory duty of Rule 8.3(a) in place with no limitation.

It is sometimes inaccurately said that the legal profession is self-governing. In fact, the courts have final authority over the content of a jurisdiction’s professional conduct rules.<sup>319</sup> One way the

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<sup>314</sup> See MODEL RULES OF PRO. CONDUCT r. 1.0 cmt. 3 (AM. BAR ASS’N 2020) (“With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct.”).

<sup>315</sup> See *id.* r. 5.1 cmt. 1 (“[L]awyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency . . .”).

<sup>316</sup> *Id.* r. 8.3(a); D.C. RULES OF PRO. CONDUCT r. 8.3(a) (D.C. BAR 2022).

<sup>317</sup> MODEL RULE OF PRO. CONDUCT r. 8.3(c) (AM. BAR ASS’N 2020); D.C. RULES OF PRO. CONDUCT r. 8.3(c) (D.C. BAR 2022).

<sup>318</sup> For example, Model Rules 1.13, 3.3, and 4.1 all have permissive or mandatory exceptions to Rule 1.6(a). So does the proposed Rule 1.13A. See *supra* text accompanying notes 255–285, 301–302.

<sup>319</sup> See Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 U. KAN. L. REV. 453, 463–64 (1997) (noting

profession supposedly governs itself is by requiring disclosure of serious rule violations by other lawyers.<sup>320</sup> The threat that transgressions will be reported to “the appropriate professional authority”<sup>321</sup> is meant to encourage compliance with the rules. That authority includes the local disciplinary agency.<sup>322</sup> An internal Justice Department report should not be seen to satisfy the rule because the Department cannot disbar, suspend, or publicly censure its lawyers. Conduct warranting, for example, a license suspension will escape that sanction if internal reporting is deemed adequate to satisfy the requirements of the rule.

#### J. RULE 8.4(C) AND (D)

Both Model Rule and Washington, D.C. Rule 8.4(c) make it “professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”<sup>323</sup> Model Rule 8.4(d) forbids “conduct that is prejudicial to the administration of justice.”<sup>324</sup> The Washington, D.C. counterpart forbids “conduct that seriously interferes with the administration of justice.”<sup>325</sup>

Fraud is a defined term in the Model Rules and the Washington, D.C. Rules. Its meaning depends on substantive law.<sup>326</sup> But the rule does not restrict the meaning of “dishonesty,” “deceit,” and “misrepresentation” to how they may be defined in criminal, tort, or other law. Each word gives lawyers a basis to reject an instruction on the ground that compliance would violate the rule in the lawyer’s reasonable estimation. The lawyer, not the client or its constituents,

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how the state’s highest court usually has authority to set the professional rules of conduct for its jurisdiction).

<sup>320</sup> See Chuck Lundberg, *Rule 8.3: Reporting Other Lawyers*, 21 NO. 26 LAWYERS J. 8, 8 (2019) (“As a matter of professional responsibility, we attorneys are mandated reporters of other lawyers, and we were mandated reporters long before statutory mandated reporting became ‘a thing’ in the 1970s and 1980s . . .”).

<sup>321</sup> See *supra* note 316 and accompanying text.

<sup>322</sup> See MODEL RULES OF PRO. CONDUCT r. 8.3 cmt. 3 (AM. BAR ASS’N 2020) (describing alternatives to the bar disciplinary agency).

<sup>323</sup> *Id.* r. 8.4(c) (AM. BAR ASS’N 2020); D.C. RULES OF PRO. CONDUCT r. 8.4(c) (D.C. BAR 2022).

<sup>324</sup> MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS’N 2020).

<sup>325</sup> D.C. RULES OF PRO. CONDUCT r. 8.4(d) (D.C. BAR 2022).

<sup>326</sup> The Model Rules and the Washington, D.C. Rules both provide: “‘Fraud’ or ‘fraudulent’ denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” MODEL RULES OF PRO. CONDUCT r. 1.0(d) (AM. BAR ASS’N 2020); D.C. RULES OF PRO. CONDUCT r. 1.0(d) (D.C. BAR 2022).

has the authority and the duty to construe these words in the context in which the instruction occurs.

### VIII. CONCLUSION

This Article began with a hypothetical. It ends with a true story with striking parallels:

In a call on Dec. 27, 2020, witnesses have said, Trump told acting attorney general Jeffrey Rosen that he wanted his Justice Department to say there was significant election fraud, and said he was poised to oust Rosen and replace him with Clark, who was willing to make that assertion. Rosen told Trump that the Justice Department could not “flip a switch and change the election,” according to notes of the conversation cited by the Senate Judiciary Committee. “I don’t expect you to do that,” Trump responded, according to the notes. “Just say the election was corrupt and leave the rest to me and the Republican congressmen.” The President urged Rosen to “just have a press conference.” Rosen refused. “We don’t see that,” he told Trump. “We’re not going to have a press conference.”<sup>327</sup>

Rosen’s “we” refers to lawyers in the Department of Justice. Their refusal to do Trump’s bidding recognizes that their professional responsibilities prevailed over executive power. Courts have authority to write rules for the conduct of lawyers who are admitted to their bar or practice in their jurisdiction. The premise of this Article is that executive power is subordinate to those rules. Whatever Chief Justice John Roberts meant when he wrote that the President possesses “all of” the executive power,<sup>328</sup> that power does not displace the judiciary’s power to regulate the bar through rules of professional conduct. There may be honest disagreement over whether a particular professional conduct rule is within the judicial power at all or as applied in the particular circumstance. Or over its

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<sup>327</sup> Carol D. Leonnig, Devlin Barrett, Josh Dawsey & Spencer S. Hsu, *Justice Dept. Investigating Trump’s Actions in Jan. 6 Criminal Probe*, WASH. POST (July 26, 2022, 6:58 PM), <https://www.washingtonpost.com/national-security/2022/07/26/trump-justice-investigation-january-6/>.

<sup>328</sup> See *supra* notes 5–6 and accompanying text.

meaning. The arbiter of that contest will, of course, be the judiciary itself, which has the final say on “what the law is.”<sup>329</sup> But once the courts speak, the disagreement is resolved so far as lawyers are concerned. That’s good for Justice Department lawyers as officers of the court<sup>330</sup> because it enables them to refuse an Executive Branch instruction to act in a way that would violate professional conduct rules or impinge on the professional autonomy that those rules give them. They can say, as we might understand Jeffrey Rosen to have said to Trump: “We won’t do that because we are lawyers first and foremost.”

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<sup>329</sup> See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the Judicial Department to say what the law is.”).

<sup>330</sup> See *Ex parte Garland*, 71 U.S. 333, 378 (1866) (“Attorneys and counsellors . . . are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. . . . The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct.”).