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# ETHICAL QUAGMIRES FOR GOVERNMENT LAWYERS: LESSONS FOR LEGAL EDUCATION

Susan Saab Fortney\*

## INTRODUCTION

Each presidential administration faces its own challenges related to the ethics of government officials and lawyers. What distinguished the Trump presidency was the steady stream of news reports relating to controversies involving government lawyers.<sup>1</sup> Starting in the first month of his term, President Trump gripped headlines with the firing of Acting Attorney General Sally Yates just hours after Yates defied President Trump by refusing to have the Justice Department defend President Trump's controversial executive order blocking people from seven Muslim-majority countries from entering the United States.<sup>2</sup> Following this firing, media stories exposed concerns related to the ethics of Executive Branch lawyers. Some of the controversies culminated in formal filings of ethics complaints

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1. "Since President Trump's inauguration, journalists and scholars have paid increased attention to government lawyers' conduct." Rebecca Roiphe, *A Typology of Department of Justice Department Lawyers' Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1079 (2020) (citations omitted).

2. Jordan Fabian, *Trump Fires Acting AG for Refusing to Defend Travel Ban*, HILL (Jan. 30, 2017), <https://thehill.com/homenews/administration/317018-trump-fires-acting-ag-for-refusing-to-defend-travel-ban> [<https://perma.cc/YH73-FVPZ>].

against lawyers working with the Trump administration.<sup>3</sup> Challenges questioning the ethics of high-level Executive Branch lawyers continued through the final days of the Trump presidency with multiple attacks on the post-election efforts of Trump's lawyers to overturn the results of the 2020 election.<sup>4</sup>

Those who view these events through a partisan lens may quickly jump to conclusions in defending or condemning the conduct of the lawyers involved in the controversies. A more neutral examination of the events reveals that ethical standards applicable to government lawyers are often thorny and debatable.

The firing of Acting Attorney General Yates illustrates the lack of consensus on the propriety of government lawyers' conduct. Some commentators commended Yates for taking a principled position.<sup>5</sup> Others, including ethics experts, suggested Yates's insubordination and handling of her opposition to the Executive Order justified her firing.<sup>6</sup>

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3. Notably, a complaint filed by twenty-seven distinguished District of Columbia attorneys, including former bar presidents and a former senior lawyer in the D.C. Bar disciplinary office, detailed a pattern of alleged ethical violations taken by Attorney General William Barr. Joseph Rich, *Insight: The Ethics Case Against Attorney General Barr*, BLOOMBERG L. (July 24, 2020, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-the-ethics-case-against-attorney-general-barr-7> [<https://perma.cc/G5HG-YD7N>]. The complaint alleges political interference in the Department of Justice's law enforcement decisions and violations of disciplinary rules prohibiting deceitful and dishonest conduct, interference with the administration of justice, conflicts of interest, and a failure to support the Constitution. *Id.* Subsequently, the D.C. Office of Disciplinary Counsel rejected the complaint, stating that they generally do not "intervene in matters that are currently and publicly being discussed in the national political arena." Jacqueline Thomsen, *An Ethics Complaint Against Attorney General Bill Barr Was Rejected, and It Has Lawyers Worried*, NAT'L. L.J. (June 9, 2021, 5:13 PM), <https://www.law.com/nationallawjournal/2021/06/09/an-ethics-complaint-against-bill-barr-was-rejected-and-it-has-lawyers-worried/?sreturn=20211113044739> [<https://perma.cc/7XUV-LRAH>].

4. For an overview of many of the sanctions and disciplinary actions against Trump-allied attorneys who sought to overturn the 2020 election, see John Kruzell, *Legal Experts Welcome Sanctions of Pro-Trump Lawyers, Say More Needed*, HILL (Aug. 28, 2021, 1:57 PM), <https://thehill.com/regulation/court-battles/569840-legal-experts-welcome-sanctions-of-pro-trump-lawyers-say-more-needed> [<https://perma.cc/M5HM-D73E>].

5. See, e.g., Barry J. Pollack, *Sally Yates and the Integrity of the Department of Justice*, CHAMPION, Mar. 2017, at 5, 6 (arguing that history will reflect that Sally Yates acted "admirably" by serving as the "guardian of the integrity of the Department of Justice," and not merely as a "loyal soldier whose job is to carry out any order as long as it is at least arguably legally defensible").

6. See, e.g., John McKay, *Trumpian Ethics and the Rule of Law*, 50 CREIGHTON L. REV. 781, 797-98 (2017) (asserting that Yates's dismissal was justified because stating opposition to the Executive Order was a political act and her duty was to advise the government on the law and not on immigration policy); see also W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 349-51 (2017) (asserting that Acting Attorney General Sally Yates "got wrong two important features of the role of government lawyers" in attacking the Muslim ban on the basis of justice, rather

Another ethics controversy involving a Trump administration lawyer revealed a split of opinion on the whether a lawyer serving in the White House should be disciplined for publicly making false claims. In a disciplinary complaint, fifteen legal ethics professors asserted that Kellyanne Conway, counselor to President Trump, violated District of Columbia professional conduct rules prohibiting dishonesty, fraud, deceit, and misrepresentation.<sup>7</sup> In response to the ethics filing, one legal ethics professor characterized the complaint as “dangerously misguided,” noting the complaint had the potential to set a terrible precedent in attempting to discipline an attorney for public speech unrelated to the practice of law.<sup>8</sup>

Similarly, commentators are split on whether lawyers representing Trump should be disciplined or sanctioned in connection with their statements and conduct associated with election challenges. While numerous ethics experts have called for discipline and sanctions of the

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than because it was unlawful, and in failing to respect the authority of client decisionmakers to choose between “competing visions of the public good”). For a case study of the different reactions to Yates’s conduct and excerpts from Yates’s letter refusing to defend the Executive Order and her explanation as to why she took such action, rather than resigning, see CATHERINE L. FISK & ANN SOUTHWORTH, WHAT LAWYERS DO: UNDERSTANDING THE MANY AMERICAN LEGAL PRACTICES 294–300 (2020).

7. Ellen Yaroshfsky, *Regulation of Lawyers in Government Beyond the Client Representation Role*, 33 NOTRE DAME J.L. ETHICS & PUB. POL’Y 151, 174 (2019) (reviewing the complaint and suggesting a new comment to Model Rule of Professional Conduct 8.4 to provide notice that the rule applies to lawyers’ conduct outside the traditional practice of law).

8. Stephen Lubet, *In Defense of Kellyanne Conway*, SLATE (Feb. 27, 2017, 9:22 AM), <https://slate.com/news-and-politics/2017/02/the-misconduct-complaint-against-kellyanne-conway-is-dangerously-misguided.html> [https://perma.cc/9EUJ-UUFM].

lawyers,<sup>9</sup> some caution against knee-jerk attempts to limit attorney speech protected by the First Amendment.<sup>10</sup>

These complaints and other controversies involving alleged misconduct by government lawyers reveal the range of ethical dilemmas that government lawyers encounter. A number of these matters also reflect the complexities related to the ethics of government lawyers. Daily, lawyers working at different levels of government must deal with a good deal of uncertainty in navigating an ethical course of conduct.

This Essay posits that legal educators can do more to empower government lawyers to deal with such ethics issues. To highlight key ethics questions government lawyers must address, Part I examines some of the most common and perplexing ethics issues that arise in government practice. Part II considers the role legal educators currently play in preparing government lawyers to handle these problems. In an effort to gauge how legal ethics professors approach issues related to government practice, Part

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9. In addition to complaints against private counsel who filed actions contesting the 2020 presidential results, complainants filed grievances against government or former government lawyers. For example, in October 2020, a group of prominent attorneys filed an ethics complaint against Jeffrey Bossert Clark, a former top Justice official under investigation for allegedly plotting to help former President Donald Trump overturn the 2020 presidential election. Sarah N. Lynch, *Attorneys File Ethics Complaint Against Ex-Justice Official Over Plot to Help Trump*, U.S. NEWS & WORLD REP. (Oct. 5, 2021), <https://www.usnews.com/news/top-news/articles/2021-10-05/attorneys-file-ethics-complaint-against-ex-justice-official-over-plot-to-help-trump> [<https://perma.cc/4WKS-LYUN>]. The complaint, signed by a number of prominent attorneys, legal ethics professors, and former law deans, alleged that Clark's conduct violated the District of Columbia disciplinary rule that prohibits fraudulent and deceitful conduct, as well as conduct that interferes with the administration of justice. A copy of the complaint against Clark is available on the website of the advocacy group, Lawyers Defending American Democracy. See Ethics Complaint from Donald Ayer, Adjunct Professor, Georgetown Law School, et al., to Hamilton P. Fox III, District of Columbia Office of Disciplinary Counsel (Oct. 5, 2021), <https://ldad.org/wp-content/uploads/2021/10/DC-Ethics-Complaint-Against-Jeffrey-Clark.pdf> (on file with Lawyers Defending American Democracy). Lawyers Defending American Democracy also filed a complaint against Texas Attorney General Kenneth Paxton. The complaint alleges ethics violations in connection with Attorney General Paxton filing a frivolous action in the U.S. Supreme Court to overturn the 2020 election results in four states and violating his lawyers' oath to support the Constitution. Tony Gutierrez, *Texas Bar Agrees to Pursue Ethics Complaint against AG Paxton*, LAWS. DEFENDING AM. DEMOCRACY (Aug. 30, 2021), <https://ldad.org/letters-briefs/cdc-responds-to-ethics-complaint> [<https://perma.cc/EKN9-QCT6>].

10. See, e.g., Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies they Tell*, 69 WASH. U. J.L. & POL'Y 37, 51-54 (2022) (concluding that lawyers should not be sanctioned for false statements about the government unless the lies interfere with an adjudicative proceeding, obstruct justice, harm a client, or otherwise demonstrate that the lawyer is unfit to practice). For a thoughtful analysis of attorney's First Amendment rights as a defense to sanctions and discipline, see Margaret Tarkington, *The Role of Attorney Speech and Advocacy in the Subversion and Protection of Constitutional Governance*, 69 WASH. U. J.L. & POL'Y 287 (2022).

II reports on the results of a survey. Drawing on the findings of the study, Part III discusses the reasons why law professors should devote more time and attention to ethics issues in government practice.

The conclusion notes that controversies involving both Republican and Democratic presidential administrations have helped shape legal ethics. One clear lesson that emerged from the steady barrage of ethics problems that arose during the Trump Presidency is that government lawyers often face a wide variety of professional responsibility dilemmas. Rather than simply criticizing the lawyers involved in those controversies, the conclusion suggests a positive outcome of the Trump era is for legal educators to take seriously ethics issues encountered by government lawyers.<sup>11</sup> By doing so, legal ethics professors discharge their own professional responsibility to their students and future public servants.

#### I. UNCERTAINTY AND THORNY ETHICS ISSUES COMMONLY ENCOUNTERED BY GOVERNMENT LAWYERS

Numerous professional responsibility scholars have recognized that government lawyering can be demanding and difficult.<sup>12</sup> As described by one, “Government lawyers must navigate across a sea of conflicting loyalties, ambiguous objectives, and ethical pressures.”<sup>13</sup> Dealing with such issues is particularly challenging when the ethics rules leave lawyers in limbo by not prescribing a clear course of conduct.<sup>14</sup> As described by Professor Catherine J. Lanctot, a legal ethics professor and former Department of Justice attorney, “The already difficult balance of competing duties and loyalties that every lawyer faces is compounded by the

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11. In this essay, the term “government lawyers” refers to lawyers employed by or retained by federal, state, or local governments; agencies; or authorities.

12. See, e.g., FISK & SOUTHWORTH, *supra* note 6, at 275 (noting that at the federal and state level, “the government lawyer typically operates in a complex environment in which separation of powers principles coexist with hierarchy within the legislative and executive branches” and that the “challenges are compounded for local government lawyers who represent multiple agencies and officials within the municipal entity simultaneously”).

13. Randy Lee, *Introduction: Symposium on Legal Ethics for Government Lawyers: Straight Talk for Tough Times*, 9 WIDENER J. PUB. L. 199, 200 (2000).

14. “Government attorneys are often compelled to operate in clouds of uncertainty because the ethical rules fail to relate professional ethical responsibilities to the substantive law related to governmental operations.” Maureen A. Sanders, *Government Attorneys and the Ethical Rules: Good Souls in Limbo*, 7 B.Y.U. J. PUB. L. 39, 39 (1992).

ambiguities inherent in the government lawyer's role."<sup>15</sup> To address such uncertainty, a number of experts have recommended rule and even legislative changes to guide government lawyers.<sup>16</sup>

Although a thorough examination of the professional responsibility of government lawyers is beyond the scope of this Essay, the following discussion identifies some key ethics questions government lawyers commonly encounter. The purpose of this overview is to demonstrate why topics related to government lawyer ethics deserve more attention in our teaching, research, and scholarship.

In government law practice, the threshold ethics question is: "who is the client?" This issue must be addressed whether the lawyer is working in the highest level of the federal executive branch or as a local lawyer representing a municipality.<sup>17</sup>

Applicable ethics rules and other authority provide limited guidance.<sup>18</sup> Consider the provisions of ABA Model Rule of Professional Responsibility 1.13, a rule stating an attorney for an entity represents the organization acting through its duly authorized constituents.<sup>19</sup> Comment 9 following Rule 1.13 notes the duty defined in Rule 1.13 applies to governmental organizations, but includes the following caveat:

Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and the matter is beyond the scope of the Rules. . . . Although in some circumstances

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15. Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 967 (1991).

16. See, e.g., Jacob I. Davis, *Nixon, Trump, and the Doom of Repeating History*, 33 GEO. J. LEGAL ETHICS 443, 458 (2020) (suggesting there needs to be a "clearer picture of exactly what the attorney's job is and what [the attorney] can do for the client").

17. Jamila Jefferson Jones, *Advising the Smart City: When Artificial Intelligence and Big Data Are the Subject of Professional Advice, What Is a Local Government Lawyer to Do*, 50 U. TOLEDO. L. REV. 447, 449–50 (2019) (discussing how the client identification will guide many of the actions made and decisions taken by local government lawyers).

18. Professional conduct standards offer "surprisingly little guidance for lawyers who advise the government on legal issues." 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 (2005).

19. Unless a lawyer has also formed a lawyer-client relationship with a constituent, Rule 1.13 clarifies that "a lawyer employed or retained by an organization represents the organization itself, not the individual constituents who act for it." ANN. MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2019).

the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.<sup>20</sup>

The Restatement of Law Governing Lawyers also equivocates in noting that “no universal definition of client of a governmental lawyer is possible.”<sup>21</sup> Rather, the Restatement appears to adopt more of a structural or functional approach in suggesting the determination of what individual or individuals personify the government requires reference to various factors such as the particular structure of the governmental authority and the purpose for which the identity question is posed.<sup>22</sup>

The identity of the government lawyer’s client has long been confusing and controversial.<sup>23</sup> John W. Dean III, President Richard M. Nixon’s former White House Counsel, identifies “confusion about the identity of the client” as one of the reasons why lawyers broke the law in connection with the Watergate scandal.<sup>24</sup>

In a 1991 article, Professor Roger C. Cramton proposed five possible identities for the client of a government lawyer: (1) the public, (2) the government as a whole, (3) the branch of government in which the lawyer is employed, (4) the particular agency or department in which the lawyer works, and (5) the responsible officers who make decisions for the agency.<sup>25</sup> Over the years, the dispute has largely been between those who maintain that the lawyer’s loyalty is to serve the “public interest” or the government as a whole, and a more restricted vision of the government lawyer as an employee of a particular agency.<sup>26</sup> Some commentators continue to push the “public interest” approach despite the problematic application, including

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20. MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 9 (AM. BAR ASS’N 2021).

21. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97, cmt. c (AM. L. INST. 2000).

22. *Id.* For a discussion of the contextual approach with examples, see Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U.L. REV. 1033, 1056–62 (2007) [hereinafter “*Government Lawyers*”].

23. Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1409 (citing an article that describes the issue of client identity as one that has “vexed decision-makers and commentators for many years”).

24. John W. Dean & James Robenalt, *The Legacy of Watergate*, 38 LITIG. 19, 23 (2012).

25. Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991).

26. *Id.* (referring to “scattering of support” for the other possibilities).



shifting to lawyers the power to make decisions about what is in the public interest.<sup>27</sup>

The lack of clarity on the identity of a government lawyer's client complicates other ethics questions, including those related to loyalty, conflicts of interest, and confidentiality.<sup>28</sup> For example, if the government lawyer represents the agency, then the attorney may have the duty to go up the organizational hierarchy when a constituent is acting or refusing to act in a manner that is a violation of the legal obligation to the organization.<sup>29</sup> On the other hand, if the government lawyer's client is the entire government, then arguably the attorney may reveal information outside the lawyer's agency or branch of government.<sup>30</sup>

Similarly, government lawyers face ambiguity when considering whether whistleblowing laws supersede their confidentiality obligations.<sup>31</sup> As noted by Professor Brad Wendel in his thoughtful examination of lawyers' confidentiality duties and whistleblower protections, lawyer whistleblowing raises "difficult, technical questions, the resolution of which is not as simple as asserting the priority of one duty over the other."<sup>32</sup>

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27. Wendel, *supra* note 6, at 303–04 (explaining that the "lawyer's belief about the content of the public interest is just that: a belief"). In a more recent essay, Professor Wendel examines different conceptions of legal ethics and four alternatives for how government lawyers may take account of the good of the community. W. Bradley Wendel, *Pluralism, Polarization, and the Common Good: The Possibility of Modus Vivendi Legal Ethics*, 131 YALE L.J.F. (2021).

28. "[L]awyers should ask the client identification question because they are interested in determining what obligations they owe." Wendel, *supra* note 6, at 302.

29. *Government Lawyers*, *supra* note 22, at 1043 (applying provisions of ABA Model Rule 1.13).

30. *Id.* at 1053.

31. In explaining that it is unclear as to whether whistleblower protection laws supersede government lawyers' confidentiality obligations, one author describes the tension as follows:

Government lawyers frequently work in nontraditional roles that make them different from private lawyers. At the same time, the force of legal ethical responsibility still applies to them, distinguishing them from other government employees. The result is that government lawyers fit uncomfortably in a grey area between the legal frameworks that enable lawyers and government employees to make unauthorized disclosures in the interest of uncovering misconduct. Specifically, even though government employees are protected by whistleblower protection laws, it is unclear whether these laws supersede government lawyers' confidentiality obligation.

Mika C. Morse, Note, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 GEO. J. LEGAL ETHICS 421, 439 (2010) (citations omitted). To address the conflict, the author proposes a new regime for handling national security whistleblowing. *Id.* at 444–50.

32. Wendel, *supra* note 6, at 321.

The identity of the government lawyer's client also relates to the professional obligation to act with independence. Questions exist as to whether independence requires that government lawyers, other than prosecutors, should have a broad conception of the public interest and obligation to do justice.<sup>33</sup> A related concern is whether the lawyer's duty to the public requires, rather than permits, disclosure of past, ongoing, or imminent wrongdoing within the government agency. After a thorough discussion of insights drawn from New York State Judicial Institute on Professionalism in the Law hearings on independence in four practice settings, Professor Milton C. Regan, Jr. concludes by stating, "Ultimately, government lawyers exist in a state of some uncertainty as to what degree of independence their position may permit."<sup>34</sup>

The discussion above identifies just a few of the perplexing ethical issues that arise in government law practice. Do government lawyers have the training and resources to deal with ethical challenges that arise in their work? Part II considers whether law schools prepare graduates for ethics issues they will encounter in government practice.

## II. THE ROLE THAT LEGAL EDUCATORS PLAY IN PROVIDING GUIDANCE TO GOVERNMENT LAWYERS

When given the opportunity to contribute to the symposium titled *Trump Administration: Lessons and Legacy*, I reflected on my own reactions to the various events that unfolded since President Trump's election. As with other news coverage involving the legal profession, I considered the legal ethics questions and wondered how my students and former students would evaluate the ethics issues.<sup>35</sup>

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33. Milton C. Regan, Jr, Zachary B. Hutchinson & Juliet R. Aiken, *Lawyer Independence in Context: Lessons from Four Practice Settings*, 29 GEO. J. LEGAL ETHICS 153, 192–93 (2016). For the seminal article persuasively advocating that civil government litigators must seek justice, see Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation*, 9 WIDENER J. PUB. L. 235, 279–80 (2000).

34. Regan, Hutchinson & Aiken, *supra* note 33, at 202. From 2009–2011, the New York State Judicial Institute on Professionalism in the Law conducted hearings that featured discussions by lawyers in solo and small firms, law firm general counsel, in-house corporate counsel, and government lawyers. *Id.* at 153.

35. When teaching, I do not seek to provide all the answers, but attempt to guide students in developing the skills of ethical decision making which include knowing what questions to ask and applying fundamental principles.

In considering issues that captured headlines during the Trump Administration, I immediately recognized my own coverage of ethics questions encountered by government lawyers, other than prosecutors, was woefully inadequate. Ironically, I served as an attorney with the U.S. Securities and Exchange Commission. If a professor who was a former public servant was not devoting much attention to ethics of government lawyers, I wondered about approaches used by other law professors.

Reflecting on my own teaching inspired me to seek information from other professional responsibility teachers. To obtain data in a systematic manner, I surveyed law professors who teach legal ethics courses.<sup>36</sup> The short online questionnaire consisted of eleven questions, including ones related to background information and coverage of ethics topics in the respondents' courses.<sup>37</sup>

Sixty-five professors responded to the questionnaire.<sup>38</sup> I do not attempt to generalize from the results, although these responses likely represent responses from professors who teach at a large percentage of the 199 ABA-accredited law schools.<sup>39</sup> Rather, the survey responses provide a window into the experiences of those who responded and a springboard for discussing why all professional responsibility professors may rethink how they approach issues related to government service.

Among the respondents, 89% reported they were full-time faculty members, 8% indicated they were adjunct law professors, and 3% checked

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36. The Institutional Review Board at Texas A&M University approved the survey instrument that was distributed with a recruitment email circulated through the email Discussion List for members of the Section of Professional Responsibility (PR Section) of the Association of American Law Schools. Using the PR Section list to solicit responses aligns with the purpose of the section. As described on the PR Section webpage, the Section promotes the communication of ideas, interests, and activities among members, provides support for pedagogical and scholarly endeavors, and facilitates dialogue on matters of interest in the teaching and improvement of the law relating to the legal profession and issues of professional responsibility. *Section on Professional Responsibility*, AALS, <https://www.aals.org/sections/list/professional-responsibility/> [https://perma.cc/7P7F-XFJT]. The recruitment email was sent on October 2, 2021, and follow-up requests were sent, with the last one adding an incentive for persons who wanted to participate in a drawing for an Amazon gift card. The response deadline was December 15, 2021.

37. The survey results [hereinafter "Law Professor Survey"] are on file with the author.

38. Most completed all of the questions on the instrument. *Id.*

39. For a listing of ABA-accredited schools broken down by private and public institutions, see *ABA Approved Schools, A.B.A.*, [https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/) (last visited May 12, 2022).

“other.”<sup>40</sup> The vast majority of the respondents (95%) reported teaching Professional Responsibility during the last five years.<sup>41</sup> The respondents largely represented a seasoned group of professors, with the majority (53%) indicating that they had taught Professional Responsibility for over ten years and 26% reporting teaching Professional Responsibility four to ten years.<sup>42</sup>

To learn about professors’ coverage of specific ethics issues arising in government practice, the survey first posed a general question, asking respondents to indicate how much time they devoted to examining the representation of organizations and ABA Model Rule 1.13.<sup>43</sup> A slight majority (52%) indicated they devote one to two hours to examining the representation of organizations, and 31% reported devoting more than two hours.<sup>44</sup> It is somewhat surprising that 17% indicated they spent less than one hour on the topic given that the representation of organizations cuts across many practice areas.<sup>45</sup>

More surprising was the percentage of respondents (12%) who indicated they devoted zero course time to examining ABA Model Rule 1.13 and the role/responsibilities of government lawyers.<sup>46</sup> The largest percentage (60%) reported they spent less than one hour on the subject.

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40. Law Professor Survey, *supra* note 37, at Question 4. The percentage of respondents who teach as adjunct professors may underrepresent the percentage of Professional Responsibility courses taught by adjuncts. This may be because many adjunct professors may not be members of the AALS PR Section. In law teaching, it is common for adjuncts to teach professional responsibility. See Susan Koniak & Roger Cramton, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 45 WM. & MARY L. REV. 147, 147 (1996) (noting that the course is often taught by adjuncts or by a rotating group of faculty conscripts).

41. Law Professor Survey, *supra* note 37, at Question 5. Instructions to the survey noted that the survey used the term “Professional Responsibility” to refer to any course that covers the law of lawyering. *Id.* at Question 3.

42. Less than 21% noted that they had taught Professional Responsibility less than four years. *Id.* at Question 6.

43. *Id.* at Question 7.

44. *Id.*

45. *Id.* In first proposing the ABA Model Rules of Professional Conduct, the Kutak Commission made a major contribution in recommending the adoption of Model Rule 1.13 to specifically cover an attorney’s obligations to organizational clients. See Arnold Rochvarg, *Enron, Watergate and the Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 68 (2003) (referring to the adoption of Model Rule 1.13 as a “significant step in the regulation of the legal profession”).

46. Law Professor Survey, *supra* note 37, at Question 8. A cross tabulation revealed an association between the respondent having worked as a government lawyer and responses on time devoted to Rule 1.13 and government service.

Twenty-eight percent devoted one hour or more to covering Model Rule 1.13 and the role/responsibilities of government lawyers.<sup>47</sup>

More generally, a question asked respondents to indicate approximately how much of their Professional Responsibility teaching time was devoted to the role and ethics of government lawyers, excluding the study and discussion of prosecution ethics. Despite the large percentage of recent graduates who obtain government law jobs, slightly over half of the respondents (53%) reported devoting less than an hour to the topic, and 9% reported devoting zero time to the topic.<sup>48</sup>

Question 10 asked respondents to indicate whether their Professional Responsibility course covered specific topics related to government law practice. The following table summarizes the survey results.

*Percentages of Respondents Who Cover Topics  
Related to Ethics in Government Law Practice*

Topics	Percentages
The identity of a government lawyer's client	15%
Ethical dilemmas encountered by government lawyers	15%
The ethical responsibilities of a government lawyer	14%
How Rule 1.13 applies to duties and conduct of government lawyers	12%
The relationship between the government lawyer and the client	12%
Confidentiality and the government lawyer	10%
Independence and the government lawyer	8%
Whistleblowing and the government lawyer	8%
Steps that a government lawyer should take to protect the best interest of the client	5%

These results reveal that the largest percentage of respondents (15%) covered the identity of a government lawyer's client. Given that a threshold

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47. Of the 28%, 26% reported spending one to two hours and 2% indicated that they spent more than two hours on the topic. *Id.*

48. *Id.* at Question 9. Twenty-three percent indicated that they devoted one to two hours to examining the role and ethics of government lawyer, excluding the study/discussion of prosecutors' duties. *Id.* Sixteen percent revealed more attention to the subject, reporting that they devote more than two hours to the examination. *Id.*

issue in government representation is client identity, it is noteworthy that 85% of respondents do not cover the identity issue at all.

Fifteen percent of respondents reported that they covered the ethical dilemmas encountered by government lawyers. More generally, 14% indicated that they cover the “ethical responsibilities of a government lawyer.”<sup>49</sup>

One would assume the percentages of professors covering the various government practice topics identified in the table would have been larger, given the importance of the topics and the fact that 45% of the respondents reported that they had previously worked as a government lawyer.<sup>50</sup> There is also a possibility of non-response bias in that the persons who completed the survey were more interested in the topic of government service and willing to devote time to answering the questionnaire. If that is the case, the results may reflect more attention to government practice issues than that devoted by the general population of professional responsibility professors.<sup>51</sup>

Noteworthy is the number of respondents who reported on the impact of events during the Trump Administration.<sup>52</sup> The majority (67%) indicated events during the Trump Administration affected their perspectives on the duties or role of government lawyers.<sup>53</sup>

The events during the Trump Administration also appeared to impact the majority of the respondents’ teaching or research. Sixty-six percent of professor-respondents reported the events during the Trump Administration affected their teaching or research.<sup>54</sup> In text comments, professors noted the events provided the basis for class discussion of current issues, including

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49. *Id.* at Question 10.

50. *Id.* at Question 14. The survey did not define government service. Therefore, respondents who served as judicial law clerks may have reported they had worked as government lawyers. More generally, 88% of respondents indicated that they practiced law before commencing their teaching careers. *Id.* at Question 13.

51. Because the survey instrument was limited to eleven questions, it is doubtful that professors’ perspectives on government practice played much of a role in whether professors completed the questionnaire.

52. The survey asked, “Did events during the Trump Administration affect your perspective on the duties or role of government lawyers.” *Id.* at Question 11.

53. When asked to describe the effects on perspectives, one respondent stated, “Rule of law and protecting democracy came to the top as practical concerns, not just big ideas in the background.” Another noted, “I definitely brought in current events to class to discuss.” A third professor indicated that the events did not change perspectives, but “it certainly added meat to the bones.” *Id.*

specific controversies such as the ethics issues that arose in the election contests.<sup>55</sup> One respondent stated, “I am drawing more from the preamble and scope about the lawyer’s role model in protecting rule of law and the integrity of the judicial institution.”<sup>56</sup> This type of course coverage may counter a concern expressed in an newspaper opinion piece published after the 2020 presidential election. The author, Professor Shawn Field, commenting on “Trump’s brazen attacks on democratic institutions,” stated, “I worry about the lasting damage to the rule of law, and more specifically, to those future lawyers I teach charged with promoting and protecting the rule of law. At the very least, the events . . . have provided a teaching moment on what not to do as an ethical lawyer.”<sup>57</sup> This observation points to the value of legal ethics instruction tackling big picture questions related to lawyers’ roles in society.

Interestingly, a few text comments provided by respondents communicated that the process of completing the survey opened professors’ eyes about the importance of devoting more attention to ethics issues related to government practice. As stated in one text comment, “This makes me realize I need to teach these concepts.”<sup>58</sup>

For the reasons discussed in Part III, I share the sentiment that ethics issues involving government law practice merit far more attention in professional responsibility instruction. In the future, I intend to focus more on ethics issues encountered by government lawyers.<sup>59</sup> Such a move aligns with efforts to provide students with more systematic education about the types of work lawyers perform, their organizations of practice, and values that prevail in different practice settings.<sup>60</sup>

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55. *Id.*

56. *Id.*

57. Shawn E. Field, *NC Professor: A Lawyer’s Ethical Duty in the Trump Era*, CHARLOTTE OBSERVER (Nov. 22, 2020), <https://www.charlotteobserver.com/opinion/article247317484.html>.

58. Law Professor Survey, *supra* note 37, at Question 17.

59. In discussing lessons from Watergate, John W. Dean, III and Egil Krogh, two attorneys involved in the Watergate scandal, suggested that legal ethics training “needs to better examine the external threats to a lawyer’s integrity, such as pressure for results, a conformist mindset and the demand for secrecy—all of which were part of the pressure facing the lawyers in the Nixon White House.” Mark Curriden, *The Lawyers of Watergate: How a “3rd-Rate Burglary” Provoked New Standards for Lawyer Ethics*, A.B.A. J. (June 1, 2012), [https://www.abajournal.com/magazine/article/the\\_lawyers\\_of\\_watergate\\_how\\_a\\_3rd-rate\\_burglary\\_provoked\\_new\\_standards](https://www.abajournal.com/magazine/article/the_lawyers_of_watergate_how_a_3rd-rate_burglary_provoked_new_standards) [<https://perma.cc/8KFK-CAGJ>].

60. Ann Southworth, *Our Fragmented Profession*, 30 GEO. J. LEGAL ETHICS 431, 446 (2017). “Some law schools have begun to embrace the idea that ethics training works best when enmeshed in

### III. RETHINKING LEGAL ETHICS INSTRUCTION RELATED TO GOVERNMENT SERVICE

Although there are many justifications for devoting more attention to ethics issues involved in government practice, the following describes the top reasons why law school professors should seriously consider incorporating more study of government lawyer ethics. Law school courses in subjects such as Administrative Law and Legislation, as well as Professional Responsibility courses, should explore lawyers' roles as public servant.<sup>61</sup> Most notably, government lawyers play an important role in protecting the legality of government processes and the rule of law. As described by Robert H. Jackson in remarks made when he was Attorney General for the U.S., "Fundamental things in our American way of life depend on the intellectual integrity, courage and daring thinking of our government lawyers. Rights, privileges and immunities of our citizens have only that life which is given to them by those who sit in positions of authority."<sup>62</sup> Government lawyers working on the local, state, federal, and international levels wield an incredible amount of influence. Their decisions impact not only the government, but the public at large. In tackling often challenging situations, these government servants clearly would benefit from more law school consideration of the ethics concerns of government lawyers.

The large percentage of law school graduates pursuing government jobs provides a second reason for legal educators to devote more attention to ethics issues encountered by government lawyers. Consistently, large percentages of graduating law students report employment in the government sector. According to information compiled from required disclosures by ABA-accredited schools, the percentages of law graduates reporting government employment from 2018 – 2020 range from a low of

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the study of the practice setting in which lawyers work and the incentives lawyers face in today's complex, diverse, and changing profession." *Id.* at 443.

61. See Donald T. Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 271 (1975) (suggesting that recognizing and studying lawyers' roles in law school can lead to government reforms to guard against future Watergates).

62. Robert H. Jackson, *Government Counsel and Their Opportunity*, 26 A.B.A. J. 411, 412 (1940) (address delivered at the Twentieth Anniversary Dinner of the Federal Bar Association on Jan. 20, 1940).



10.2% (for the class of 2020) to 12.1% (for the class of 2018), not including graduates pursuing clerkships.<sup>63</sup>

In addition to the significant percentage of recent graduates who pursue government jobs, a large percentage of the legal profession report employment in the government sector. According to a U.S. Bureau of Labor Statistics report for 2020, 18% of lawyers—144,756 individual lawyers—report employment in federal, state and local government positions, excluding education and hospitals.<sup>64</sup>

The nature of government lawyers' work can vary a great deal depending on the level and branch of government and position held by the attorney. Many lawyers act in representational capacities, while others find themselves in more regulatory and adjudicative roles. In serving in these positions, government lawyers often handle complex questions in which their ethical responsibilities are uncertain. Depending on the size and nature of the government office, the lawyers may not have internal ethics specialists to provide guidance.<sup>65</sup>

Once government lawyers are in practice, the continuing legal education programs (CLEs) they attend may not include programming that addresses relevant ethics problems encountered by government lawyers. Rather, they may attend CLEs relating to the subject matter of their work. For example, securities regulators may attend a CLE on securities law,

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63. For the annual percentages of employment outcomes, see A.B.A. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, EMPLOYMENT OUTCOMES (Apr. 2021), [https://www.americanbar.org/groups/legal\\_education/resources/statistics/](https://www.americanbar.org/groups/legal_education/resources/statistics/). The ABA statistics represent a national compilation of information that individual ABA-accredited law schools must annually report to the ABA. A report by the National Association of Law Placement provides comparable percentages. See NALP, CLASS OF 2020 NATIONAL SUMMARY REPORT (Aug. 2021), [https://www.nalp.org/uploads/NationalSummaryReport\\_Classof2020.pdf](https://www.nalp.org/uploads/NationalSummaryReport_Classof2020.pdf) (indicated that 11.5% of the Class of 2020 obtained government employment after graduation).

64. U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK: WORK ENVIRONMENT (Sept. 8, 2021), <https://www.bls.gov/ooh/legal/lawyers.htm#tab-3> [<https://perma.cc/525G-PZP6>]. The 18% of all lawyers breaks down as follows: 5% in federal government, 6% in state government, and 7% in local government, with the state and local percentages excluding lawyers in education and hospital positions. *Id.*

65. Large agencies and departments may have offices and personnel responsible for assisting with ethics issues. For example, the Office of Professional Responsibility (OPR) at the Department of Justice “was established in 1975 in response to professional misconduct associated with Watergate.” UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, <https://www.justice.gov/opr> [<https://perma.cc/B2QS-D828>]. The primary mission of the OPR is “to ensure that Department attorneys perform their duties in accordance with the high professional standards expected of the nation’s principal law enforcement agency.” *Id.*

rather than a CLE that would include an ethics session related to government lawyering. Clearly, these government lawyers would benefit from having had more exposure in law school to ethics issues related to their sector of practice. This, at a minimum, would have prepared them to know what questions to ask and where to go for answers. Such exposure in law school should provide government lawyers with a foundation for developing research strategies for tackling ethics issues that may turn on the complexities of state and local law.

More law school attention to government lawyers may contribute to additional scholars studying and writing about the ethics in government law practice. This could also lead to more coverage in professional responsibility textbooks. Often, commentary and problems in textbooks dictates what professors cover in class. Currently, some of the most widely used professional responsibility texts include limited discussion of the government lawyer ethics, excluding coverage of prosecutors' ethics.<sup>66</sup> More professors writing about and discussing government lawyers' ethics may lead to additional treatment of the topic in textbooks and secondary treatises.

Study, commentary, and publications, such as the articles in this symposium, may further discourse and debate related to government lawyer ethics.<sup>67</sup> By way of example, at the beginning of the Trump presidency, Professor Brad Wendel wrote an in-depth article examining contested law

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66. In contrast to the majority of professional responsibilities textbooks, a textbook authored by Catherine Fisk and Ann Southworth devotes an entire chapter to government lawyers. In twenty-five pages, they examine some of the most important concerns of government lawyers, including questions of who the client is and how government lawyers approach their counseling duties. FISK & SOUTHWORTH, *supra* note 6, at 275–300; *see also* DEBORAH L. RHODE ET AL., LEGAL ETHICS 668–82 (8th ed. 2020) (discussing the “ethical terrain of government lawyering”); HAZARD ET AL., THE LAW AND ETHICS OF LAWYERING 688–707 (6th ed. 2017) (examining issues that arise in government practice, including the identity of the client).

67. In addition to this symposium, called *After the Trump Administration: Lessons and Legacy for the Legal Profession*, at least two other law review symposia focused on the ethics of government lawyers: *see* Michael J. Gerhardt, *Introduction: Legal Ethics in the Age of Trump*, 98 N.C. LAW REV. 1029 (2020); Bruce A. Green, *Lawyers in Government Service—A Forward, The Varied Roles, Regulation, and Professional Responsibilities of Government Lawyers*, 87 FORDHAM L. REV. 1791 (2019). The Georgetown Journal of Legal Ethics also organized an April 21, 2021, panel discussion, *Complicity and Other Evils*, discussing whether government lawyers should stay or leave during an unethical regime. *Complicity and Other Evils*, GEO. J. LEGAL ETHICS (Apr. 21, 2021), <https://www.law.georgetown.edu/legal-ethics-journal/news/panel-discussion-complicity-and-lesser-evils/> [https://perma.cc/5EAC-CCCP].

of lawyering issues related to government law practice.<sup>68</sup> Such thoughtful analyses provide guidance to both lawyers and legal profession regulators.<sup>69</sup> More scholarship may also lead to ethics rule changes related to government practice.<sup>70</sup>

Finally, more attention will help elevate the prestige of government practice and support those students interested in public service positions. This will help counter the dominant narrative and dynamics in law school that often socialize students to equate success with monetary awards and positions in the private sector.<sup>71</sup> The study of government lawyering may contribute to more qualified lawyers pursuing and remaining in public service positions.

### CONCLUSION

Developments arising out of scandals in both Democratic and Republican presidential administrations have directly impacted legal ethics and the law of lawyering. In connection with the investigation of activities connected to the death of Vince Foster, the Deputy White House Counsel and personal friend of President Bill Clinton and First Lady Hillary Rodham Clinton, Independent Counsel Kenneth Starr sought to enforce a grand jury subpoena instructing attorney James Hamilton to produce his handwritten notes of Hamilton's meeting with Vince Foster, following Mr. Foster's

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68. Wendel, *supra* note 6.

69. *Id.* at 274 (suggesting that the article may "serve as a source of guidance for lawyers in the new administration, or as a roadmap for discipline by lawyer regulators").

70. See, e.g., Yaroshefsky, *supra* note 7, at 173–75 (proposing a comment be added to ABA Model Rule of Professional Conduct 8.4 to provide notice to government lawyers that the rule's prohibition on misrepresentation applies to conduct outside of the traditional practice of law); see also Sanders, *supra* note 14, at 72–78 (identifying specific amendments to ABA Model Rules of Professional Conduct 1.6, 1.7 and 1.13) and Tarkington, *supra* note 10, at XX (recommending a number of Model Rule amendments, including ones to clarify the duties of attorneys advising government officials and government attorneys' confidentiality and reporting obligations).

71. See Laura M. Schacter, *Making It and Breaking It: The Fate of Public Interest Commitment During Law School*, 88 MICH. L. REV. 1874, 1877–79 (1990) (reviewing Robert V. Stoner's book based on an empirical study of law students at the University of Denver College of Law and the shift in student interest from public to private sector jobs). Based on his study, Professor Stoner suggested that students need to immerse themselves in some sort of public-interest oriented culture during law school to retain their commitment to public interest law. *Id.* at 1879. Although the Stoner study focused on students expressing interest in public interest work, Professor Stoner's observations about the dominant attitude in law school that values corporate jobs more than public sector ones and law school culture also apply to perspectives on government practice.

death. In *Swidler & Berlin v. U.S.*, the U.S. Supreme Court sustained a motion to quash the subpoena, holding that the common law attorney-client privilege survives the death of the client.<sup>72</sup>

More notably, legal ethics instruction in law school and the legal profession's emphasis on legal ethics has been recognized as a legacy of Watergate.<sup>73</sup> Following the indictment of twenty-one lawyers accused of wrongdoing in the Watergate scandal, the American Bar Association adopted a standard requiring ABA accredited law schools to provide legal ethics instruction.<sup>74</sup>

Fifty years after the Watergate break-in, controversies in the Trump Administration highlighted a number of legal ethics issues that merit serious examination.<sup>75</sup> As discussed above, government lawyers must deal with ambiguities and complexities related to identifying the client and fulfilling basic professional responsibility duties, such as those requiring government lawyers to preserve confidences, to act independently and loyally on behalf of clients, and to avoid conflicts of interest.

Unfortunately, many lawyers enter government employment unprepared to deal with legal ethics challenges that they will encounter.<sup>76</sup>

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72. 524 U.S. 399, 401 (1998). For a fascinating discussion of how the Court's decision in *Swidler & Berlin*, "along with other extremely important public battles over government officials' claims of executive and attorney-client privilege, and the related events surrounding President Clinton's impeachment . . . symbolically frame a transition from a post-Watergate era" to a post-Clinton era in which the "dominant legal ethics themes and expectations underlying lawyering are fierce loyalty to the client, confidentiality, privilege, and aggressive advocacy—even at the expense of the truth," see Michael Stokes Paulsen, *The Independent Counsel Investigation, the Impeachment Proceedings and President Clinton's Defense: Inquiries into the Role and Responsibilities of Lawyers*, Symposium, *Dead Man's Privilege: Vince Foster and the Demise of Legal Ethics*, 68 *FORDHAM L. REV.* 807, 811–12 (1999).

73. See Dean & Robenalt, *supra* note 24, at 19 (stating that the "legal profession's emphasis on ethics has grown and expanded since Watergate").

74. Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 *HASTINGS L.J.* 673, 673 (2000).

75. See Davis, *supra* note 16, at 443 (referring to constant criticism of the many conflicts of interest and ethical issues raised by the Trump cabinet).

76. As suggested by Professor Michael J. Gerhardt, "It is naïve to think that merely requiring the instruction of legal ethics in law schools will ensure lawyers comport themselves in perfect accordance with the rules of professional responsibility." Gerhardt, *supra* note 67, at 1038. Nevertheless, more instruction will at least introduce students to the issues so that they know what questions to ask and what guidance is available for lawyers in government practice. A former law dean described the normal roles of professional responsibility education as follows: the identification and study of problematical situations which give rise to issues of legal ethics, a knowledge of the existing standards for resolving those issues, and an evaluation of whether such standards help effectuate or perhaps present obstacles to the fulfillment of the lawyer's role in our society. Weckstein, *supra* note 61, at 274–75.

This situation may change if legal ethics professors, commentators, and scholars tackle legal ethics issues in government law practice. If more do so, a positive legacy of the Trump era will be influencing legal ethics instruction and discourse to devote more attention to government practice. Such developments would benefit the lawyers, as well as the government, public, and communities they serve.