



PROFESSIONAL INDEPENDENCE IN THE OFFICE OF
THE ATTORNEY GENERAL

Norman W. Spaulding

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INTRODUCTION

Warrantless surveillance, extraordinary rendition, indefinite detention, torture. These are the most serious charges of extralegal conduct by the present administration—conduct which, in one form or another, Attorneys General Ashcroft and Gonzales and their staffs have attempted to give the imprimatur of law. The charges are serious indeed. To them, lesser charges could be added (cronyism, distortion of enforcement priorities, abuse of prosecutorial discretion).¹ What are we to make of the fact that the nation’s highest legal

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1. On the shift in DOJ priorities, see Dan Eggen & John Solomon, *Justice Dept.’s*

officers, not to mention a good number of their subordinates, have been drawn so willingly, it would appear, into a position of complicity with, if not outright endorsement of, extralegal conduct at odds with our most fundamental constitutional and democratic commitments?

As with prior instances of extralegal conduct by Attorneys General, the call is now nearly ubiquitous for a lawyer who would bring greater professional independence to the office, and hopefully thereby, more strict observance of relevant legal restraints, to the pursuit of the President's foreign and domestic policy agendas.² But what commentators and congressional critics mean by independence is far from clear. The term is easy to invoke, and it has a long pedigree, not only in debates about the proper role of a government lawyer, but in broader debates about the professional integrity of lawyers in private practice.³ Still, it admits of no obvious definition.

ABA Model Rule of Professional Conduct 2.1 hints at an answer by

Focus Has Shifted; Terror, Immigration Are Current Priorities, WASH. POST, Oct. 17, 2007, at A1. On cronyism, see Dan Eggen, *Deputy Attorney General Defends Prosecutor Firings*, WASH. POST, Feb. 7, 2007, at A3; David Johnston et al., *A New Mystery to Prosecutors: Their Lost Jobs*, N.Y. TIMES, Mar. 4, 2007, § 1, at 1; David Johnston, *Justice Dept. Names New Prosecutors, Forcing Some Out*, N.Y. TIMES, Jan. 17, 2007, at A17; Philip Shenon, *Justice Dept. Chief Is Facing Test in Minnesota*, N.Y. TIMES, Nov. 13, 2007, at A1. On warrantless surveillance, see David Johnston, *Bush Intervened in Dispute Over N.S.A. Eavesdropping*, N.Y. TIMES, May 16, 2007, at A1. On the other more serious charges, see *infra* Part III. Owen Fiss offers a concise summary focusing on the role of the Department of Justice in *Law is Everywhere*, 117 YALE L.J. 256 (2007) (citing primary sources).

2. On the lack of independence of Attorney General Gonzales, see Eric Lipton & David Johnston, *Gonzales's Critics See Lasting, Improper Ties to White House*, N.Y. TIMES, Mar. 15, 2007, at A24. As of this writing, Judge Mukasey's nomination has been confirmed by the Senate and he has taken charge of the Department of Justice. Whether and to what extent his promises of greater independence from the White House will be realized remains to be seen. There is reason, from his Senate testimony, to worry. See Philip Shenon, *Challenges Awaiting, Mukasey Takes Ceremonial Oath*, N.Y. TIMES, Nov. 15, 2007, at A26.

3. The most comprehensive study on professional independence in private practice is Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988). For post-Watergate calls for professional independence see *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 93d Cong. 84 (1974) [hereinafter *Removing Politics*]; Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 608-33 (1998) (tracing dialogue on professional independence post-Watergate in congressional debates leading to the independent counsel statute). On the concept of professional independence as autonomy from the state and from state regulation, see MODEL RULES OF PROF'L CONDUCT pmbl. (1983) ("The legal profession is largely self-governing. . . . To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."); see also Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281, 1290-92 (2003) (arguing against federal regulation of attorneys post-Enron because lawyers in private practice are often required to protect their clients from the government).

providing that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”⁴ Comment 1 emphasizes that the lawyer must say what she thinks even if her advice “involves unpleasant facts and alternatives that a client may be disinclined to confront.”⁵ The lawyer is not to be “deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”⁶ And of course a lawyer must withdraw when “the representation will result in violation of the rules of professional conduct or other law.”⁷ But the rules are equally emphatic that “a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”⁸ A lawyer should also “pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”⁹

There is, too, when one examines the discourse on the office of the Attorney General in particular, a distinct tendency for solemn insistence on independence to be followed almost immediately by a concession that politics *inevitably* influences the role.¹⁰ The concession is telling. On the one hand, we

4. MODEL RULES OF PROF’L CONDUCT R. 2.1 (1983).

5. *Id.* R. 2.1 cmt. 1.

6. *Id.*

7. *Id.* R. 1.16(a)(1); *see also id.* R. 1.16(b) (voluntary withdrawal).

8. *Id.* R. 1.2(d).

9. *Id.* R. 1.3 cmt. 1. For discussion of the practical and theoretical ambiguities that arise from these competing injunctions for lawyers in private practice, see Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995).

10. *See, e.g.*, DANIEL J. MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 27-28 (1980):

Because resources are always less than infinite in government departments, and are usually inadequate to do everything a department is charged with doing, priorities are necessary. If the Department of Justice is to function rationally, policies must be established as to how the government’s legal and investigative resources are to be used. This necessarily involves decisions that some laws are to be enforced more vigorously than others. . . .

. . . .
 . . . In other words, the lawyering work in the Department of Justice will be responsive, to an extent, to the results of the most recent presidential election. No one seems to question the propriety of this, and it is inevitable in a democratic government. Yet the considerations that go into these decisions are among those often described as political, thus illustrating that not all that is political is necessarily improper in the administration of justice

See also Removing Politics, supra note 3 passim; Hearing to Examine the Nomination of Michael B. Muckasey to be Attorney General: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2007); *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005); 153 CONG. REC. S15,648-01 (daily ed. Dec. 14, 2007) (comments of Sen. Cardin); 153 CONG. REC. S14147-01 (daily ed. Nov. 8, 2007) (executive session on Mukasey nomination); 153 CONG. REC. S13741-02 (daily ed. Nov. 5, 2007) (comments of Sen. Cardin); 151 CONG. REC. S923-02 (daily ed. Feb. 3, 2005); 151 CONG. REC. S688-02 (daily ed. Feb. 1, 2005); 150 CONG. REC. S11,868-02 (daily ed. Dec. 7, 2004) (statement of Sen.

expect Attorneys General to be, borrowing a term from Justice Story, exemplary “public sentinels.”¹¹ In both substance and appearance, we expect them to uphold the strictest fidelity not just to law, but to those basic rule-of-law values upon which the impartial enforcement of law depends.¹² An Attorney General who is seen to treat law with the casual indifference or opportunism of an apostate invites apostasy in all law officers, from the beat cop on up, and, conceivably, in the average citizen as well.

And yet we also expect the President to have the Attorney General of his choosing. In time of war, moreover, even if we do not say with the Romans, *inter arma silent legis*, we do insist (perhaps a little too quickly) that the Constitution is not a suicide pact. Just as importantly, in times of war and in times of peace we acknowledge that meaningful decisions about the enforcement of existing law and advice about how to pursue administration policies within the bounds of the law cannot possibly be made on the basis of law alone. Whether one sees law as a realist, as inevitably bound up with political judgment, and all the more so in the work of representing the government, or whether one sees legal reasoning as an autonomous discipline which, at least in the work of representing the government, must nonetheless take shape in response to distinctively political concerns, the result is all the same: the role of the Attorney General in enforcing existing law, advising and offering opinions on administration goals, and administering the Department of Justice is both political and legal.

And if that is so, one is left to wonder what kind of independence might operate in this context. If it is independence from the client, who is the client? Is it the same kind of independence the bar expects lawyers to exhibit in relation to private clients?

All too commonly, the call for independence functions merely to disguise dissatisfaction or disagreement with an administration’s political goals (and actions taken to further them) in the ostensibly neutral language of professional

Leahy); Eric Lichtblau, *Gonzales Is Confirmed in a Closer Vote Than Expected*, N.Y. TIMES, Feb. 4, 2005, at A13.

11. See Joseph Story, Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University (Aug. 25, 1829), in *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 176, at 180-81 (Perry Miller ed., 1962). Story states:

Upon the actual administration of justice in all governments, and especially in free governments, must depend the welfare of the whole community. . . . The lawyer is placed, as it were, upon the outpost of defence, as a public sentinel, to watch the approach of danger, and to sound the alarm, when oppression is at hand.

Id.

12. The oath of office provides:

I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

5 U.S.C. § 3331 (2000).

misconduct. Rather than challenge the political goals directly, critics assail the professionalism of the lawyers charged with implementing or offering legal foundation for them. The same critics are, however, quite often silent or dismissive of professionalism concerns when their preferred party is in power. Much of the academic commentary on the office of the Attorney General, at least since Watergate, has this tendentious structure.¹³ So too the confirmation and oversight hearings in Congress.¹⁴ In any event, the structure of the discourse suggests, rather unhelpfully, that independence is a thoroughly dependent term—that its meaning is determined by the broader political terms in which the role of Attorney General is understood and according to which it is played.

If, as it happens, independence as an evaluative criteria for the office of Attorney General also arises primarily *ex post*, that is to say, in the wake of legal scandals, then independence may turn not just on general political concerns, but more specifically on the presence and perception of *ultra vires* action by the administration. Only then do Congress, critics, and commentators insist that the Attorney General stand independent of the President he or she serves and the administration's goals. But if the term becomes salient only after other checks on the abuse of power (and law) by an administration have failed, independence may depend for its value, its particular political and professional salience, on extralegal excess. If this is true, then independence is a doubly dependent term, and is thus of little help in gaining analytic purchase on the role of government lawyers.

Finally, there is the paradox that genuinely independent Attorneys General may be too independent to be trusted by an administration. If that leads to their exclusion from the process of decision making on how to achieve critical administration goals, their advice will independent, to be sure, but also irrelevant.

Is there more to professional independence in the office of the Attorney General? Would greater independence have prevented the extralegal conduct of the current administration? How should we account for the seemingly

13. See, e.g., NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990* (1992); DOUGLAS KMIEC, *THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT* (1992); MEADOR, *supra* note 10; Betty Houchin Winfield, "To Support and Defend the Constitution of the United States Against All Enemies, Foreign and Domestic": Four Types of Attorneys General and Wartime Stress, 69 *MO. L. REV.* 1095 (2004); see also *infra* Part III.

14. See, e.g., *The Nomination of Michael B. Mukasey to be Attorney General: Hearings Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (Bush II); *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (Bush II); *The Confirmation of Edwin Meese III to be Attorney General of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. (1985) (Reagan); *The Prospective Nomination of Griffin B. Bell, of Georgia, to be Attorney General: Hearings Before the S. Comm. on the Judiciary*, 95th Cong. (1977) (Carter).

subordinate position of independence in a larger framework of political contestation? What explains our profoundly ambivalent and alternating desire for the legal restraint we expect would follow from independence and the aggressiveness we expect from its absence in the nation's chief law officer?

We might begin by thinking about what independence would mean if it is more than a dependent term. The traditional starting point in the literature on the professional responsibility of lawyers is with antebellum civic republican ideals of disinterested public service and public-minded counseling of private clients.¹⁵ Without denying the importance of civic republican ideals, I believe a broader frame is more appropriate. Civic republican ideals bring into sharp relief the tension between self-interested and market-driven conceptions (some would say distortions) of professional work, on the one hand, and public-minded conceptions on the other. However relevant this tension is in private practice, the range of tensions present in government service is wider because the boundaries between public, personal, and client interest are considerably more opaque. Moreover, as I argue at some length below, a broader cultural and political discourse on independence emerged after and often in resistance to the Federalist and Whig civic republican ideal.

This Article traces a strain of the discourse on independence through the Civil War experience, focusing on the impact of the war for a class of elites who were instrumental in the general movement toward professionalization in the decades leading up to and following the war. The rise of the professions in the latter half of the nineteenth century is well documented. Mid-Victorian Americans used professional organizations, specialized education, and internal regulation to stake out exclusive jurisdictional claims for the provision of lucrative and socially necessary services.¹⁶ The standard narrative, however, downplays both the overall significance of the Civil War and the internal conflicts in the ideas of independence that emerged from the experience of the war.

I have elsewhere emphasized the influence of the war and Reconstruction on the professional identity and formal organization of lawyers.¹⁷ Here my purpose is to show that in the very period in which nineteenth-century elites established institutional structures to legitimate and extend the influence of professional authority, independence took on new and sometimes contradictory meanings. Part I thus follows an arc from transcendentalist and perfectionist

15. Gordon, *supra* note 3, at 13-14.

16. *See, e.g.*, BURTON J. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA* 80-128 (1976); THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE* (1977); MARGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* (Gerard W. Gawalt ed., 1984).

17. Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001 (2005).

ideals of anti-institutional individualism in the 1830s, to radical social reformist projects leading up to the Civil War (especially in the form of abolitionism), to heroic, detached military service during the war, to the eventual valorization of submission to necessary social roles. The overall trajectory is from independence as a rejection of conformity and profound skepticism about the corrupting effects of social institutions to independence as a form of detachment from self in the service of increasingly well-defined and internally regulated social roles.¹⁸ In Part II, I set this arc of understandings of independence against the history of the office of the Attorney General and the creation of the Department of Justice. My objective is not to suggest a strict parallel between cultural understandings of independence and independence in the office of the Attorney General. Rather, I argue that independence takes on a new range of meanings during the very period in which the office of the Attorney General was transformed from a part-time position held by a single lawyer into the superintendent of a bureaucracy responsible for managing the legal affairs of the executive branch. The war and Reconstruction experience is pivotal to this specific instance of professionalization.

I begin with the early history of the office of the Attorney General to emphasize its relatively informal structure and an almost exclusive reliance on political accountability to check excessive dependence upon or subservience to the President (as well as other forms of role corruption). Although there were antebellum calls for formal organization of the office, the Department of Justice was not established until 1870. It emerges not only from the heat of the Civil War, with all the complexities thereby implicated in the intersection of law and executive action in a time of war, but from new demands placed on federal law enforcement by the political and legal work of Reconstruction. Notwithstanding the profound institutional changes provoked by the war and Reconstruction, especially the centralization of control over the legal work of the executive branch in the office of the Attorney General, no major structural reforms were established to protect the independence of the office and prevent the embarrassment of law by politics (presidential, congressional, or popular; wartime, peacetime, or transitional).¹⁹

18. In the lived experience of nineteenth-century professionals, of course, action and ideology reflected quite mixed positions along this trajectory. Different professional groups and individuals practicing within those professions undoubtedly developed unique conceptual frames to rationalize and regulate their relationships to craft and client. Nothing about my argument in Part I is intended to deny that complexity for lawyers, especially those who served in the office of the Attorney General and the Department of Justice. I simply leave to another day the task of uncovering the ways in which practicing lawyers internalized specific understandings about independence. An excellent starting point on lawyers in private practice is Robert Gordon, *The Ideal and Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA*, *supra* note 16.

19. Histories of the office of the Attorney General have glossed over or ignored altogether the profound cultural, legal, and institutional significance of these changes, particularly the central influence of the national security and civil rights emergencies

We continue to live with those institutional choices and our discourse on professional independence continues to reflect the conflicting desires expressed in the trajectory of nineteenth century ideas about moral rectitude, conformity, duty, and institutional reform. As I argue in Part III, we cannot understand the place of professional independence in debates about the role of lawyers for the current administration without engaging that trajectory. Beyond the deceptively reassuring register of moral condemnation, and condemnation from the perspective of professional ethics, there lurks a rather profound and as yet unattended set of questions about the subordination of law to politics in our nation's highest law enforcement office, the relationship between counseling lawlessness and assisting law reform, and the viability of structural reforms that would enhance independence without diminishing political accountability.

I. SELF-RELIANCE, DISCIPLINE, AND THE ETHIC OF RESPONSIBILITY

A. *Independence as Self-Reliance*

In the American context, the most robust theory of independence is not civic republicanism but the romantic, transcendentalist ideal of Emersonian self-reliance. Emerson's self-reliant man represents the apotheosis of the Cartesian subject. Praising the nonchalance of presocial adolescence, Emerson writes that "a boy is the master of society; independent, irresponsible . . . He cumpers himself never about consequences, about interests: he gives an independent genuine verdict. You must court him: he does not court you."²⁰ Whereas the grown man, he laments, is

clapped into jail by his consciousness. . . . Ah, that he could pass again into his neutral, godlike independence! Who can thus lose all pledge, and having observed, observe again from the same unaffected, unbiased, unbribable, unaffrighted innocence, must always be formidable He would utter opinions on all passing affairs, which being seen to be not private but necessary, would sink like darts into the ear of men, and put them in fear.²¹

Adolescent candor is, for Emerson, but one instance of the kind of free thought self-reliance demands and dependence on the views of others stifles. He rails against the pressures to conform, to "lean and beg day and night," inherent in society.²² "Society everywhere is in conspiracy against the manhood of every one of its members. . . . The virtue most in request is conformity."²³ False praise, he continues, is "mortifying,"²⁴ "envy is

provoked by the war and Reconstruction. *See infra* Part II.B.

20. Ralph Waldo Emerson, *Self-Reliance*, in 1 THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 1045, 1047 (4th ed. 1994).

21. *Id.*

22. *Id.* at 1056.

23. *Id.* at 1047.

ignorance,” “imitation is suicide.”²⁵ The only true voices, he insists, are those “which we hear in solitude.”²⁶ Genius is not the evolution of received wisdom or tradition (Emerson is “ashamed to think how easily we capitulate to badges and names, to large societies and dead institutions”),²⁷ but the fortitude “[t]o believe in your own thought, to believe that what is true for you in your private heart, is true for all men.”²⁸ Genius is always the fruit of self-reliance, he admonishes, for “[i]n every work of genius we recognize our own rejected thoughts.”²⁹ In sum, “[w]hoso would be a man must be a nonconformist. . . . Nothing is at last sacred but the integrity of our own mind. Absolve you to yourself and you shall have the suffrage of the world.”³⁰ “Trust thyself.”³¹

Emerson concedes that self-reliance will often put one at odds with others (“For non-conformity the world whips you with its displeasure”),³² and he knew whereof he spoke. The early journal entries from which his essay on self-reliance grew began in 1832, the year he renounced his pulpit; the later journal entries were written around the time of his famous Divinity School Address, which provoked vituperative attacks in the press and a three-decade ban from Harvard.³³ Still, the essay makes no concession whatsoever to the art of compromise. Great works “teach us to abide by our spontaneous impression with good humored inflexibility *then most when the whole cry of voices is on the other side.*”³⁴ And as there is no higher authority than the self, “[n]o law can be sacred to me but that of my nature. . . . What I must do, is all that concerns me, not what the people think.”³⁵ He who learns self-reliance, he insists, not only becomes “doctrine, society, law to himself,”³⁶ but touches the

24. *Id.* at 1049.

25. *Id.* at 1046.

26. *Id.* at 1047.

27. *Id.* at 1048.

28. *Id.* at 1046.

29. *Id.*

30. *Id.* at 1047.

31. *Id.* at 1046.

32. *Id.* at 1049.

33. *See id.* at 1045 n.1 (editor’s note).

34. *Id.* at 1046 (emphasis added).

35. *Id.* at 1048-49. “[I]f you would be a man, speak what you think to-day in words as hard as cannon balls, and to-morrow speak what to-morrow thinks in hard words again, though it contradict everything you said to-day. . . . To be great is to be misunderstood.” *Id.* at 1050. Emerson was emphatic on the point: “I appeal to your customs, I must be myself, I cannot break myself any longer for you, or you. If you can love me for what I am, we shall be the happier. If you cannot, I will seek to deserve that you should. I must be myself. I will not hide my tastes or aversions. I will trust that what is deep is holy, that I will do strongly before the sun and the moon whatever only rejoices me, and the heart appoints.” *Id.* at 1056. His insouciance and defiance are of course unmistakably romantic. *See* NANCY L. ROSENBLUM, *ANOTHER LIBERALISM: ROMANTICISM AND THE RECONSTRUCTION OF LIBERAL THOUGHT* 94, 103 (1987). On the position of romantics regarding the law and social rules, *see id.* at 34-56. I am grateful to Nomi Stolzenberg for the reference.

36. Emerson, *supra* note 20, at 1056.

divine.³⁷

However divine Emersonian self-reliance may be, it would appear to require a kind of antinomian solipsism so extreme as to preclude any kind of meaningful engagement in social affairs. If so, it is a theory of independence far too robust for any professional, certainly a professional as entrenched in conformity to tradition and the interests of others as a lawyer must be.

Emerson, for his part, is openly disdainful not just of conformity, but of duty: "I have my own stern claims and perfect circle. It denies the name of duty to many offices that are called duties. But if I can discharge its debts, it enables me to dispense with the popular code."³⁸ He ridicules the "city dolls" who, following college, fret about being "installed in an office within one year afterwards in the cities or suburbs of Boston or New York."³⁹ The Thoreau-like youth, by contrast, dabbles about, "walks abreast with his days, and feels no shame in not 'studying a profession,' for he does not postpone his life, but lives already."⁴⁰ Indeed, Emerson relies so heavily on the metaphor of solitude that it must be considered more than a merely figurative prerequisite to self-reliance. "We must go alone," he insists. "Isolation must precede true society. I like the silent church before the service begins, better than any preaching."⁴¹

Finally, as if to dismiss any doubt on the question, Emerson offers the "retained attorney" as the very antithesis of a self-reliant man. We know the tired sermon, the canned editorial, the stump speech before they are delivered, just as we know what side the retained attorney will argue, because social roles enforce conformity of thought:

A man must consider what a blindman's-bluff is this game of conformity. If I know your sect, I anticipate your argument. I hear a preacher announce for his text and topic the expediency of one of the institutions of his church. Do I not know beforehand that not possibly can he say a new and spontaneous word? Do I not know that with all this ostentation of examining the grounds of the institution, he will do no such thing? Do I not know that he is pledged to himself not to look but at one side; the permitted side, not as a man, but as a parish minister? He is a retained attorney, and these airs of the bench are the emptiest affectation. Well, most men have bound their eyes with one or another handkerchief, and attached themselves to some one of these communities of opinion. This conformity makes them not false in a few particulars, authors of a few lies, but false in all particulars.⁴²

Still, Emerson had higher aspirations for self-reliance than the pleasure and

37. We should not be ashamed of giving voice to "that divine idea which each of us represents." *Id.* at 1046.

38. *Id.* at 1056.

39. *Id.* at 1057.

40. *Id.*

41. *Id.* at 1055. "Man does not stand in awe of man, nor is the soul admonished to stay at home, to put itself in communion with the internal ocean, but it goes abroad to beg a cup of water of the urns of men." *Id.*

42. *Id.* at 1049.

freedom of retreat and itinerancy. The essay moves from a purely solipsistic individualism toward the view that history is made by the self-reliant. "It is easy in the world to live after the world's opinion; it is easy in solitude to live after our own; but the great man is he who in the midst of the crowd keeps with perfect sweetness the independence of solitude."⁴³ More than merely sustaining his independence in a crowd, the self-reliant man reshapes society. "An institution is the lengthened shadow of one man; as, the Reformation, of Luther; Quakerism, of Fox; Methodism, of Wesley; Abolition, of Clarkson. . . . [A]ll history resolves itself very easily into the biography of a few stout and earnest persons."⁴⁴ Thus against the conformity of popular opinion, the oppression of convention and "mob" thought, "[i]t is easy to see that a greater self-reliance—a new respect for the divinity in man—must work a revolution in all the offices and relations of men; in their religion; in their education; in their pursuits; their modes of living; their association; in their property; in their speculative views."⁴⁵

Of course, Emerson offers no mechanics for how this obstreperous, utterly uncompromising intuitionist would move from the woods to the center of social institutions, let alone into a law office. For many years, he was living proof of the inutility of his doctrine. He "held himself aloof from public controversy . . . refus[ing] to become directly involved in any of the reform movements agitating American society."⁴⁶ And one can question the fit of the examples he gives in support of the character traits he defends.

My purpose for the moment is simply to observe that critics of zealous, client-centered lawyering cling to something like this concept of independence, to the idea that notwithstanding a lawyer's inescapably vicarious action and her embeddedness at the line between tradition and desire (order and liberty), she might nevertheless "go upright and vital, and speak the rude truth in all ways."⁴⁷ No confidence would be sacred with such independent counsel. No submission to the client's ends would occur except in the rarest cases of perfect

43. *Id.*

44. *Id.* at 1052. "The poise of the planet, the bended tree recovering itself from the strong wind, the vital resources of every vegetable and animal, are also demonstrations of the self-sufficing, and therefore self-relying soul. All history from its highest to its trivial passages is the various record of this power." *Id.* at 1055.

45. *Id.* at 1057.

46. GEORGE M. FREDRICKSON, *THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISIS OF THE UNION* 12 (1993).

47. Emerson, *supra* note 20, at 1048. On morally activist role critics, see generally ARTHUR APPLBAUM, *ETHICS FOR ADVERSARIES* (1999); *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* (Deborah L. Rhode ed., 2000); DAVID LUBAN, *LAWYERS AND JUSTICE* (1988); DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 19-64 (2007); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998); *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* (David Luban ed., 1984); Gordon, *supra* note 3; Jesselyn Radack, *Tortured Legal Ethics: The Role of The Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1 (2006); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

agreement, and even then the client might find herself abandoned at the bar by a self-reliant lawyer who suddenly realized she had been “foolish[ly] consisten[t]” in adhering to the client’s cause.⁴⁸

All of us are nonetheless drawn to this ideal of self-reliance, or remnants of it, when we observe conduct in institutional actors that shocks the conscience. We want desperately to believe that, even if some of the actors remain utterly unrepentant, there are others who wish now that they had trusted their intuitions, been less “mendicant and sycophantic,”⁴⁹ spoken out, said no, quit the offending institution, etc. This retroactive, and, as the case may be, proleptic longing for independence is Emersonian at root. The irony of course is that, by all accounts, the lawyers at the Department of Justice most closely associated with the charges of extralegal conduct by the administration appear to have been animated precisely by their “own stern claims and perfect circle[s].”⁵⁰ Indeed, they may have trusted themselves and their intuitions too much. After all, what is the administration’s robust theory of executive supremacy in time of war if not the boldest of attempts to throw off “all external support, and stand[] alone”⁵¹ against Congress, the courts, the Constitution as we know it, and even the people? These were lawyers animated less by duty than by cause.⁵²

Emerson wrote *Self-Reliance* at least in part against the traditional republican conception of independence grounded in property rights and institutional engagement.⁵³ Property ownership, on this view, creates a proper incentive to engage in public service while sustaining the economic independence of the citizen-servant. Wealth thus limits the potentially corrupting effects of service as a source of income; public service cultivates and extends the higher civic virtues.⁵⁴ By the 1830s, with the rise of party politics and the spoils system it invited, Emerson’s skepticism was not misplaced.⁵⁵

It is no accident either that he used the term “revolution” to describe the

48. Emerson, *supra* note 20, at 1050.

49. *Id.* at 1052.

50. *Id.* at 1056.

51. *Id.* at 1062.

52. I return to this issue in Part III, *infra*.

53. Emerson, *supra* note 20, at 1061 (“And so the reliance on Property, including the reliance on governments which protect it, is the want of self-reliance.”).

54. MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 85 (H.H. Gerth & C. Wright Mills eds. & trans., 1958); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835*, at 49-50 (1991); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 53-75 (1969); Gordon, *supra* note 3 *passim*.

55. See, e.g., Major L. Wilson, *The “Country” Versus the “Court”: A Republican Consensus and Party Debate in the Bank War*, 15 J. EARLY REPUBLIC 619, 638-41 (1995) (discussing competing claims of corruption in party politics by Whigs and Jacksonian Democrats).

probable effect of self-reliance instead of mere improvement or change “in all the offices and relations of men.” As both Lewis Menand and George M. Fredrickson have ably shown, Emersonian perfectionism and civic republicanism ran aground in the mass death and ideological factionalism of the Civil War. In the aftermath, a third, far humbler conception of independence emerged.

B. *Transcendental Conflict: Independence as Personal Detachment*

For many Northern elites, abolitionism took hold through commitment to millennial reform, which drew heavily from transcendentalist radical individualism and anti-institutionalism. “[T]he leading exponent of this view was Theodore Parker, Unitarian minister of the Twenty-Eighth Congregational Society of Boston.”⁵⁶ Parker took Emerson’s intuitionist concept of divine revelation, stripped away its ethical “coldness,” and transformed transcendentalism into a reformist doctrine that both worked outside and attempted to revolutionize traditional institutions of civil society.

His consciousness of “the just and right” made him feel a personal responsibility for the conduct of society, and he became active in prison reform, the temperance movement, feminism, and ultimately threw all his energies into the antislavery cause. Yet his attachment to a number of particular movements did not mean that he departed radically from the anti-institutional ideal, as set forth by Emerson and Thoreau, however much he deplored their love of isolation. Since all the institutions he confronted fell under the stern judgment of his moral sense—and he undoubtedly set standards to which no human institutions could possibly conform—Parker was not in fact working within institutions at all but was standing outside and calling for their radical reconstruction on *a priori* moral grounds.⁵⁷

Parker inspired others (including Southern convert Moncure Conway, James Freeman Clarke, David A. Wasson, John Weiss, and William Henry Furness)⁵⁸ to follow his “path from Emersonian individualism to universal reform” and, in particular, to support “the most radical antislavery elements.”⁵⁹

By the late 1850s, as the South became more strident, Northern transcendentalist zeal coalesced with conservative belief that only a “unifying national crisis”⁶⁰ could bring “the discipline of suffering,” “see the nation punished for its sins against traditional values,”⁶¹ and restore faith in and deference to the moral leadership of the “cultivated class.”⁶² But the length and

56. FREDRICKSON, *supra* note 46, at 13.

57. *Id.* at 14.

58. *Id.* at 14-15.

59. *Id.* at 14, 16-17. By 1856 even Emerson himself would speak out in praise of John Brown’s raid. *Id.* at 39-40.

60. *Id.* at 35.

61. *Id.* at 48.

62. *Id.* at 32.

senseless brutality of the war that followed brought something different. Leading abolitionists abandoned the cause of blacks once emancipation cleared their consciences of the blight of slavery,⁶³ many unionists twisted defense of the Constitution into blind, patriotic deference to the President,⁶⁴ and Northern soldiers who enlisted in a transcendentalist fervor soon came to question the commitments that brought them to the front.

Fredrickson argues, for example, that Oliver Wendell Holmes, Jr., grievously wounded in the battle of Ball's Bluff early in the war, "was not sustained in his ordeal by the thought of the 'holy' cause in which he was fighting, but rather by the desire to prove to himself that he had the qualities of . . . 'a truly chivalrous gentleman.'"⁶⁵ Indeed, "Holmes' growing distrust of 'causes' and ideology was strengthened by his discovery that some of the most efficient and courageous officers in his regiment had Copperhead sentiments."⁶⁶ More than just gentlemanly courage, Holmes began to appreciate duty for duty's sake. He increasingly "defined the purpose of the conflict more and more in exclusively military terms, and developed a tough-minded stoical philosophy" far from any "humanitarian optimism" belonging to "the believer who is fighting in a religious cause."⁶⁷ He would later claim

that the faith is true and adorable, which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.⁶⁸

Menand is more precise in locating Holmes' transformation. At Ball's Bluff, Union troops crossed the Potomac to a cliff on the Virginia side and were caught off guard by a substantial Confederate force when they reached the top of the cliff. They were promptly driven off the cliff and back into the river while Confederates fired upon them at will from above. The Union colonel in charge was shot through the head and only 800 of the 1700 soldiers who crossed the Potomac made it back to Maryland alive. Holmes, having been "hit by a minié ball—a rifle bullet—just above the heart . . . was dragged from the field and carried to the bottom of the cliff," put onto a scow, and ferried across the river for medical treatment.⁶⁹ The experience of injury from an absurdly planned and disastrous offensive left Holmes seeking comfort not in the

63. *Id.* at 122-23.

64. *Id.* at 134-39 (discussing work of Francis Lieber for the Loyal Publication Society, Joseph Parrish Thompson's address before the Union League Club of New York, Henry Bellow's sermon "Unconditional Loyalty," and Horace Bushnell's sermon "Popular Government by Divine Right").

65. *Id.* at 169.

66. *Id.*

67. *Id.* at 169-70.

68. *Id.* at 170 (quoting Oliver Wendell Holmes, *The Soldier's Faith, An Address Delivered on Memorial Day at a Meeting Called by the Graduating Class of Harvard University* (May 30, 1895), in *OLIVER WENDELL HOLMES, SPEECHES* 56, 59 (1896)).

69. LOUIS MENAND, *THE METAPHYSICAL CLUB* 35 (2001).

assurance of religious faith, but in the “assurance that he had done his duty.”⁷⁰

A year later at the battle of Fredericksburg, Holmes, sick with dysentery, saw his close friend Henry Abbott take his place and lead two charges into withering fire from entrenched Confederate troops in the city.

In obedience to orders, and carrying only a sword, Abbott marched at the head of a platoon into the first semicircle of houses. His men were promptly wiped out by enemy fire. He returned, and without hesitation, ordered a second platoon forward—“to certain and useless death,” as Holmes later wrote—when the order to advance was countermanded.⁷¹

Abbott survived Fredricksburg, but “his second lieutenant was killed. The Twentieth Massachusetts lost forty-eight men, more than in any other engagement of the war,” and the Union side suffered 13,000 casualties to just 5000 Confederate.⁷² By the end of the war only four other Union regiments would suffer “a higher number of battle deaths” than Holmes’ and Abbott’s Twentieth Massachusetts.⁷³

What impressed Holmes was not that Abbott “had exposed himself so cavalierly to danger,”⁷⁴ but rather that, as a Democrat “contemptuous of the cause for which he fought,”⁷⁵ he had so exposed himself “despite knowing that the order to advance was stupid, and despite a complete antipathy toward the cause in whose name he was, for all he knew, about to die.”⁷⁶ Holmes “began . . . to rate the professionalism and discipline of the soldier higher than the merits of any particular cause—to admire success more than purity of faith.”⁷⁷

Abbott would later die heroically at the Battle of the Wilderness, a bloody, forty-day campaign in Virginia during Grant’s drive to Richmond in the spring of 1864. Having already earned a “reputation as one of the most valiant officers in the army,” Abbott was shot because, after ordering his troops to drop to the ground in a firefight, he remained standing so that he could continue to direct their fire.⁷⁸ Menand concludes that Abbott had “impressed on Holmes, possibly by his conversation but certainly by his example, the belief that nobility of character consists in doing one’s job with indifference to ends, and his death seems to have set the seal on this belief.”⁷⁹

Like Holmes, John W. De Forest, Charles Francis Adams, Jr., Charles Russell Lowell, Henry Lee Higginson and his cousin Thomas Wentworth Higginson returned from the war chastened. Against the ideological

70. *Id.* at 37.

71. *Id.* at 43.

72. *Id.*

73. *Id.* at 51.

74. *Id.* at 43.

75. *Id.* at 40.

76. *Id.* at 43.

77. *Id.* at 43-44.

78. *Id.* at 54.

79. *Id.*

firebrands—the “ultras” as Adams called them—the war shaped

a generation which would have little respect for the broad enthusiasms of their elders, which would think in more practical or “pragmatic” terms. These men were not likely to be deficient in duty, but their concept of “duty” would be defined less in relation to great causes, and more as a matter of doing necessary tasks in an efficient way.⁸⁰

More “than a love of ‘causes’ . . . was being shed—it was the whole Emersonian style of intellectuality.”⁸¹

Adams began to “speak a nonideological language that his father could not understand.”⁸² Lowell, who did not survive the war, wrote to his fiancée in June of 1863:

I wonder whether my theories about self-culture, &c., would ever have been modified so much, whether I should ever have seen what a necessary failure they lead to, had it not been for this war: now I feel every day more and more that a man has no right to himself at all.⁸³

Just before his death in 1864 he would write to a close friend who had also been under the spell of Emerson: “I hope you have outgrown all foolish ambitions . . . and are now content to become a ‘useful citizen’ . . . The useful citizen is a mighty unpretending hero. But we are not going to have any country very long unless such heroism is developed.”⁸⁴

Self-reliance, in the form of antinomian solipsism, was replaced by a kind of independence *from self and cause*, an abnegation which in turn made routine work within social institutions not only possible but in some sense preferable. “What was occurring,” Fredrickson sums,

was the transformation of the ideal of the “strenuous life”—which had previously meant a retreat into the wilderness—into a social ideal. . . . [I]t was now deemed more suitable to do one’s duty in a strenuous way within society. . . . The military experience, which had taught the young patrician intellectuals to take pride in a life of service and to emphasize professional skills and professional objectives, had destroyed whatever respect they might have had

80. FREDRICKSON, *supra* note 46, at 172.

81. *Id.* This is not to say that the war diminished the romantic impulses of these mid-Victorian men. Military valor, even, and perhaps especially, in the face of senseless death, was potentially both stoic and chivalric. See ROSENBLUM, *supra* note 35, at 10, 13-14 (describing nineteenth-century “romantic militarism” as a species of “heroic individualism” that makes a “standing criticism of utilitarian calculation” and reflects a “longing for action corresponding to the dignity and intensity of human desire”) (internal quotation marks omitted). But the embrace of institutionally prescribed duty for duty’s sake, and the simultaneous subordination of personal identity and interest, reflects a turn from, or at least a displacement of, the profoundly individualistic romantic impulses in Emerson’s concept of self-reliance.

82. FREDRICKSON, *supra* note 46, at 170.

83. *Id.* at 172 (quoting Letter from Lowell to Miss Shaw (June 17, 1863), in EDWARD W. EMERSON, LIFE AND LETTERS OF CHARLES RUSSELL LOWELL 259 (1907)).

84. *Id.* at 173 (quoting Letter from Lowell to Henry Lee Higginson (Sept. 10, 1864), in EMERSON, *supra* note 83, at 341-42).

for anti-institutional thinking, radical individualism, or transcendental hopes of self-fulfillment.⁸⁵

As Menand writes,

[t]o the Wendell Holmes who returned from the war, generalism was the enemy of seriousness. War had made him appreciate the value of expertise: soldiers who understood the mechanics of battle fought better—more effectively, but also more bravely—than soldiers who were motivated chiefly by enthusiasm for a cause.⁸⁶

And with Fredrickson, Menand concludes that for many of the men “who had been through the war, the values of professionalism and expertise were attractive; they implied impersonality, respect for institutions as efficient organizers of enterprise, and a modern and scientific attitude—the opposites of the individualism, humanitarianism, and moralism that characterized Northern intellectual life before the war.”⁸⁷ Holmes took up law, Adams became a railroad man, Higginson went into business, and De Forest remained in army service for several years.⁸⁸

C. *Independence Lost: From Detachment to Discipline*

Detachment from self and cause brings us closer to an understanding of what “professional” independence might mean. The lawyer, perhaps especially the institutionally embedded lawyer, requires detachment of this sort to avoid or at least mitigate the distortions of (self) interest and ideology—to serve rather than dominate or blindly obey others.⁸⁹ But a completely detached lawyer may be excluded from ends-based institutional decisions or excluded from institutional service altogether on the ground that she lacks personal, political, or ideological commitment to fundamental institutional goals.

In its strongest form, detachment may be inconsistent with the exercise of judgment, at least in matters that require sensitivity to ends. Even the metaphor of the dedicated soldier raises the Weberian specter of a loss of self to “rationally uniform” disciplinary obedience.⁹⁰ Weber identified modern military discipline with the extension, gradual displacement, and perversion of the chivalric code of honor that so impressed Holmes in Abbott’s military

85. *Id.* at 175-76; *cf. id.* at 176 (discussing Emerson’s conversion).

86. MENAND, *supra* note 69, at 58.

87. *Id.* at 59.

88. FREDRICKSON, *supra* note 46, at 174.

89. *See* Gordon, *supra* note 3; *cf.* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 210-15 (1993) (suggesting that professionalism may have been a mere cloak for self interest).

90. MAX WEBER, *The Meaning of Discipline*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY, *supra* note 54, at 253, 253.

service.⁹¹ And he observed the connection between military discipline and alienation experienced in bureaucratic and mass industrial labor. “The discipline of the army,” he wrote, “gives birth to all discipline. . . . [M]ilitary discipline is the ideal model for the modern capitalist factory” where “the psycho-physical apparatus of man is completely adjusted to the demands of the outer world, the tools, the machines—in short, to an individual ‘function.’”⁹² Discipline, in this sense, “increasingly restricts the importance of charisma and of individually differentiated conduct,”⁹³ and, when fully internalized, can shade into blind obedience and subjection. Thus, if at one end of the spectrum Emersonian self-reliance is solipsistic and anti-institutional, at the other end detachment not only invites the pure automatism of disciplinary subjection, but may devolve into the inhumane aloofness of Arendt’s Eichmann, and, perhaps only a little less nefariously, the quiescence of Whyte’s Organization Man.⁹⁴

Weber, who both witnessed the absurdity of mass warfare in World War I and studied the rise of mass industrial society in Europe and the United States,⁹⁵ was acutely aware of the problems both extremes present. In the political realm, where indifference to ends is arguably unsustainable, and where the government lawyer necessarily finds herself, his solution was intermediate.

91. *Id.* at 254-61.

92. *Id.* at 261.

93. *Id.* at 262.

94. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963); WILLIAM H. WHYTE, JR., *THE ORGANIZATION MAN* (1956). Burton Bledstein’s otherwise brilliant account of the rise of professional authority in the nineteenth century underestimates this disciplinary side of professional detachment, especially the ways in which bureaucratic and industrial organization toward the end of the century almost immediately threatened mid-Victorians’ ideals of independence. See BLEDSTEIN, *supra* note 16, at 90 (describing clients as “helpless”); *id.* at 92 (“[The mid-Victorian professional] resisted all corporate encroachments and regulations upon his independence, whether from government bureaucrats, university trustees, business administrators, public laymen, or even his own professional associations. The culture of professionalism released the creative energies of the free person who was usually accountable only to himself and his personal interpretation of the ethical standards of his profession.”). Bureaucracy and industrial capitalism created both clients with powerful leverage over the lawyers advising them and increasingly hierarchical structures of practice. See LARSON, *supra* note 16; ROBERT H. WEIBE, *THE SEARCH FOR ORDER, 1877-1920* (1967); Gerard W. Gawalt, *The Impact of Industrialization on the Legal Profession in Massachusetts, 1870-1900*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA*, *supra* note 16, at 97; Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA*, *supra* note 16, at 3.

95. World War I was itself, in some sense, the product of the culture of bureaucratic organization. JOHN KEEGAN, *THE FIRST WORLD WAR* chs. 2 & 3 (1998) (arguing that, according to the dictates of modern planning for mass warfare, once Germany mobilized, sheer logistics required other European powers to mobilize); *id.* ch. 6 (describing the absurdity of prolonged trench warfare). For a discussion of the influence of World War I on Weber’s views, see WOLFGANG J. MOMMSEN, *MAX WEBER AND GERMAN POLITICS, 1890-1920* 190-389 (Michael S. Steinberg trans., 1984), and REINHARD BENDIX, *MAX WEBER: AN INTELLECTUAL PORTRAIT* 27, 451 (1960).

He argued that the political actor who would be independent should not live “off” politics, but “for” politics.⁹⁶ “Under normal conditions, the politician must be economically independent of the income politics can bring him.”⁹⁷ The dichotomy is not exclusive—the political actor who lives “for” politics either “enjoys the naked possession of the power he exerts, or he nourishes his inner balance and self-feeling by the consciousness that his life has meaning in the service of a ‘cause.’ In this internal sense, every sincere man who lives for a cause also lives off this cause.”⁹⁸ Economic independence nevertheless distinguishes the person who “strives to make politics a permanent *source of income*,” who “lives ‘off’ politics as a vocation,” from the person of means who decides to serve.⁹⁹ To be sure, elites may “exploit their political domination in their own economic interest”¹⁰⁰—Weber notes that “[t]here has never been such a stratum that has not somehow lived ‘off’ politics”¹⁰¹—but the person who lives “off” politics for an income is less independent, more susceptible to the corruption of patronage.¹⁰²

Although economic independence is necessary for Weber, it is not ethically sufficient. Weber insisted that politicians must be able to temper what he called “an ethic of ultimate ends” with “an ethic of responsibility.”¹⁰³ The ethic of ultimate ends parallels Parker’s political extension of Emersonian self-reliance—it demands “passionate devotion to a ‘cause,’”¹⁰⁴ charismatic leadership, and “a ‘romanticism of the intellectually interesting,’ running into emptiness devoid of all feeling of objective responsibility.”¹⁰⁵ The adherent of an ethic of ultimate ends is indifferent to consequences and “feels ‘responsible’ only for seeing to it that the flame of pure intentions is not quenched.”¹⁰⁶

For just this reason, the ethic of ultimate ends “must go to pieces on the problem of the justification of means by ends.”¹⁰⁷ Although “logically” an ethic of ultimate ends “has only the possibility of rejecting all action that

96. WEBER, *supra* note 54, at 84.

97. *Id.* at 85.

98. *Id.* at 84.

99. *Id.*

100. *Id.* at 86.

101. *Id.*

102. *Id.* at 86-88, 108-09. In political office, the propertyless may also be more revolutionary:

A quite reckless and unreserved political idealism is found if not exclusively at least predominantly among those strata who by virtue of their propertylessness stand entirely outside of the strata who are interested in maintaining the economic order of a given society.

This holds especially for extraordinary and hence revolutionary epochs.

Id. at 86. Those who live “off” politics may thus be both susceptible to the corruption that maintains the status quo and to revolutionary idealism.

103. *Id.* at 120.

104. *Id.* at 115.

105. *Id.*

106. *Id.* at 121.

107. *Id.* at 122.

employs morally dangerous means . . . [i]n the world of realities, as a rule, we encounter the ever-renewed experience that the adherent of an ethic of ultimate ends suddenly turns into a chiliastic prophet."¹⁰⁸ To serve the right end, all means become justifiable, even those that contradict the ends sought—and all the more so in the political domain where "[t]he decisive means . . . is violence."¹⁰⁹ Even with a viable political strategy in hand, the adherent of an ethic of ultimate ends must confront the "ethical paradox" that "one of the conditions for success is the depersonalization and routinization, in short, the psychic proletarianization [of followers], in the interests of discipline."¹¹⁰

Weber insisted that "[w]hoever wants to engage in politics at all, and especially in politics as a vocation, has to realize these ethical paradoxes," has to realize that "he lets himself in for the diabolical forces lurking in all violence."¹¹¹ Moreover, against a pure ethic of ultimate ends, Weber argued that the political actor "is responsible for what may become of himself under the impact of these paradoxes."¹¹² The adherent of an ethic of responsibility, he emphasized, is cautious, "takes account of . . . the average deficiencies of people" in calculating how to implement ideas, and, more importantly, "[h]e does not feel in a position to burden others with the results of his own actions so far as he [is] able to foresee them."¹¹³ In the ideal politician, then, "an ethic of ultimate ends and an ethic of responsibility are not absolute contrasts but rather supplements . . ."¹¹⁴ On the one hand, passionate devotion to cause is checked by "a feeling of responsibility," "a sense of proportion," and, above all, "habituation to detachment in every sense of the word"—a calculated "*distance* to things and men."¹¹⁵ On the other hand, the paralysis of indecision that responsibility and sensitivity to consequences can induce is forestalled by charismatic devotion.

In Weber's typology, however, political independence and the conditions for its realization are quite distinct from the question of independence in those who serve politicians. The proper vocation of administrative officials and civil servants, he claims, is rigidly apolitical. They "should engage in impartial 'administration.' . . . *Sine ira et studio*, 'without scorn and bias.' . . . Hence, he shall not do precisely what the politician, the leader as well as his following,

108. *Id.*

109. *Id.* at 121. "It is the specific means of legitimate violence as such in the hand of human associations which determines the peculiarity of all ethical problems of politics." *Id.* at 124.

110. *Id.* at 125.

111. *Id.* at 125-26.

112. *Id.* at 125.

113. *Id.* at 121.

114. *Id.* at 127.

115. *Id.* at 115-16. "'Lack of distance' *per se* is one of the deadly sins of every politician." *Id.* at 115.

must always and necessarily do, namely, *fight*.”¹¹⁶ And whereas the responsibility of the politician is personal, the responsibility of the civil servant is merely institutional:

The honor of the civil servant is vested in his ability to execute conscientiously the order of the superior authorities, exactly as if the order agreed with his own conviction. This holds even if the order appears wrong to him, and if, despite the civil servant’s remonstrances, the authority insists on the order. Without this moral discipline and self-denial, in the highest sense, the whole apparatus would fall to pieces. The honor of the political leader . . . lies precisely in an exclusive *personal* responsibility for what he does, a responsibility he cannot and must not reject or transfer.¹¹⁷

The specter of Eichmann remains. More chillingly, Weber’s deference to charisma, his separation of scientific and bureaucratic administration from politics, and his ambiguous account of the ethic of responsibility produced a theory of “plebiscitary leader democracy” that offered little protection against fascism. As Wolfgang Mommsen writes, Weber “neglected the question of the limits in principle of the use of mass demagogic means,” and “[i]n spite of their basically democratic character, Weber’s constitutional projects had an undeniably authoritarian tinge and were not immune to a totalitarian reformulation. Political charisma in itself, in the absence of intrinsic moral principles, cannot furnish the firm ground necessary to create a stable democratic order.”¹¹⁸

Weber did not survive to see the events of 1933 in Germany. But his failure to identify these risks is striking given his open frustration as a moderate liberal during World War I with conservatives’ use of propaganda to manipulate patriotism, militarism, and pan-German nationalism for narrow partisan goals.¹¹⁹

The rise of fascism in Germany has obvious relevance to the domestic political use of foreign policy by the current administration, but my more immediate query is whether the roles of the Attorney General and high level Department of Justice staff fit Weber’s model of institutional action. Weber emphasizes that “the modern lawyer and modern democracy absolutely belong together,”¹²⁰ but on the ground that lawyers trained in “plead[ing] effectively the cause of interested clients”¹²¹ make able politicians, not on the ground that lawyers make good civil servants. More generally, jurisprudence figures as a scientific discipline in Weber’s work, outside the value-laden realm of prophecy and demagoguery that is politics.¹²² As Mommsen argues, “Weber

116. *Id.* at 95.

117. *Id.*

118. MOMMSEN, *supra* note 95, at 408, 413; *see also id.* at 342, 413, 439.

119. *Id.* at 190-282.

120. WEBER, *supra* note 54, at 94.

121. *Id.*

122. MAX WEBER, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS ON

permitted no independent role as such in the sphere of political decision making to the social scientist but was, rather, of the view that both spheres must be kept strictly aloof."¹²³ Indeed, "[i]f Weber conceded science a role in politics, it was distinctly a serving one; science was . . . more or less restricted to being a 'handmaiden of politics.'"¹²⁴

The formalism, impracticality, and danger in this rigid separation are too obvious. It invites the excesses of both charisma and discipline—a demagogic, ends-oriented politics coldly executed by blindly obedient bureaucrats. For an ethic of responsibility to operate as a meaningful check, political actors require the limiting counsel of experts who can specify the consequences of alternative courses of action and have the courage to utter “‘inconvenient’ facts.”¹²⁵ Mommsen contends that Weber’s separation of politics from science

does not mean that science has no role whatever to play in the realm of decision making. On the contrary, the politician who acts in accord with the principles of ethics of responsibility has to reflect in advance, and in the best possible way, about the possible consequences of his actions. To this extent, he must inevitably turn to science, which can help reduce the complexity of specific social situations.¹²⁶

But if an ethic of responsibility is to serve “as the point of departure for the development of a normative ethics,”¹²⁷ particularly an ethic of professional independence, then experts must embody the attributes of responsibility (proportionality, detachment, sensitivity to social consequences, etc.) even when they see themselves as internally animated by the same ultimate ends held by the politicians they serve. High-level civil servants (those whose work is more than executory) must be capable of resisting both disciplinary subjection, with its indifference to ultimate ends, *and* the myopia of charismatic passion for cause, with its disregard for unconscionable or illicit means and nefarious consequences.

In a constitutional democracy such as ours, in which the executive has wide discretion but no power to dissolve parliament or circumvent statutory law via referendum—no power, that is, to make its own law—the work of government lawyers includes both determining the permissible statutory and constitutional boundaries of “ultimate ends” and the permissible means by which those ends may be pursued. Professional independence, in this context, thus requires a kind of virtuous mean between discipline and self-reliance. The

SOCIOLOGY, *supra* note 54, at 144-46; *see also* MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954).

123. MOMMSEN, *supra* note 95, at 441.

124. *Id.*

125. WEBER, *supra* note 54, at 147.

126. MOMMSEN, *supra* note 95, at 442. *But see id.* (expressing ambivalence about Weber’s commitment to an ethic of responsibility); *id.* at 442 n.70, 443 n.74 (citing Wolfgang Schluchter and H.H. Bruun).

127. *Id.* at 442.

lawyer who errs too far in either direction will find herself at least complicit in, if not actively endorsing, lawlessness and oppression.

II. INDEPENDENCE THROUGH POLITICAL ACCOUNTABILITY?

A. *Early History of the Office of the Attorney General*

When we turn to the history of the office of the Attorney General in America, the most striking fact is that the mechanisms for encouraging or enforcing independence have been decidedly informal, interstitial, and indirect. At its inception, and for nearly a century thereafter, the salary of the office was “low, half that of other cabinet officers.”¹²⁸ The first Attorney General, Edmond Randolph, Washington’s aide-de-camp during the revolution and a former Attorney General and governor of Virginia, not only had to sustain his private practice to earn a living, he arrived in the capital to find that “[h]e had no clerk, no files, no furniture, and no office space. He had to write out his own opinions, letters, and briefs.”¹²⁹ Randolph was especially bitter about the low pay. To a friend he wrote:

I am a sort of mongrel between the State and the U.S.; called an officer of some rank under the latter, and yet thrust out to get a livelihood in the former—perhaps in a petty mayor’s or county court. . . . Could I have foreseen it, [it] would have kept me at home to encounter pecuniary difficulties there, rather than add to them here.¹³⁰

William Wirt, who served twelve years under Presidents Madison and Monroe, longer than any other Attorney General, nearly had to beg for “book presses,” so that his opinions might be recorded, “a map and chart stand, a writing desk and seat for his clerk, six chairs, two washstands, a stone pitcher and tumblers, and one water table.”¹³¹

For decades, Attorneys General served without even so much as a clerk,¹³² and in order to sustain their practices, many lived away from the capital notwithstanding the cabinet seat the position entailed.¹³³ William Pinkney,

128. BAKER, *supra* note 13, at 50. The initial salary of \$2000 was raised to \$4000 by 1831, but remained there until 1853 when Congress raised it to \$8000. *Id.* at 56. *See also* HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 80-81 (1937).

129. BAKER, *supra* note 13, at 50.

130. *Id.* at 51 (quoting Letter from Randolph (1790), in MONCURE DANIEL CONWAY, OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE AND PAPERS OF EDMUND RANDOLPH 135 (1888)).

131. CUMMINGS & MCFARLAND, *supra* note 128, at 81.

132. In 1819 Congress finally provided \$1000 for a clerk and \$500 for contingent expenses, though the salary was later cut to \$800 and the expense allocation eliminated altogether. An office was provided in the early 1820s. BAKER, *supra* note 13, at 56.

133. *Id.*

Madison's Attorney General, resigned rather than leave his "lucrative Baltimore practice" to "keep his office at the seat of government during the sessions of Congress."¹³⁴ In complex cases, and in areas that demanded extended effort, it was also common for Attorneys General to retain private lawyers for assistance.¹³⁵ Without question, these early holders of the office were not to live "off" politics—at least not directly.

Rather, it was hoped that the office would improve their private practice and open wider professional opportunities. Wirt frankly conceded that his "single motive for accepting the office was the calculation of being able to pursue [his] profession on a more advantageous ground."¹³⁶ Personal advancement was thus plainly a motive; all good lawyers knew that "constant practice was essential to legal success."¹³⁷ Indeed, "[a]ttorneys general were expected to supplement their incomes with private practice."¹³⁸ Even after Caleb Cushing began the tradition of abandoning private practice on accepting appointment to the office in the 1850s, the financial sacrifice was substantial. Nancy Baker reports that in 1859, the year before Edwin Stanton "joined President Buchanan's administration, [he] earned a handsome income of \$40,000, plus bonuses and expenses. As Attorney General, his annual salary dropped to \$8,000."¹³⁹

Against whatever was gained in independence from the administration in the antebellum period by virtue of continued private practice and geographic distance, one must of course weigh the risk of excessive dependence on private clients. Although it appears to have been fairly uncommon for the Attorney General to have had private clients whose interests were genuinely adverse to the government's, long hours on non-government representation surely took attention away from the nation's legal business.¹⁴⁰ Indeed, the crush of government work was one of Cushing's primary reasons for leaving private practice. And the risk that private work would influence positions taken on behalf of the government was real.¹⁴¹

134. CUMMINGS & MCFARLAND, *supra* note 128, at 78.

135. The practice grew exponentially during the Civil War. *See* CONG. GLOBE, 41st Cong., 2d Sess. 3034-39 (1870).

136. BAKER, *supra* note 13, at 58.

137. CUMMINGS & MCFARLAND, *supra* note 128, at 81.

138. BAKER, *supra* note 13, at 55. As Cummings and McFarland emphasize, even in colonial times "[t]he attorney general himself was concerned with making a livelihood. His salary was small, and he was expected to derive most of his income from private practice. By assuming criminal prosecutions, he could monopolize one considerable body of litigation and thereby increase his fees and advertise his skill." CUMMINGS & MCFARLAND, *supra* note 128, at 13.

139. BAKER, *supra* note 13, at 58.

140. *Id.* at 59; CALEB CUSHING, A REPORT OF THE ATTORNEY GENERAL, SUGGESTING MODIFICATIONS IN THE MANNER OF CONDUCTING THE LEGAL BUSINESS OF THE GOVERNMENT, H.R. EXEC. DOC. NO. 33-95, at 19 (1854).

141. As Caleb Cushing argued:

there is reason to doubt whether, at the present day, in the United States, it is expedient that a

However welcome a full-time legal officer must have been in managing the government's legal affairs, Cushing's transition ended one of the few early structural elements that at least potentially fostered independence in the office.¹⁴² Indeed, beyond the freedom to remain in private practice and away from the capital, there were almost no other structural guarantees of professional independence. Professional ethical standards were, if not entirely inchoate, certainly uncodified and enforced largely through local, informal methods of censure.¹⁴³ There was no Office of Professional Responsibility—a product of post-Watergate reforms.¹⁴⁴ The Judiciary Act of 1789, which established the office of the Attorney General, simply required:

a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such

head of a department should, under any circumstances, continue in the practice of law as a profession. Whatever change in the amount of public business the present greatness and wealth of the country may have produced, they have produced a still greater change in the multitude and urgency of the private interests which assail the government. . . . Formerly, in an age of simpler manners, when the public expenditures were less, the number of places less, the population of the country less—at such a time a secretary, eminent in the legal profession, might, without possibility of reproach or suspicion of evil, take charge of private suits or interests at the seat of government.

H.R. EXEC. DOC. NO. 33-95, at 19-20. Indeed, Cushing himself was the subject of decidedly off-color criticism by his contemporaries for inconsistency of position. *See* Henry Barrett Learned, *The Attorney-General and the Cabinet*, 24 POL. SCI. Q. 444, 459 (1909).

More directly, there is evidence that Roger Taney, Attorney General for President Andrew Jackson during the controversy over renewal of the charter of the Second National Bank, communicated government confidences to and secured government financial aid for a Maryland state bank owner and personal client who stood to gain by dissolution of the Second National Bank. On Taney's role in the bank controversy, itself a national political event grounded in competing visions of independence, see ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 89, 101 (1953); CARL BRENT SWISHER, *ROGER B. TANEY* 160-325 (1935); Lynn, L. Marshall, *The Authorship of Jackson's Bank Veto Message*, 50 MISS. VALLEY HIST. REV. 466 (1963); Walter George Smith, *Roger Brooke Taney*, 47 AM. L. REG. 201 (1899); Wilson, *supra* note 55. On Taney's conflict of interest, see WALKER LEWIS, *WITHOUT FEAR OR FAVOR* 207-23 (1965); SWISHER, *supra*, at 219-45.

142. Of course, nothing prevented attorneys general from using full-time engagement as a springboard for lucrative work after leaving office, or, for that matter, from interpreting their duties in office in ways that aided former clients. *See supra* note 141 (discussing Taney's conflict of interest in the bank controversy); *see also infra* note 202 (discussing the effect of Richard Olney's conflicts on early enforcement of the Sherman Act).

143. *See* GERARD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTES, 1760-1840* (1979); Spaulding, *supra* note 17, at 2019-40 (discussing history of antebellum professional identity and organization).

144. *See* Department of Justice Order No. 635-74, 40 Fed. Reg. 58,643 (Dec. 18, 1975).

compensation for his services as shall by law be provided.¹⁴⁵

William Wirt attempted to establish a custom of internal consistency and adherence to *stare decisis* when he took office by insisting that opinions of the Attorney General be recorded and that, except in extraordinary circumstances, litigation positions and prior opinions should be followed in future cases by future Attorneys General.¹⁴⁶ Strictly observed, this practice would not only sustain rationally consistent legal positions over time, and thus give the impression of impartiality, it would also provide a foundation for resisting the political whims of new administrations.¹⁴⁷ But while Wirt's habit of recording Attorney General opinions has held over time, his commitment to internal consistency across administrations has not.¹⁴⁸

Most fundamentally, the Judiciary Act left appointments to the office open to the President, subject to confirmation by the Senate. An earlier version of the bill would have required appointment by the Supreme Court—an approach that would have reinforced substantially the Attorney General's independent status as an officer of the court.¹⁴⁹ The change to presidential appointment rather powerfully suggests that Congress endorsed political accountability (to the President for appointment and removal, and to Congress for confirmation, salary, budget, and oversight) as the primary method of ensuring faithful execution of the office.

Reliance on political accountability has produced Attorneys General who closely identify with the Presidents they serve. Many have a record of party service, often in leadership and campaign positions, prior to appointment, and some have known the Presidents they served on a personal level before taking office.¹⁵⁰ The dominant model, as Nancy Baker argues, is thus an Attorney General with “strong bond[s] of loyalty to the president”—a lawyer who either “acquiesces” in administration orders or “pursue[s] the president's political agenda because he shares it.”¹⁵¹ Moreover, the President typically “‘expects his attorney general . . . to be *his advocate* rather than an impartial arbiter, a judge of the legality of his action.’ Because of a president's desire for loyalty, support, and compatibility, Advocate traits tend to be the norm”¹⁵² Thus,

145. Act to Establish the Judicial Courts of the United States, ch. 20 § 35, 1 Stat. 73, 93 (1789).

146. CUMMINGS & MCFARLAND, *supra* note 128, at 84-90.

147. Learned, *supra* note 141, at 448-49.

148. See *infra* Part II.B (discussing the problem of confusion).

149. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108-09 (1923).

150. The effect is magnified by the fact that the Senate has rarely exercised direct influence in the choice of attorneys general, so political accountability to Congress, while not trivial, comes for the most part *ad hoc* and *ex post* in oversight hearings. See *infra* note 154 (discussing post-scandal appointments of attorneys general who are more independent from the President).

151. BAKER, *supra* note 13, at 67.

152. *Id.* (emphasis added).

with the exception of Attorneys General who are so well-connected politically that “they have their own political base of support” outside the administration, these partisan attorneys tend to approach the legal duties of the office purposively, sometimes quite aggressively, in order to advance administration goals.¹⁵³ Partisan attorneys may also develop into influential cabinet members—“trusted counselor[s] on whom the president relies for a broad range of nonlegal as well as legal advice, including domestic politics or foreign affairs.”¹⁵⁴

B. *From War and Reconstruction: A Department of Justice*

One of the most striking facts about the endorsement of centralized bureaucratic control over federal legal work in the creation of the Department of Justice in 1870 is how little was done to adjust the role of presidential political influence and accountability. Indeed, to a certain extent, centralized control diminished independence from the President by rendering the lines of political accountability more direct. Although there had been calls for centralized authority over executive branch legal work during the antebellum period (President Jackson called for the establishment of a law department under the supervision of the Attorney General parallel to other cabinet level executive departments, as did Caleb Cushing in the Pierce administration),¹⁵⁵

153. *Id.* at 67-68.

154. *Id.* at 67. Genuinely independent attorneys general, by contrast, tend to emerge either in less partisan political climates, or, more commonly, as a concession to an oppositional Congress or public obloquy following extralegal executive branch conduct in which a partisan Attorney General was complicit. *Id.* at 126. Benjamin Brewster was brought in by President Chester Arthur to handle prosecutions in the controversial Star Route scandal (valuable private postal route contracts had been awarded despite rampant bid-fixing and route manipulation; prominent Republican party officials and a senator were directly implicated). CUMMINGS & MCFARLAND, *supra* note 128, at 254-60. Calvin Coolidge hired Harlan Fiske Stone, then dean of the Columbia Law School, to help the Department of Justice recover from Harry Daugherty and A. Mitchell Palmer. Palmer was responsible for the infamous mass arrests, detentions, and deportations arising from the Red Scare in 1919 and 1920. BAKER, *supra* note 13, at 110-15. Daugherty, who passed on the leases at issue in the Teapot Dome scandal and appears to have been involved in the attempted cover up, was also twice charged and tried for conspiracy to defraud the government for taking money from a German company whose assets had been seized during World War I. *Id.* at 119-20.

More recently, of course, Nixon’s Attorney General John Mitchell, who approved the plan to install electronic surveillance in the Democratic National Committee headquarters and was convicted on five counts of obstruction of justice and perjury, *id.* at 120-25, was eventually succeeded by Edward Levi, a former law professor and president of the University of Chicago who had never before met President Ford and “had not registered with any political party for several years.” *Id.* at 141-43. President Carter’s selection of the former federal judge Griffin Bell was also the product of post-Watergate political pressure to select a more independent Attorney General. *Id.* at 151.

155. CALEB CUSHING, A REPORT OF THE ATTORNEY GENERAL, SUGGESTING MODIFICATIONS IN THE MANNER OF CONDUCTING THE LEGAL BUSINESS OF THE GOVERNMENT, H.R. EXEC. DOC. NO. 33-95 (1854); Learned, *supra* note 141, at 453-54. Jackson was not the

the overall trend was in the opposite direction.

To begin with, the Judiciary Act of 1789 gave the Attorney General no authority over local district attorneys. That meant the Attorney General had little or no ability to influence the government's position in litigation, let alone assure cross-jurisdictional uniformity of federal law—the facts and basic legal issues were established independently by the efforts of district attorneys in their initial trial and appellate work. Early on, the Supreme Court also rejected Attorney General Edmond Randolph's attempt to supervise the decisions of lower federal courts in cases involving federal rights.¹⁵⁶

Congress also made a fairly regular habit of devolving authority to initiate litigation and render intra-department legal advice onto other government officers, including non-lawyers. This began as early as 1797 with a statute “giving to the Comptroller of the Treasury the power and discretion of instituting legal proceedings in cases of delinquent revenue officers.”¹⁵⁷ Congress then extended control over district attorneys to the Comptroller in 1820,¹⁵⁸ and, under the leadership of Daniel Webster, Congress not only rejected Jackson's proposal to centralize legal authority in the Attorney General, it created a Solicitor of the Treasury to replace the Comptroller in managing Treasury suits and “to provide rules for the district attorneys to follow in regard to all litigation in which the United States was a party.”¹⁵⁹ Other departmental solicitors followed, each initiating litigation on his own and producing opinions on federal law that sometimes conflicted with the litigation positions and opinions of others.¹⁶⁰ The net effect was that district attorneys “were at a loss whether to report to the Treasury or to the Attorney General,”

first to see the need. Washington passed along to Congress a proposal drawn up by Randolph in 1791, but the bill died. Sewall Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 176 (1938). Madison proposed a similar concentration of legal work before the outbreak of the War of 1812, though it is not clear that he envisioned placing the Attorney General in charge. Congress did not act. Learned, *supra* note 141, at 445; *see also id.* at 455 (discussing Polk's proposal); *cf.* CUMMINGS & MCFARLAND, *supra* note 128, at 218 (discussing Attorney General Black and Bates' views).

156. *See* Hayburn's Case, 2 U.S. (2 Dall.) 408, 409 (1792); CUMMINGS & MCFARLAND, *supra* note 128, at 26-28; *see also* Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 590-618 (analyzing archival sources on Randolph's position in *Hayburn's Case* in terms of separation of powers).

157. Key, *supra* note 155, at 177.

158. *Id.*

159. *Id.* at 178; *see also id.* at 179 (discussing Webster's motivations).

160. *Id.* at 179 (“From 1830 on, the story is increasingly one of the struggle to maintain some semblance of unity in legal affairs in the face of the rising power of the departmental solicitors, a story in which the closing chapter probably has not by any means yet been written.”). In the ensuing decades before 1870, Congress would add a Solicitor of the Internal Revenue Bureau, the War Department, the Navy Department, and the Post Office Department. *See* CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870); *see also* CUMMINGS & MCFARLAND, *supra* note 128, at 221 (describing creation of departmental solicitors); *id.* at 197-99 (discussing confusion surrounding handling of confiscation cases in 1861 and 1862).

the Attorney General “did not regard himself as empowered to discipline misconduct,” and “cabinet officers continued to give directions” contrary to the opinions of the Attorney General.¹⁶¹

Whether intended or not, the resulting disarray may have worked to enhance the independence of each department, and certainly the district attorneys, from direct political accountability to the President. It also likely relieved the Attorney General from some of the political pressure that centralized authority entails. But decentralization also produced confusion, and as the Civil War and Reconstruction period starkly revealed, it left ample room for rank partisanship and complicity in extralegal executive branch conduct.

With respect to confusion, the war and Reconstruction vastly multiplied the legal business of the federal government. The Reconstruction Amendments and enforcing legislation established a dynamic new relationship between the states and the national government in order to protect the rights of newly freed blacks in the South—a relationship that highlighted the importance of coordination to ensure consistent enforcement efforts by district attorneys in Southern states.¹⁶² Federal marshals and quite often federal troops intervened to protect nascent political reorganization; antebellum and wartime liabilities, particularly bonds from confederate states, rights to confiscated property, and charges of treason had to be adjudicated; pensions, pardons, and all the other incidents of the return to a relative peace had to be litigated; and with the fledgling administrative state born of the war now expanding its reach, the opinion-giving function of federal legal officers became increasingly important.¹⁶³ All of these developments exhausted the legal staff of the federal government, demanded a new kind of detached commitment to professional service, and raised the coordination costs and conflicts arising from divided legal authority.¹⁶⁴

Histories of the establishment of the Department of Justice lay heavy emphasis on the confusion of divided legal authority, making the turn to centralization in 1870 seem logical and inevitable (even if not complete until the rise of the welfare state under Franklin D. Roosevelt).¹⁶⁵ The uglier

161. CUMMINGS & MCFARLAND, *supra* note 128, at 219.

162. HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* (1975); HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875* (1982); ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS 1866-1876* (2005).

163. CUMMINGS & MCFARLAND, *supra* note 128, at 220 (“As the war came to a close and reconstruction began, the legal business of the government increased.”), ch. 10 *passim*; HYMAN, *supra* note 162; HYMAN & WIECEK, *supra* note 162; KACZOROWSKI, *supra* note 162.

164. *See* CONG. GLOBE, 41st Cong., 2d Sess. 3034-39 (1870).

165. *See, e.g.*, JAMES A. HIGHTOWER, *GOV'T AND GEN. RESEARCH DIV., CONG. RESEARCH SERV., FROM “ATTORNATUS” TO THE DEPARTMENT OF JUSTICE—AN HISTORICAL PERSPECTIVE OF THE NATURE OF THE ATTORNEY GENERALSHIP OF THE UNITED STATES AS EMBODIED IN THE DEPARTMENT OF JUSTICE ACT OF 1870* (1966), in *Removing Politics, supra*

underside of military exigency and executive branch complicity in extralegal conduct—which fits less cleanly with centralization as a reform measure—is generally ignored.¹⁶⁶

To begin with, Lincoln's Attorney General, Edward Bates, along with the President's other legal advisors, not only produced official opinions offering tendentious legal authority for the President's wartime measures in derogation of civil liberties,¹⁶⁷ they launched a media campaign using pamphlets and organized propaganda machines in a war of ideas to sustain Northern morale, marginalize copperhead opponents, and convince the public that the President was not violating the Constitution to save the republic.¹⁶⁸ William Whiting's comments in an 1862 pamphlet exemplify the sharp tone of administration defenses:

[A person's] rights enjoyed under the constitution, in time of peace are different from those to which he is entitled in time of war.

. . . .

. . . If the commander-in-chief orders the army . . . to send traitors to forts and prisons; to stop the press from aiding and comforting the enemy by betraying our military plans; to arrest within our lines, or wherever they can be seized, persons against whom there is reasonable evidence of their having aided or abetted the rebels, or of intending to do so—the pretension that in so

note 3, at 405, 417; Key, *supra* note 155, at 180; Learned, *supra* note 141, at 460-61. Other studies of the history of the office of the Attorney General ignore the war and Reconstruction period altogether. See, e.g., BAKER, *supra* note 13; Bloch, *supra* note 156.

166. A notable exception is CUMMINGS & MCFARLAND, *supra* note 128, ch. 10 *passim*; see also Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1300-05 (2000). But even Cummings and McFarland separate their description of impeachment and Stanbery's loyalty to Johnson in defiance of Reconstruction legislation from the establishment of the Department of Justice, which they too see as primarily intended to improve efficiency and avoid confusion. See *id.* ch. 11 *passim*. They are also overly optimistic about the effect of forming the Department and centralizing control for purposes of Reconstruction enforcement. See *id.* at 248. Waxman attends to the influence of Reconstruction enforcement, but his focus is on the creation of the office of the Solicitor General.

167. Lincoln's extralegal measures are well documented. See *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487); CUMMINGS & MCFARLAND, *supra* note 128, at 202-04, 206; DAVID HERBERT DONALD, LINCOLN (1995); DANIEL FARBER, LINCOLN'S CONSTITUTION (2003); HYMAN & WIECEK, *supra* note 162; MARK E. NEELY, JR., THE FATE OF LIBERTY (1991); PHILIP S. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA (1975); J. G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1951); CHARLES W. SANDERS, JR., WHILE IN THE HANDS OF THE ENEMY: MILITARY PRISONS OF THE CIVIL WAR (2005). On the specific role of lawyers both within and outside the Lincoln administration, see Spaulding, *supra* note 17, at 2040-94. Bates would later resign at least in part, it seems, from increasing concern about abuse of the war power. CUMMINGS & MCFARLAND, *supra*, at 204. He was, however, replaced by James Speed, who wrote an opinion justifying the trial and execution of Lincoln's assassins by military commission. *Id.*; see also THE DIARY OF EDWARD BATES 1859-1866 (Howard K. Beale ed. 1933).

168. See HYMAN & WIECEK, *supra* note 162, at 232-78 (1982); Spaulding, *supra* note 17, at 2040-81 (2005).

doing he is violating the constitution is not only erroneous, but it is a *plea in behalf of treason*. To set up the rules of civil administration as overriding and controlling the laws of war, is to aid and abet the enemy. It falsifies the clear meaning of the constitution¹⁶⁹

Matters were no less vexed after the war. In the months preceding Andrew Johnson's impeachment, his Attorney General, Henry Stanbery, disseminated numerous formal opinions to federal officers that flatly contradicted recent congressional legislation (often passed over Johnson's veto) designed to reverse Southern Black Codes and address revived resistance to Reconstruction.¹⁷⁰ Stanbery wrote to prevent the lawful disenfranchisement of ex-rebel officeholders; he opined that local voter registration boards had to accept at face value "voter-applicant's statements" as to the offices they had held in the Confederacy; he opined, against Congress' clear endorsement of federal military control by districts in the still-defiant Southern states, that Reconstruction officers had only the power "to sustain the existing frame of social order and civil rule, and not a power to introduce military rule in its place. . . . [I]t is a police power to be used only when the state failed to perform";¹⁷¹ he opined, "despite the clear contrary language of the Civil Rights and Reconstruction laws," that individuals' civil rights fall "within the exclusive cognizance of the state civil courts";¹⁷² and he pressed military officers to act in violation of other laws.¹⁷³

Sharp conflict on the ground between white Southern ex-rebels and Reconstruction governments provoked the sharpest of conflicts between the President's asserted war powers and congressional authority, between positive law and implied emergency powers. Stanbery stood four-square with the President. As commentators have observed, "[t]his able lawyer, serving his client the President, played the role of an adversary advocate for political purposes, but he employed the deceptively objective language and logic that the

169. WILLIAM WHITING, *WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES* 51, 60-61 (10th ed., Boston, Little, Brown 1864) (emphasis added). Whiting's comments are chillingly similar to the post-9/11 comments of Attorney General Ashcroft. For some of Attorney General Ashcroft's claims regarding critics of the Bush administration's antiterrorism policies, see Neil A. Lewis, *A Nation Challenged: The Senate Hearing; Ashcroft Defends Antiterror Plan; Says Criticism May Aid U.S. Foes*, N.Y. TIMES, Dec. 7, 2001, at A1; Katharine Q. Seelye, *War on Terror Makes for Odd Twists in Justice System*, N.Y. TIMES, June 23, 2002, § 1, at 16.

170. CUMMINGS & MCFARLAND, *supra* note 128, at 211-12 (describing Stanbery as "wholeheartedly with the President" in opposition to Reconstruction); *id.* at 212 (describing Stanbery's role in drafting veto message for the military Reconstruction bill); *id.* at 215 (describing Stanbery's refusal to defend the government in *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868), a challenge to the constitutionality of congressional reconstruction in the Supreme Court).

171. HYMAN & WIECEK, *supra* note 162, at 446; *see also* HANS L. TREFOUSSE, *IMPEACHMENT OF A PRESIDENT: ANDREW JOHNSON, THE BLACKS, AND RECONSTRUCTION* 72-74 (1999).

172. HYMAN & WIECEK, *supra* note 162, at 446.

173. *Id.* at 447.

language of the law provided.”¹⁷⁴ This helped convince lower-level agents to privilege his directives over the binding language of congressional enactments.¹⁷⁵ By July 1867,

Congress, its leadership desperate, over a veto passed an amendment to the Military Reconstruction law to counteract Stanbery’s restrictive interpretations. It made all provisional state authorities “subject in all respects to the military commanders,” and stipulated that *no commander or voter registrar* “shall be bound . . . by any opinion of any civil officer of the United States.”¹⁷⁶

This explicitly stripped the Attorney General of his opinion-giving authority in the area of Reconstruction. Power to control Reconstruction commanders was expressly vested in then General Grant to avoid manipulation by Johnson and Stanbery.¹⁷⁷

It is possible, if not tempting, to dismiss Stanbery and Johnson as aberrant figures, products of aberrant times, but there is both the earlier extralegal conduct of the Lincoln administration to contend with, and the disturbing parallel to present day claims of executive supremacy in contexts that involve equally vexing questions about the proper balance between civilian and military authority. There is also the fact that the effort to centralize executive branch legal authority culminating in the 1870 Department of Justice Act began with a House resolution on December 12, 1867, just five days after the House rejected the first recommendation of the Judiciary Committee to impeach President Johnson for refusing to follow Reconstruction laws, and nine days after Johnson’s defiant third annual message.¹⁷⁸ Within two months, Johnson would openly violate the Tenure of Office Act by replacing Secretary of War Stanton without the Senate’s consent, and the House would vote for impeachment.¹⁷⁹ Stanbery resigned as Attorney General to devote full attention to the defense of Johnson in the impeachment trial. After prevailing, however, the Senate refused

174. *Id.* at 446.

175. *Id.*; cf. KACZOROWSKI, *supra* note 162, at 38-39.

176. HYMAN & WIECEK, *supra* note 162, at 448 (emphasis added); *see also* TREFOUSSE, *supra* note 171, at 76-77.

177. HYMAN & WIECEK, *supra* note 162, at 448.

178. CONG. GLOBE, 41st Cong., 2d Sess. 3034-39 (1870); HYMAN & WIECEK, *supra* note 162, at 450. The Senate Judiciary Committee secured a resolution requesting the position of the Attorney General on centralizing the government’s legal work on December 16, 1867. Stanbery’s reply advocated establishing a Solicitor General to argue cases in the Supreme Court as well as a Law Department under the control of the Attorney General. CUMMINGS & MCFARLAND, *supra* note 128, at 222-23.

179. HYMAN & WIECEK, *supra* note 162, at 455-56. On Johnson’s impeachment and the relationship to his refusal to enforce reconstruction laws, see MICHAEL LES BENEDICT, PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA (2006); MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1973); CHESTER G. HEARN, THE IMPEACHMENT OF ANDREW JOHNSON (2000); TREFOUSSE, *supra* note 171.

to confirm Stanbery's reappointment as Attorney General.¹⁸⁰

It is, to say the least, somewhat surprising that Congress contemplated centralization of legal authority in the office of the Attorney General in the middle of the impeachment controversy,¹⁸¹ especially given that uniformity of legal opinions and litigation positions was offered as one of the chief reasons for the change. Congressional supporters evinced deep concern about the amount of legal fees paid to outside counsel during the war and Reconstruction to help handle the government's legal business, but they laid equal emphasis on the need for a single officer to control litigation in the lower courts and rationalize "executive law."¹⁸² If ever the conduct of an Attorney General should have provoked Congress to check the influence of political accountability to the President and incorporate structural guarantees of independence, one would have expected this of the Reconstruction congresses. But, apart from requiring an annual report to Congress by the Attorney General, nothing in the Department of Justice Act modified the structure of political accountability in the direction of independence from the President. Instead, it created a formal bureaucratic structure under the direct supervision of the Attorney General.¹⁸³

One possible explanation is that by 1870, with Grant well into his first term, the Fourteenth Amendment ratified, Amos T. Akerman (a "vigorous"

180. CUMMINGS & MCFARLAND, *supra* note 128, at 215.

181. The congressional record reveals that centralization was considered from the very outset of the Civil War. In July, 1861, Congress authorized the Attorney General to exercise control over district attorneys and to retain outside counsel. 12 Stat. 285 (1861); *see* Key, *supra* note 155, at 180-81. But the effect of the statute was compromised four days later when Congress passed legislation expressly reserving the traditional authority of the Solicitor of the Treasury, and Congress later extended authority to guide district attorneys to the Solicitor of Internal Revenue. *See* 14 Stat. 471 (1867); 12 Stat. 327 (1861); *see also* CUMMINGS & MCFARLAND, *supra* note 128, at 218-25.

182. CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870). As Congressman Jenkes asserted:

It is a misfortune that there should be different constructions of the laws of the United States by different law officers of the United States. Whether the opinion of the Attorney General be right or wrong, it is an opinion which ought to be followed by all the officers of the Government until it is reversed by the decision of some competent court. It is for the purpose of having a unity of decision, a unity of jurisprudence, if I may use that expression, in the executive law of the United States, that this bill proposes that all the law officers therein provided for shall be subordinate to one head.

Id.; *see also* CUMMINGS & MCFARLAND, *supra* note 128, at 222.

183. According to the statute, the Attorney General is made the head of the Department of Justice; a Solicitor General and two assistant attorneys general are established to assist him; the solicitors from other departments are transferred to and placed under the supervision and control of the head of the Department of Justice; the Attorney General and other departments are barred from retaining outside counsel; the opinion-giving function is formally centralized in the office of the Attorney General, as is control of the district attorneys; and the President is given the power to appoint, with the advice and consent of the Senate, all senior and assistant solicitors; all others are to be appointed and removed by the Attorney General. *See* Act to Establish the Department of Justice, 16 Stat. 162 (1870).

supporter of the Republican cause)¹⁸⁴ serving as Attorney General, and Republicans still firmly in control of Congress, even those concerned about Stanbery's deviance discounted the recurrence of similar problems. Another is that the Congress did not then endorse the theory of a unitary executive and could establish a law department without worrying overmuch about undue presidential influence because it had just recently asserted its authority over executive branch officers by statute. That, after all, is one clear implication of Johnson's impeachment and subsequent loss to Grant in 1868.

Histories of the office of Attorney General have been largely silent on the point. Relying on Jackson's plea in 1830 and Caleb Cushing's letter to President Pierce in 1854 advocating a law department, some commentators have nonetheless implied that centralization is predicated upon or uniquely consistent with a theory of the unitary executive.¹⁸⁵ But opinion was divided in the antebellum period. Jackson is, of course, a transitional figure with respect to presidential control of the executive branch. It is well known that he struggled with "independence" and, on some issues, open discord, in his first cabinet.¹⁸⁶ He demanded more loyalty from subsequent appointees and, as the debates around his opposition to renewing the charter to the Second National Bank reveal, he used that control to implement and defend robust exertions of executive power. Given the critical role played by Roger Taney in the bank battle, Jackson's call for centralizing authority over the government's legal work in the office of the Attorney General can be seen as an attempt to enhance presidential control.¹⁸⁷

Caleb Cushing's letter, which Pierce forwarded to Congress, was more explicit. He expressly grounded his appeal for centralized authority in the office of the Attorney General on the claim that, according to "settled constitutional theory," the President must be able to exercise unified control over the discretionary acts of executive branch officers. "[U]ltimate discretion, when the law does not speak, must reside, as to all executive matters, with the President, who has the power to appoint and remove, and whose duty it is to take care that the laws be faithfully executed."¹⁸⁸ This constitutional theory,

184. CUMMINGS & MCFARLAND, *supra* note 128, at 227.

185. Hightower, *supra* note 165, at 409-11 (suggesting that an Attorney General vested with centralized control is implicit in founding a national government); *id.* at 415-16 (discussing Jackson and Cushing); Key, *supra* note 155, at 180; Learned, *supra* note 141, at 456-57.

186. See SCHLESINGER, *supra* note 141, at 47-73; Richard P. Longaker, *Was Jackson's Kitchen Cabinet a Cabinet?*, 44 MISS. VALLEY HIST. REV. 94 (1957).

187. Roger Taney, the replacement for Jackson's first Attorney General Berrien (who turned out to be tepid on attacking the Second National Bank), was among his most loyal supporters, helping to draft his bank veto message and eventually taking over the Treasury Department to effectuate the withdrawal of federal deposits. See *supra* note 141.

188. CALEB CUSHING, A REPORT OF THE ATTORNEY GENERAL, SUGGESTING MODIFICATIONS IN THE MANNER OF CONDUCTING THE LEGAL BUSINESS OF THE GOVERNMENT, H.R. EXEC. DOC. NO. 33-95, at 11 (1854).

while it supposes, in all matters not purely ministerial, that executive discretion exists, and that judgment is continually to be exercised, yet requires unity of executive action, and, of course, unity of executive decision; which, by the inexorable necessity of the nature of things, cannot be obtained by means of a plurality of persons wholly independent of one another, without corporate conjunction, and released from subjection to one determining will¹⁸⁹

Unified control, he continued, is also dictated by sound policy:

The organization of the executive departments of administration implies order, correspondence and combination of parts, classification of duties, in a word, system: otherwise there is waste and loss of power, or conflict of power, either of which is contrary to the public service, in the regard of so much work to be done by such and such persons, and at a given cost of either time or money. Besides which, in a political relation, want of due arrangement of public functionaries and their functions, is want of due responsibility to society and to the law.¹⁹⁰

The Attorney General is thus properly considered “the administrative head, under the President, of the legal business of the government,” and, Cushing concluded, the Judiciary Act should be amended to reflect and endorse centralized, departmental control.¹⁹¹

On this view, centralization is a means to the end of unitary executive control. But a closer reading of the letter raises complicating questions about Cushing’s position. First, Cushing flatly concedes that the President does not have power to disregard duly enacted legislative constraints on executive discretion.¹⁹² He also insists that, in the role of legal advisor, the action of the Attorney General is “quasi-judicial.”¹⁹³ The Attorney General must not, therefore, consider the administration his client:

It frequently happens that questions of great importance, submitted to him for determination, are elaborately argued by counsel; and whether it be so or not, he feels, in the performance of this part of his duty, that he is not a counsel giving advice to the government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation.¹⁹⁴

At least with respect to the Attorney General’s opinion-giving function, then,

189. *Id.* at 12.

190. *Id.* at 14.

191. *Id.* at 15-16 (“So far the administrative power, and the corresponding administrative responsibility exist, and they require modification in details only in order to be completely adapted to the theory of departmental organization.”); *id.* at 16 (“The President undoubtedly has the power to assign all these cases, as they arise, to the charge of the Attorney General; and it would be fitting that he should do so, provided the corresponding changes in the organization of this office be authorized by Congress.”).

192. *Id.* at 11 (“Where the laws define what is to be done by a given head of department, and how he is to do it, there the President’s discretion stops”).

193. *Id.* at 6.

194. *Id.*

Cushing's view is consistent with Weber's ethic of responsibility, not the kind of disciplinary subjection entailed by the theory of the unitary executive.

Perhaps even more importantly, Cushing was writing against an earlier formal opinion by William Wirt that rejected the unitary theory. Wirt argued that the President cannot directly interfere with the performance of duties delegated by Congress to inferior officers:

If the laws . . . require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself. The constitution assigns to Congress the power of designating the duties of particular officers; the President is only required to take care that they execute them faithfully.¹⁹⁵

On this strict constructionist view, the President can only act through his powers of removal and appointment to control feckless or corrupt officers, and only through such officers on lower level agents.¹⁹⁶ More broadly, Wirt advocated scrupulous observance of statutory limits on executive authority. "In a government of laws like ours," he wrote to President Monroe, "it seems to me of importance that the influence of every office should be confined within the strict limits prescribed for it by law."¹⁹⁷ Thus, there appears not to have been any clear consensus on the unitary theory of the executive branch and the effects of centralizing legal control in the new Department of Justice would therefore have depended heavily on how Congress specified the obligations of subordinate executive branch officers.¹⁹⁸

In any event, however safe the Reconstruction Congress felt in centralizing legal control under the Attorney General in 1870, new abuses stemming from the endorsement of political accountability arose almost immediately. From its apogee in the early years of the first Grant administration, congressional and executive branch enthusiasm for enforcing Reconstruction laws declined steadily to the stalemated presidential election of 1876 and the Hayes-Tilden compromise of 1877 which brought Redemption and "home-rule" in the South. As Robert Kaczorowski has ably detailed, even proponents of Reconstruction within the Department of Justice gradually capitulated to the general deflation of political will.¹⁹⁹

195. 1 Op. Att'y Gen. 624, 625-26 (1823).

196. *Id.* at 626; *see also* 5 Op. Att'y Gen. 630 (1852).

197. CUMMINGS & MCFARLAND, *supra* note 128, at 82; *see also id.* at 86.

198. By 1935, of course, the Supreme Court resolved the tension between strict constructionist and unitary theories decidedly in favor of presidential control. *See Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 602 (1926).

199. KACZOROWSKI, *supra* note 162, chs. 7-9 *passim*. Kaczorowski, in my view, overemphasizes the effect of Supreme Court doctrine, which itself may have been influenced by political sentiment but, for Department of Justice officers, would nevertheless have helped rationalize under-enforcement. For a critique of Supreme Court-centric histories of

Political hostility to Reconstruction also surfaced in direct criticism of the Attorney General's centralized control of bizarre, quasi-civil, quasi-military institutional arrangements in still-deviant Southern states. As *The Nation* editorialized in 1874, contrary to the "modest position" the Attorney General occupied "down to 1861" and the establishment of the Department of Justice in 1870, he was now "charged with the superintendence and direction of the United States marshals and district attorneys in the discharge of their duties, and they were ordered to report to him." Out of this originally "very natural and proper arrangement" grew something that seemed monstrously different:

As a result of the Reconstruction Acts and the Constitutional Amendments, a large number of the Southern States have been divided between, not two political parties, but two bitterly hostile factions, which are only prevented from flying at each other's throats by the armed forces of the United States, and one of which is led by adventurers from the North, who act under the superintendence or advice of the United States marshals, who have the control of the soldiers. The marshals are, in truth, everywhere political chiefs, who derive their strength from the fact that if the worst comes to the worst—that is, if their opponents lose all patience—they can bring up the troops. . . . The control of the troops in the Southern States has, therefore, been transferred to the Attorney-General, who moves them on the marshal's report Now the result is that the Attorney-General's office has become a kind of political bureau, to which competitors for the government of sovereign States carry their petitions and proofs. . . . His functions, indeed, are a combination of those of the French Minister of Justice and Minister of the Interior and of the Governor-General of British India. That is, he has the supervision of the officers of the law courts in the discharge of their ordinary duties; he has the direction, also, of a kind of prefects of departments in the United States marshals, whose functions are semi-political; and his relations to the Southern governors are very like those of the Governor-General to the native princes who are still allowed to hold their territory. . . . He is, moreover, acting as the servant of a President who treats his ministers as members of his staff, and all criticism of them by the public as an impertinence unworthy of notice.²⁰⁰

By 1874, *The Nation* had made the liberal republican turn away from Reconstruction, hence the cynical tone of the indictment. But the charges raised against the Attorney General were serious—lawlessness, tyranny, patronage corruption, abuse of authority, and incompetence. And to the extent that the attitude of *The Nation* paralleled elite popular sentiment in the North regarding Reconstruction, the editorial captures the viewpoint from which a retreat from

the period, see Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 *LAW & SOC'Y REV.* 343 (2007). On the political history, see ERIC FONER, *RECONSTRUCTION 1863-1877* (1988); WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION 1869-1879* (1979); see also CUMMINGS & MCFARLAND, *supra* note 128, at 234-35 (discussing political repercussions for Attorney General George H. Williams, who defended enforcement efforts in the early years of the second Grant administration).

200. Edwin L. Godkin, *The Inflation of the Attorney General*, *THE NATION*, Oct. 1, 1874, at 214-15.

Reconstruction enforcement could seem both necessary and justified.²⁰¹ The racism and states' rights fundamentalism of Johnson and Stanbery's Southern strategy eventually became political and legal dogma.

III. THE CURRENT ADMINISTRATION

In the most grave professional failings of Attorneys General since the Civil War and Reconstruction (e.g., early underenforcement of the antitrust laws; the raids, physical abuse and detention of immigrants alleged to harbor anti-American beliefs organized by Attorney General A. Mitchell Palmer in 1920; and Watergate), centralized control and political influence were equally significant factors.²⁰² What then are we to make of the fact that no major structural guarantees of independence have been implemented in the office of

201. For less cynical views of the project of civil rights enforcement that highlight the dire racial and political consequences of the retreat from Reconstruction see, FONER, *supra* note 199; GILLETTE, *supra* note 199; HYMAN & WIECEK, *supra* note 162; KACZOROWSKI, *supra* note 162.

202. On underenforcement and misuse of the Sherman Act, particularly by Grover Cleveland's Attorney General, Richard Olney, see GERALD G. EGGERT, RICHARD OLNEY: EVOLUTION OF A STATESMAN (1974); HENRY JAMES, RICHARD OLNEY AND HIS PUBLIC SERVICE (1971); RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA 1888-1992 (1996); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955); Donald J. Pisani, *Promotion and Regulation: Constitutionalism and the American Economy*, 74 J. AM. HIST. 740, 760 (1987); cf. WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965); Wendell Berge, *Problems of Enforcement and Interpretation of the Sherman Act*, 38 AM. ECON. REV. 172 (1948). On the effect of Theodore Roosevelt's more aggressive stance with Attorney General Phillander Knox and Charles J. Bonaparte, see EDMUND MORRIS, THEODORE REX 88, 196 (2001); PERITZ, *supra*; THORELLI, *supra*; Arthur M. Johnson, *Antitrust Policy in Transition, 1908: Ideal and Reality*, 48 MISS. VALLEY HIST. REV. 415 (1961).

On the Palmer Raids, see *Charges of Illegal Practices of the Department of Justice: Hearings on "Report upon the Illegal Practices of the United States Department of Justice" Before a Subcomm. of the S. Comm. on the Judiciary*, 66th Cong. (1921); *Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others: Hearings Before the H. Comm. on Rules*, 66th Cong. (1920); R.G. BROWN ET. AL., TO THE AMERICAN PEOPLE: REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE (1920), reprinted in MASS VIOLENCE IN AMERICA: ILLEGAL PRACTICES OF THE DEPARTMENT OF JUSTICE (Robert M. Fogelson & Richard E. Rubenstein eds., 1969); ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1967); ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA 1919-20 (1964); LOUIS F. POST, THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY (1970); WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933 (2d ed. 1963); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003); Stanley Cohen, *A Study in Nativism: The American Red Scare of 1919-20*, 79 POL. SCI. Q. 52 (1964).

On Watergate, see *Removing Politics*, *supra* note 3; BAKER, *supra* note 13; STANLEY I. KUTLER, WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON (1990); Gormley, *supra* note 3.

the Attorney General?²⁰³ What does this say about our understanding of and, perhaps more importantly, our practices of criticizing the relationship between federal law and politics? How do these understandings and practices relate to the conduct of lawyers for the Bush administration following the attacks of September 11, 2001?

There is now a burgeoning literature on the conduct of lawyers for the Bush administration, particularly the role of the lawyers who offered formal opinions purporting to confer legal authority for torture.²⁰⁴ The literature is, for the most part, roundly condemnatory. While I share the conviction that the work of lawyers for the Bush administration warrants censure for setting us on a path away from our most fundamental democratic and constitutional

203. Civil service reform in the late nineteenth century did not reach the issue of political corruption in the highest levels of the Department of Justice, *see* JOHN G. SPROAT, *THE BEST MEN: LIBERAL REFORMERS IN THE GILDED AGE* 257-71 (1968). The Hatch Act reaches only overt political activity, *see* 5 U.S.C. §§ 7321-7326; 5 C.F.R. §§ 733-734 (2007). The success of the independent counsel statute, 28 U.S.C. §§ 591-599, which expired in 1999, is open to question. *See* Morrison v. Olson, 487 U.S. 654 (1988); Robert W. Gordon, *Imprudence and Partisanship: Starr's OIG and the Clinton-Lewinsky Affair*, 68 *FORDHAM L. REV.* 639 (1999); Gormley, *supra* note 3; Benjamin J. Priester et al., *The Independent Counsel Statute: A Legal History*, L. & CONTEMP. PROBS., Winter 1999, at 5; Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 *GEO. L.J.* 2267 (1998). Finally, the ability of the Office of Professional Responsibility to check presidential influence on high level Department of Justice Officials is also open to question. *See* Att'y Gen. Order No. 635-1974 (Dec. 8, 1975); Att'y Gen. Order No. 1931-1994 (Nov. 8, 1994); *see also* Att'y Gen. Order No. 2791-2005 (Dec. 23, 2005) ("Nothing in the final rule [establishing the Advisory Office of the Office of Professional Responsibility] shall be construed as affecting the functions or overriding the authority of the Office of Legal Counsel as established by 28 C.F.R. 0.25."); Scott Shane, *Waterboarding Focus of Inquiry by Justice Department*, *N.Y. TIMES*, Feb. 23, 2008, at A1 (noting that OPR "reports to the attorney general" and that "[i]n 2006, when [the head of OPR] tried to look into the Justice Department's role in approving the National Security Agency's domestic surveillance program, Mr. Bush blocked the investigation by denying . . . investigators the necessary security clearances" until November 2007).

204. *See, e.g.*, DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2007); LUBAN, *supra* note 47, at 162-206; *THE TORTURE DEBATE IN AMERICA* (Karen J. Greenberg ed., 2006); Cole, *supra* note 202; Winfield, *supra* note 13; David Cole, *The Man Behind the Torture*, *N.Y. REV. BOOKS*, Dec. 6, 2007, at 38 (reviewing JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW & JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007)); David Cole, *What Bush Wants to Hear*, *N.Y. REV. BOOKS*, Nov. 17, 2005, at 8 (reviewing JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005)); Lawyers' Statement on Bush Administration Torture Memos (Aug. 4, 2004), *available at* <http://www.hrw.org/pub/2004/lawyers-statement.pdf>; *cf.* GOLDSMITH, *THE TERROR PRESIDENCY*, *supra*; Jeffrey K. Shapiro, *Legal Ethics and Other Perspectives*, in *THE TORTURE DEBATE IN AMERICA*, *supra*, at 229.

The factual record on the precise role government lawyers played is, of course, incomplete, and will likely remain so. That renders any assessment, including the one that follows, somewhat speculative. For a basic summary of the memoranda on the issue of torture, *see* LUBAN, *supra*, 162-206. For the most comprehensive publicly available collection of the work product of Bush administration lawyers, *see* *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg and Joshua L. Dratel eds., 2005).

commitments,²⁰⁵ the assumptions about professional independence underlying the discourse of condemnation are, I believe, falsely reassuring. That false comfort is dangerous to the extent that it distorts debate about the source of professional failure and possible reform measures.

A. Independence as Moral Activism

One set of criticisms aimed at the Bush administration lawyers is grounded in the assumption that the advice sanctioning extralegal conduct in response to the attacks of September 11, 2001, was the product of coldly neutral, amoral legal advice.²⁰⁶ The lawyers in the Department of Justice, on this view, gave distorted advice either because they wrongly imported adversarial ideology about their role obligations into a counseling function in which there is no adversary, or because, caught up in disciplinary indifference to social ends, they simply lacked the character and integrity to avoid complicity in immoral and inhumane conduct.²⁰⁷ In the first version of this critique, the lawyers zealously, indeed overzealously, spun the law and facts to suit the administration's agenda. Following the dictates of the duty of zealous advocacy (the idea that the lawyer's duty is to serve the client's lawful interests without regard to the social or moral worth of those interests), they treated their own

205. Indeed, their work may well warrant more serious professional, civil, and criminal sanctions.

206. See, e.g., LUBAN, *supra* note 47, at 164 (taking at face value John Yoo's claim that he was engaged in "lawyering as usual," not "offering morally motivated advice"); Stephen Holmes, *Is Defiance of Law a Proof of Success? Magical Thinking in the War on Terror*, in THE TORTURE DEBATE IN AMERICA, *supra* note 204, at 119 ("Since ancient times, in fact, legal minds have proved willing to provide technically-refined justifications for the carefully dosed infliction of pain as a method of extracting information."); Neil M. Peretz, *The Limits of Outsourcing Ethical Responsibilities of Federal Government Attorneys Advising Executive Branch Officials*, 6 CONN. PUB. INT. L.J. 23, 60-62 (2006) ("Many lawyers are like Yoo in eschewing morality as a possible criterion for analysis. They believe there is a 'demarcation between the legality and morality of a proposed course of conduct, with lawyers providing information on the former, but leaving the latter untouched, to be resolved only at the client's discretion.' This matches the long-established view of the lawyer as an 'amoral technician,' who optimizes on client loyalty and obedience."); Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 226-27 (2006) ("[F]or the most part, the legal profession lacks discernible moral resources with which to condemn the OLC attorneys, notwithstanding their perceived facilitation of torture. The dominant view of legal practice is founded on a purported demarcation between the legality and morality of a proposed course of conduct, with lawyers providing information on the former but leaving the latter untouched, to be resolved only at the client's discretion.").

207. LUBAN, *supra* note 47, at 197-98, 201; Christopher Kutz, *The Lawyers Know Sin: Complicity in Torture*, in THE TORTURE DEBATE IN AMERICA, *supra* note 204, at 241 (analogizing professional failure of Bush administration lawyers to sin); Dawn E. Johnsen, *Faithfully Executing the Laws*, 54 U.C.L.A. L. REV. 1559, 1584-85 (2007); Radack, *supra* note 47, at 14 (criticizing Bush administration lawyers and concluding that "[u]ltimately, the attorney must be guided by what his conscience tells him is in the public interest").

moral convictions on the subject and the predictable moral costs of the conduct they sanctioned as irrelevant to their work product. In the second version, the result is the same, but the critique allows for the possibility that, over and above their perceived ethical obligations as lawyers, they internalized broader institutional mandates of the administration (especially a heightened duty of loyalty and efficient, obedient execution of orders) in their capacity as senior officials within the bureaucracy. They were, in the administration's parlance, "forward-leaning",²⁰⁸ in Emersonian parlance, "leaning" and "mendicant" conformists.²⁰⁹

Properly independent lawyers, on either account, would have been moral activists. They would have rejected the rigid separation of conscience from professional duty (either on the theory that, outside a litigation setting, zealous advocacy must give way to independent judgment, or on the theory that law and morality are so inseparable that good legal advice, even from a zealous advocate, must be morally informed). Independent lawyers also would have refused institutional mandates to the extent that they impinged upon their perceived duties as lawyers to render disinterested legal advice. By hypothesis, the opinions offered by such lawyers would have been more balanced, more sensitive to counterargument,²¹⁰ and, if the administration persisted after remonstrance, the lawyers would have been self-reliant enough to withdraw or resign, and perhaps even disclose confidences (at least with respect to torture and extraordinary rendition) if necessary to prevent criminal conduct with life-threatening consequences for third parties.²¹¹

B. Independence as Legal Positivism

A second set of arguments critical of the Bush administration lawyers draws again on the critique of zealous advocacy, this time focusing on the duty of fidelity to positive law. On this view, any properly trained, responsible

208. LUBAN, *supra* note 47, at 172; *see also* Michael Hatfield, *Fear, Legal Indeterminacy, and the American Lawyering Culture*, 10 LEWIS & CLARK L. REV. 511, 511 (2006) (arguing that Jay Bybee's memo was "at odds with both our national moral spirit and our law"); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 70 (2005) (arguing that "administration lawyers faced considerable pressure to think in a 'forward-leaning' way, on the assumption that the September 11th attacks had created a kind of normative watershed"). An element of self-interest in promotion to higher office may also have complemented this institutional zeal.

209. "Leaning," interestingly, is a central metaphor for lack of independence in Emerson's essay.

210. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983); *see also* Peretz, *supra* note 206, at 38 ("Legal advisors to policymakers should not zealously advocate because it is unlikely that an equally zealous adversary will arise to oppose them. In a policymaking setting there is often no adversary to counterbalance the government attorney's advocacy with a contrary viewpoint that provides grist for the neutral third party (i.e. the policymaker) to weigh the arguments and discover the truth.").

211. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

lawyer would have identified and respected the clear legal boundaries prohibiting torture, domestic surveillance, indefinite detention and extraordinary rendition, the classification and treatment of prisoners of war, etc.²¹² Even if the administration lawyers lacked all moral scruples, so the argument goes, they should not have disregarded the unequivocal mandates of positive law. Zealous advocacy is only justified within the bounds of the law; it cannot justify taking frivolous legal positions.²¹³ As with criticisms of overzealous advocacy in private practice, professional failure here is attributed to the ideology of advocacy itself. When client interests are privileged over all else, even clear legal boundaries can be stretched to the breaking point by the cynical acid of lawyers trained to manipulate the law to meet the client's ends.²¹⁴ Minimally independent lawyers, on this account, would have refused to support lawlessness.

C. Independence as Civic Republicanism

A third set of arguments draws on the civic republican tradition of disinterested professional service. Here, the problem with the Bush administration lawyers is conceived not just as failure to respect positive legal boundaries as such, but a failure to approach the counseling function from a

212. This is the core of David Cole's position. See DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (2002); see also LUBAN, *supra* note 47, at 197 (stating that "crucial arguments in the torture memos are frivolous"); *id.* at 198 ("In the case of the torture memos, the giveaway is the violation of craft values common to all legal interpretive communities."); Johnsen, *supra* note 207, at 1584; Kutz, *supra* note 207, at 242 (arguing for criminal liability for lawyers who counseled torture); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1205 (2007) ("[E]xtraordinary rendition is not permissible under existing, applicable, and well-established norms of international human rights law and international humanitarian law. Renditions are carried out in secret, employ extra-legal means, and typically result in prisoner abuse, including cruel treatment, torture, and sometimes death."); Wendel, *supra* note 208, at 68 ("The overwhelming response by experts in criminal, international, constitutional, and military law was that the legal analysis in the government memos was so faulty that the lawyers' advice was incompetent."); *id.* at 70 ("[T]he process of providing legal advice was so badly flawed, and the lawyers working on the memos were so fixated on working around legal restrictions on the administration's actions, that the legal analysis became hopelessly distorted"); *id.* at 121 ("Rather than assisting the client to comply with the law, the government lawyers in this case simply abandoned the ideal of compliance altogether in favor of their own, custom-built legal system.").

213. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d), 1.16(a)(1), 3.1 (1983).

214. Luban analogizes to lawyers for Enron and savings and loans in the 1980s. See LUBAN, *supra* note 47, at 201 ("When they write [cover your ass] memos, lawyers cross the fatal line from legal advisor to moral or legal accomplice."); see also Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 458-63, 468-69 (2005). For the original critique of the ideology of advocacy, see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

perspective that consciously incorporates the general interests of the rule of law. Lawyers, all the more so lawyers representing the state, have a duty not only to provide disinterested advice, but to be “public sentinels”—to, as Robert Gordon puts it, “resolutely obstruct[] . . . any attempted domination of the legal apparatus by executive tyrants, populist mobs, or powerful private factions. . . . They are to repair defects in the framework of legality,” not merely exploit them;²¹⁵ and they are to adopt “a purposive perspective [that] would strive to maintain the spirit of the laws both inside and outside the context of representation,” not seek to “subvert and nullify the purpose of the rules.”²¹⁶ This means finding “ways to harmonize the client’s . . . plans with the purposes of the legal framework,” and, by implication, refusing to assist and remonstrating with the client when her plans threaten the legal framework.²¹⁷

On this account, the administration lawyers were not only complicit in extralegal conduct, the conduct they endorsed and the form of their endorsement can be seen as undermining the rule of law itself (chiefly separation of powers, civil liberties, respect for positive law, and, if one adds the denial of access to counsel and fair procedure for trials by military commission, due process itself). Purposive lawyers would have abjured technical and formalistic methods of minimizing the positive law and instead approached the issues with the detachment of a judicial officer on something like the terms Caleb Cushing describes in his 1854 letter.²¹⁸ They would have seen the public, or, more precisely, the public interest (as embodied in the

215. Gordon, *supra* note 3, at 14; *see also* ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (discussing the tradition of lawyer statesmanship); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998).

216. Gordon, *supra* note 3, at 23; *see also* Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, in *THE TORTURE DEBATE IN AMERICA*, *supra* note 204, at 153 (discussing unique obligations of government lawyers “that go beyond those of private attorneys”); Peretz, *supra* note 206 (same); *cf.* George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT’L SECURITY L. & POL’Y 409, 418, 431 (2005); Wendel, *supra* note 208, at 114-15 (describing the “special institutional role of lawyers as custodians of law and the role of law in pushing back against the energy of officials who seek to aggrandize the government’s power”).

217. Gordon, *supra* note 3, at 23 (1988); *see also* MODEL RULES OF PROF’L CONDUCT R. 1.16 (1983); Peter Margulies, *When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy*, 30 FORDHAM INT’L L.J. 642, 665 (2007) (arguing that while “[p]olicymakers at certain crucial junctures in U.S. history have defied the letter of the law to promote equality, dignity, and nonaggression,” their actions, unlike the Bush administration’s, were justified by “a purposive style of interpretation . . . premised on the goals served by constitutional or international law”).

218. *See supra* note 192 and accompanying text. Compare Chief Justice Rehnquist’s considerably more advocacy-oriented view when he served in the Office of Legal Counsel. *Nominations of William H. Rehnquist and Lewis Powell, Jr.: Hearings Before the S. Comm. of the Judiciary*, 92d Cong. 42, 185 (1971); William H. Rehnquist, *The Old Order Changeth: The Department of Justice Under John Mitchell*, 12 ARIZ. L. REV. 251, 255 (1970).

Constitution and federal law) as their client, not the Bush administration.

D. Independence as Political Accountability

Each of these critiques has its appeal, and some foundation in the facts. But the fit is hardly perfect. First, notice that the problem in each approach is primarily one of character, how lawyers define and internalize professional norms, not one of institutional design, how the structure of the office of the Attorney General and the Department of Justice supports or suppresses compliance with professional norms. An ethic of responsibility (morally activist, positivist, or civic republican) thus stands or falls with the integrity of individual role actors. Second, the core problem appears to lie in the general standards of professional conduct applicable to all lawyers which, role critics claim, endorse (over) zealous client-centered lawyering. Professional failure in the Department of Justice is but one more piece of evidence that the lawyering role as it is conventionally played is morally corrupt and that “good” lawyers who know this must uphold their own higher standards.²¹⁹

In either case, the problem appears to be correctable primarily through Congress. Above all, the Senate must take care to ensure that only truly upstanding lawyers are appointed and confirmed to hold leadership positions.²²⁰ And Congress must insist on proper oversight. The analysis thus returns to political accountability. But the history of the office of the Attorney General reveals that accountability to Congress can affect independence only contingently, and (at least with respect to oversight) usually *ex post*.²²¹ Independence, that is, remains dependent on political will.

Perhaps that is just as it should be, a question to which I will return shortly. For now, I wish to emphasize another reason to doubt the fit between the condemnatory discourse on the Bush administration lawyers and their conduct. However reassuring it may be to believe that character and the ideology of

219. Or they must help modify professional standards to include morally activist or purposive role obligations.

220. See *Removing Politics*, *supra* note 3, at 16, 41, 63, 74, 88, 154, 198 (insisting that character and integrity are the most basic check against misuse of the office and asserting lack of character and integrity as cause of lawyers’ complicity in Watergate).

221. The recent record of oversight, for instance, is mixed. See *Department of Justice Oversight: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 5, 18, 53-60 (2007) (questioning Att’y Gen. Gonzales regarding torture); *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (investigating the Gonzales firings); 153 Cong. Rec. S15227-01 (daily ed. Dec. 12, 2007) (statement of Sen. Patrick Leahy) (describing replacement of “two of the outstanding U.S. attorneys who were fired almost a year ago as part of the ill-advised, partisan plan to replace well-performing U.S. attorneys”); see also *supra* note 10 (Senate queries regarding Mukasey’s independence and position on torture). Compare the above with *Confirmation Hearing on the Nomination of John Ashcroft to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2001).

advocacy account for the professional failure of these lawyers, the available evidence suggests a more complex set of sources. Both the moral activism and civic republican critiques resonate in part by discounting the possibility that administration lawyers were animated by deep personal and professional enthusiasm for the administration's foreign policy agenda. But against the moral activist view that conscience and moral courage would have altered their approach to the role must be weighed the possibility (I think quite likely) that, whatever their post hoc statements to the contrary, these lawyers were in fact operating consistently with conscience. That is to say, they acted as moral activists or "cause lawyers," seeking to vindicate, not disregard, their own strongly held moral, political, and legal views.²²² If that is right, if these lawyers did indeed embrace a kind of Emersonian radical anti-institutional reform agenda with respect to domestic and international legal fetters on antiterrorism policy, the general professional standards of neutral, morally humble advocacy critics attack might actually have provided a check that conscience could not.

Against the civic republican concern that the ideology of advocacy does not foster respect for the architecture of the rule of law must be weighed the

222. As David Luban concedes:

The lawyers were political conservatives, mostly veterans of the Federalist Society and clerkships with Justices Scalia and Thomas, and Judge Laurence Silberman. Some sources . . . stated that their strategy was also shaped by longstanding political agendas that had relatively little to do with fighting terrorism, such as strengthening executive power and halting US submission to international law.

LUBAN, *supra* note 47, at 172 n.28 (internal quotation marks omitted). More modestly, their prior political activities and affiliations may have predisposed them to respond favorably to the pressing new demands of the administration. See Cole, *The Man Behind the Torture*, *supra* note 204; cf. LUBAN, *supra* note 47, at 197 ("The evidence shows that all these memos were written under pressure from officials determined to use harsh tactics—officials who consciously bypassed ordinary channels and looked to lawyers sharing their aims.").

For relevant academic positions taken by John Yoo, see *Courts at War*, 91 CORNELL L. REV. 573 (2006); *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183 (2004); *Using Force*, 71 U. CHI. L. REV. 729 (2004); *Applying the War Powers Resolution to the War on Terrorism*, 6 GREEN BAG 2d 175 (2003); *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001); *UN Wars, US War Powers*, 1 CHI. J. INT'L L. 355 (2000); *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169 (1999); *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435 (1999); *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87 (1998); *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); see also JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006); YOO, *THE POWERS OF WAR AND PEACE*, *supra* note 204.

For Jay Bybee's academic positions, see Printz, *The Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269 (2001); *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994).

possibility that these lawyers (perhaps naively or too easily) believed the conduct their advice sanctioned was fundamental to generating an appropriate new legal framework for handling the distinctive issues presented by terrorism in the twenty-first century. If so, the problem may have been an excess of purposivism, not an excess of narrowly client-centered lawyering. Indeed, I have elsewhere suggested that the introduction of adversarial values and institutional practices (judicial review, access to counsel, the right of confrontation, etc.) might have done far more both to constrain and to enhance the legitimacy of the administration's antiterrorism policy than the condemnatory discourse acknowledges.²²³

I think the positivist claim that the administration lawyers violated black letter law is quite right. Several of the central positions taken by the administration are legally frivolous.²²⁴ Or rather, they *were* frivolous. In a structure that subordinates law to politics, it is always possible that initially extralegal acts will be ratified in the new political environment they help to create. As the survey of the founding of the Department of Justice reveals, Johnson and Stanbery's open defiance of Reconstruction later became national policy as the political will to put down ex-rebel resistance in the South failed and Congress and the courts revived federalism doctrine to restrict federal enforcement authority. Lincoln and Bates' suspension of the writ of habeas corpus and defiance of Taney's opinion in *Ex parte Merryman* were followed by congressional suspension in 1863.²²⁵ With respect to the Bush administration's antiterrorism policy, Congress has acquiesced on a number of important fronts and looks to be acquiescing on others—even to the point of conferring retroactive immunity on complicit third parties.

Most prominently, Congress passed the Military Commissions Act of 2006, which, as David Luban laments,

stripped federal courts of habeas corpus jurisdiction over Guantanamo, defined "unlawful enemy combatants" broadly, prohibited detainees from arguing for Geneva Convention rights, retroactively decriminalized humiliating and degrading treatment, declared that federal courts could not use international law to interpret war crimes provisions, vested interpretive

223. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. (forthcoming 2008).

224. Cf. ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007); ERIC A. POSNER & ADRIAN VERMEULE, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003); see also ROBERT F. TURNER, *An Insider's Look at the War on Terrorism*, 93 CORNELL L. REV. 471 (2008) (favorably reviewing JOHN YOO, *WAR BY OTHER MEANS* (2006)). I disagree with Posner and Vermeule's thesis as well as the apologia it offers for the Bush administration lawyers. I cite their scholarship only to indicate that there is not universal consensus on the frivolity of the positions the government lawyers took.

225. These are not the only examples one could give. See PETER IRONS, *THE NEW DEAL LAWYERS* (1982) (discussing the role of lawyers in the Roosevelt administration in overcoming constitutional objections to the New Deal); *supra* note 141 (discussing Jackson and Taney's removal of government deposits from the Second National Bank).

authority over Geneva in the President, allowed coerced evidence to be admitted, gave the government the power to shut down revelation of exactly what techniques were used to obtain such coerced evidence, and defined criminally cruel treatment in a deeply convoluted way. For example, the bill distinguishes between “severe pain,” the hallmark of torture, and merely “serious” pain, the hallmark of cruel treatment short of torture—but it then defines “serious” pain as “extreme pain.”²²⁶

He concludes that “the torture lawyers helped to define a ‘new normal,’ without which the Military Commissions Act would not exist.”²²⁷ Congress also confirmed Attorney General Mukasey without winning his agreement that waterboarding constitutes torture,²²⁸ and, as of this writing, is on the verge of broadening domestic spying provisions of the Foreign Intelligence Surveillance Act and retroactively immunizing telecommunications companies who participated in the administration’s earlier, extralegal surveillance efforts.²²⁹

To be sure, not all extralegal projects “succeed”, and not all should.²³⁰ But if success brings with it the imprimatur of new law, and if failure has the effect of reaffirming the legitimacy of existing law, why not simply embrace political accountability and the subordination of independence it demands? We are all good realists now, aren’t we? However one would answer these questions, my point for present purposes is that the structure and history of the office of the Attorney General and the Department of Justice already provide powerful answers. If we value independence, if we want government lawyers to embody an ethic of responsibility, genuine independence requires structural support. And we would have to be willing to relinquish some of the flexibility for change—more baldly put, the room for lawlessness—which the current framework allows.

Specifying the structural changes that would enhance independence without compromising the positive aspects of political accountability is, of

226. LUBAN, *supra* note 47, at 204.

227. *Id.*; cf. Sanford Levinson, *In Quest of A “Common Conscience”: Reflections on the Current Debate About Torture*, 1 J. NAT’L SECURITY L. & POL’Y 231, 236-37 (2005) (noting that “[i]t is far too easy (and tempting) for liberal critics of the OLC memos to focus on John Yoo or Jay Bybee or Daniel Levin (the current head of OLC), rather than on, say, Senate Democrats who voted to support the relevant treaty conditions that have helped to cause so much consequent mischief”).

228. Dan Eggen & Paul Kane, *Senate Confirms Mukasey By 53-40*, WASH. POST, Nov. 9, 2007, at A1 (noting that Mukasey “repeatedly refuse[d] to classify waterboarding, a simulated-drowning technique, as torture”; also noting that he received less congressional support in the final vote than any Justice Department leader in the past half-century); Philip Shenon, *Attorney General Choice Treads Careful Line at Senate Hearing*, N.Y. TIMES, Oct. 18, 2007, at A1.

229. Eric Lichtblau, *Senate Passes Bill to Expand U.S. Spying Powers*, N.Y. TIMES, Feb. 12, 2008. The Supreme Court also now has before it a case regarding the rights of detainees at the Guantanamo Bay naval base to challenge their designation as enemy combatants. *Boumediene v. Bush*, No. 06-1195 (argued Dec. 5, 2007).

230. *Cf. supra* note 202 (discussing the Palmer raids and Watergate).

course, a surpassingly important question. A starting point would be to consider mechanisms for rendering the guidelines drafted by former Office of Legal Counsel lawyers enforceable.²³¹ Second, some things can be done to enhance accountability to Congress and the public. For instance, with respect to the advisory function of the Attorney General (now vested in the Office of Legal Counsel) formal opinions should be made public, subject to very narrow exceptions. As former Associate Justice Arthur Goldberg advised in the post-Watergate hearings in 1974, “[e]xcept in cases of genuine national security—strictly defined by law, not the amorphous state in which it now exists—virtually all the activities of the Justice Department, including advice to the president, should be made public.”²³²

Third, and relatedly, history and structure strongly suggest that that political accountability to the President is most likely to compromise professional independence in precisely those areas where secrecy and/or political disempowerment of affected groups forestall meaningful congressional oversight and public scrutiny. This is perhaps the central lesson of the Civil War and Reconstruction period with respect to the political accountability of government lawyers—wartime exigency and executive branch decisions regarding unpopular or disenfranchised minorities can combine in ways that distort both public deliberation and congressional oversight.²³³ The problem of transparency in national security matters is all the more acute today. Leaks to the media and post hoc congressional oversight are woefully inadequate substitutes for *ex ante*, structural guarantees of independence in the advisory function performed by the Office of Legal Counsel. This is an area where political accountability is likely to fail with sufficient regularity to warrant *ex ante* controls.²³⁴

231. See Walter E. Dellinger et al., *Principles to Guide the Office of Legal Counsel* (2004), reprinted in Johnsen, *supra* note 207, app. 2. There is nothing natural or inevitable about the current structure. The organization of the office in England, for example, provides other structural alternatives. See, e.g., J. EDWARDS, *THE LAW OFFICERS OF THE CROWN* (1964).

232. *Removing Politics*, *supra* note 3, at 61.

233. It is also the central lesson of Japanese internment during World War II. See PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE INTERNMENT CASES* (1993) (detailing the role of government lawyers).

234. See, e.g., David Johnston & Scott Shane, *Debate Erupts on Techniques Used by C.I.A.*, N.Y. TIMES, Oct. 5, 2007, at A1 (Senator John D. Rockefeller IV expressing exasperation that the oversight committee obtained more information from newspapers than from the Department of Justice on detention and torture policies); Adam Liptak, *U.S. Appeals Court Upholds Dismissal of Abuse Suit Against C.I.A., Saying Secrets Are at Risk*, N.Y. TIMES, Mar. 3, 2007, at A6 (describing dismissal of kidnapping and abuse suit against CIA on grounds that lawsuit would expose state secrets); see also *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), cert. denied, 128 S.Ct. 373 (2007); cf. David Johnston, *Bush Intervened in Dispute over N.S.A. Eavesdropping*, N.Y. TIMES, May 16, 2007, at A1 (discussing former Deputy Attorney General James Comey’s testimony before the Senate Judiciary Committee, revealing internal dissent over the administration’s violation of FISA).

Finally, and perhaps most importantly, a meaningful conversation about how to ensure professional independence must move beyond the falsely reassuring discourse of condemnation and confront our alternating desire for and hand-wringing about lawlessness and political accountability. The counternarrative to the civic republican view of lawyers as solemn guardians of the rule of law is the pragmatic concession that there is a tradition of lawlessness embedded, however controversially, in the framework of law itself.

