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Can Government Lawyers Be Heroes?

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Brad Wendel, *Government Lawyers in the Trump Administration*, **Cornell Legal Studies Research Paper No. 17-04** (2017), available at [SSRN](#).

In 1973, in what has come to be known as the Saturday Night Massacre, Richard Nixon attempted to fire special prosecutor Archibald Cox, prompting his own Attorney General to resign. In the wake of the Watergate scandal, the bar recoiled in shock as it acknowledged the number of lawyers complicit in illegal conduct. In this timely new article, [Brad Wendel](#) explores the obligations of government attorneys in an administration that has shown an unsettlingly similar disregard for legal limitations on its power.

It's hard to keep up with the Trump administration's distaste for dissent. Trump fired acting Attorney General Sally Yates when she refused to enforce his travel bans on individuals with visas from seven predominantly Muslim countries. White House Press Secretary Sean Spicer issued an ultimatum to state department civil servants, warning them to "get with the program," and Senior White House Policy Adviser Steven Miller insisted that Trump's national security decisions "will not be questioned." Frustrated with the Washington Post's coverage during the presidential campaign, Trump threatened to retaliate against owner Jeff Bezos by investigating Amazon for antitrust and tax violations. He responded to Judge Gonzalo Curiel's unwillingness to dismiss a fraud suit against Trump University by insisting that the judge was biased because of his Mexican heritage. More recently, in a rage against the court that blocked his travel ban, President Trump tweeted an attack on the "so-called judge." He vowed to use "enhanced interrogation techniques" and to throw flag burners in jail, with either ignorance or little regard for the fact that both have been determined to be illegal. Even Saturday Night Live spoofs prompt the President to engage in a barrage of social media insults.

Wendel easily convinces his readers that this administration has little tolerance for dissent, or what it might call disloyalty. In this climate, it is safe to assume that lawyers will be tested. Rather than wait for another Watergate scandal, Wendel offers a powerful guide for government lawyers. Building on his prior work, Wendel expresses little patience for arguments that a government lawyer owes her duties to the public or some abstract notion of the common good. He is disturbed by the arrogance or paternalism of a lawyer substituting her own opinion of what is in the public interest for that of her client. Most government lawyers do not serve the public interest writ large, but rather the particular agency in which they work. The people elect individuals to represent their interest, and it undermines both the democratic process and the rule of law when lawyers usurp that role.

The traditional obligations owed to the client do not, however, render the lawyer's job ministerial. Drawing on the controversy over the now-famous torture memo, drafted by John Yoo and Jay Bybee, Wendel argues that lawyers have a fiduciary obligation to render competent, independent, and candid advice. While sympathetic to the context – The Office of Professional Responsibility's (OPR) (an internal office devoted to ensuring that DOJ lawyers abide by their ethical obligations) report came shortly after 9/11 when the threat of terrorist activity seemed frighteningly real – Wendel concludes that the torture memo fell below these ethical standards. Wendel reminds attorneys who may be in a similar position in the Trump administration that, while OPR did not sanction Yoo or Bybee, it did conclude that it was a close question as to whether the lawyers intentionally or recklessly provided incompetent advice to their [client](#). In an ironic twist, even [Yoo believes that President Trump has an unhealthy attitude toward the power of the executive](#).

Amidst all of this, we have seen and are likely to continue to see an unprecedented number of leaks from within the administration. While it might be tempting to supply inside information to journalists, Wendel argues that government

lawyers should think twice before following in Daniel Ellsberg's shoes. Wendel discusses the ethics of whistleblowing for government lawyers and concludes that even the most well-intentioned act might be a betrayal of client confidences, a breach worthy of censure. The lawyer engages in misconduct if the disclosure does not fall under the exceptions in Model Rule 1.6 or 1.13, even if it is authorized by federal statutory provisions. Similarly, lawyers who were thinking of reviving Duncan Kennedy's call for "sabotage" – the intentional rebellion against an evil client's wrongful acts – are risking their license and betraying their professional obligations.¹

This does not leave government lawyers as defenseless pawns in President Trump's game. Wendel explains that the government is designed with "competing power centers" to help preserve liberty, democratic accountability, and the rule of law. Lawyers can ethically work with their client to exercise this intra-branch check on presidential power, but they enjoy only a limited ability to do so. A lawyer can resign if her client persists in crime or fraud involving the lawyers' services or if the client persists in a course of conduct which the lawyer finds repugnant. They have an obligation to the rule of law, which according to Wendel, is a culture of argument, or a "system for reasoned analysis through which norms can be contested and established." It is this concept of a rule of law that limits government lawyers from caving to power.

With his usual grace and logic, Wendel presents a convincing account of a robust if limited role for lawyers in the Trump administration. They cannot run wild as moral arbiters of all that their bosses choose to do, but they play an important role in reigning in an administration whose respect for the rule of law is thin at best. Even more hopeful at a time in which our country seems so deeply divided, Wendel sets a course for professionals in preserving a rule of law that transcends partisan politics.

Wendel's argument is most compelling when he discusses the role of lawyers in the Office of Legal Counsel and Attorney General's office, whose job it is to provide advice on the legality of executive action. I'm not as persuaded when he includes lawyers who staff more bureaucratic positions, as it is not as clear that the law governing lawyers should or does limit their role quite as much. Career civil servants can be the last line of defense and an important form of resistance when traditional checks on naked power fail. Shouldn't professionals who staff government agencies, like all civil servants, draw on their experience and knowledge to protect the public from unsound policies? Wendel implies that lawyers, who are essentially acting as civil servants, may have a greater obligation to give in to Spicer's plea to "get with the program" than their nonlawyer counterparts, but there is something unsatisfying about a profession that bars its members from joining other bureaucrats in drawing on their experience and expertise to protect the public interest.

1. Duncan Kennedy, *Rebels from Principle: Changing the Corporate Law Firm from Within*, **Harv. L. Sch. Bull.** (Fall 1981), at 39. [2]

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