

**COLLOQUIUM**

**THE VARIED ROLES, REGULATION,  
AND PROFESSIONAL RESPONSIBILITIES  
OF GOVERNMENT LAWYERS**

**LAWYERS IN GOVERNMENT SERVICE—  
A FOREWORD**

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Lawyers in government serve in many different roles, both representational and nonrepresentational. Some represent the federal, state, or local government, a particular governmental entity (such as a department of consumer affairs) or agency (such as the NLRB), or public officials in their official capacity. These lawyers render a range of legal services and act as litigators, negotiators, drafters, and counselors. Other lawyers in government serve in nonrepresentative capacities; for example, as elected or appointed officials or as their aides. Scholarship on government lawyers addresses these varied roles and functions from varied perspectives, drawing on different bodies of law and legal theory.

The eight articles in this collection could not possibly cover the full range of government lawyers' work, but they do range widely, addressing government lawyers' roles as legal advisors<sup>1</sup> and policy advisors,<sup>2</sup> as agency officials<sup>3</sup> and agency counsel,<sup>4</sup> as state and federal attorneys general,<sup>5</sup> and as

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1. Peter Margulies, *Legal Dilemmas Facing White House Counsel in the Trump Administration: The Costs of Public Disclosure of FISA Requests*, 87 FORDHAM L. REV. 1913 (2019); Melissa Mortazavi, *Institutional Independence: Lawyers and the Administrative State*, 87 FORDHAM L. REV. 1937 (2019); W. Bradley Wendel, *Law and Nonlegal Norms in Government Lawyers' Ethics: Discretion Meets Legitimacy*, 87 FORDHAM L. REV. 1995 (2019).

2. Stephen Lee & Sameer M. Ashar, *DACA, Government Lawyers, and the Public Interest*, 87 FORDHAM L. REV. 1879 (2019).

3. *Id.*

4. Daniel R. Ernst, *Mr. Try-It Goes to Washington: Law and Policy at the Agricultural Adjustment Administration*, 87 FORDHAM L. REV. 1795 (2019).

5. Lisa F. Grumet, *Hidden Nondefense: Partisanship in State Attorneys General Amicus Briefs and the Need for Transparency*, 87 FORDHAM L. REV. 1859 (2019); Jed Handelsman Shugerman, *Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of*

criminal prosecutors<sup>6</sup> and civil enforcement lawyers.<sup>7</sup> Two of the writings offer historical perspectives.<sup>8</sup> Others illuminate the work of contemporary government lawyers—for example, Stephen Lee and Sameer Ashar study federal immigration lawyers in the Obama administration,<sup>9</sup> while Peter Margulies explores what he calls “lifeboat lawyering” in the Trump administration.<sup>10</sup>

These writings make interesting individual contributions while also addressing common concerns, the most prominent being government lawyers’ discretion. The writings belie the concept of government lawyers’ work as ministerial or purely technocratic.<sup>11</sup> As Lee and Ashar demonstrate, government lawyers exercise discretion across a range of lawyering roles and professional services.<sup>12</sup> And how they exercise it, whether in giving advice, enforcing the law, or otherwise, has significant public impact. Consider Daniel Ernst’s account of Jerome Frank’s work as general counsel of the Agricultural Adjustment Administration in the Roosevelt administration: through their interpretation of the law, Ernst illustrates, government lawyers can significantly influence or restrict the agencies within which they work and the officials with whom they work.<sup>13</sup> Or consider Lisa Grumet’s discussion of state attorneys general who file amicus briefs seeking to invalidate laws similar to those adopted by their own state legislatures: government lawyers have opportunities not only to carry out the legislative will but, as in this example, to frustrate it.<sup>14</sup>

On balance, these studies suggest that government lawyers’ discretion is necessary, even if subject to abuse. One question they explore is how to protect government lawyers’ independence from the inappropriate influence of the partisan political officials under whom they serve. Rebecca Roiphe and I envision professional conduct rules and other professional norms as sources of federal prosecutors’ professional independence,<sup>15</sup> and Peter Margulies likewise underscores the importance of federal government lawyers’ fidelity to unwritten norms that government officials may disregard.<sup>16</sup> Pointing to political cronies whom presidents have sometimes appointed to serve as their attorneys general, Jed Shugerman argues that federal prosecutors need greater structural independence from the president

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*the U.S. Attorney General as a Case for Structural Independence*, 87 FORDHAM L. REV. 1965 (2019).

6. Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction from the President?*, 87 FORDHAM L. REV. 1817 (2019).

7. Lee & Ashar, *supra* note 2.

8. Ernst, *supra* note 4; Shugerman, *supra* note 5.

9. Lee & Ashar, *supra* note 2.

10. Margulies, *supra* note 1.

11. *See, e.g.*, Lee & Ashar, *supra* note 2, at 1890.

12. *See, e.g., id.* at 1912 (“There is a degree of ethical discretion inherent in the decision-making of all lawyers, including those in service of the government.”).

13. *See generally* Ernst, *supra* note 4.

14. Grumet, *supra* note 5.

15. Green & Roiphe, *supra* note 6.

16. Margulies, *supra* note 1.

in order to protect against “partisanship, self-dealing, and cronyism.”<sup>17</sup> Melissa Mortazavi similarly emphasizes the need for institutional structures to bolster, not undermine, government lawyers’ professional independence.<sup>18</sup>

If government lawyers are not mechanistically implementing elected officials’ direction but are exercising power and discretion in meaningful ways in their own right, then what makes their exercise of authority legitimate and how are they to be held accountable? Brad Wendel and Melissa Mortazavi each explore this question.<sup>19</sup> Wendel says that it is not enough for government lawyers to claim to act in “the public interest”—at least not in accordance with their own personal conceptions of the public interest—because “[l]awyers in general do not have privileged access to knowledge of the common good.”<sup>20</sup> But government lawyers’ exercise of discretion may find legitimacy through their commitment to the rule of law and their employment of accepted professional conventions for interpreting the law<sup>21</sup> and for enforcing it.<sup>22</sup> And institutional cultures can support government lawyers’ commitment to professional norms.<sup>23</sup>

My thanks to each of the authors both for contributing their writings to this collection and for previously presenting their works in progress at the Colloquium on *The Varied Roles, Regulation, and Professional Responsibilities of Government Lawyers* at Fordham University School of Law on October 12, 2018. This Colloquium was the most recent in almost a quarter-century of collaborations between the *Fordham Law Review* and the Stein Center for Law and Ethics around themes of significance to the legal profession. This time, we were joined in organizing the Colloquium by Rebecca Roiphe, who directs New York Law School’s Institute for Professional Ethics, Brad Wendel of Cornell Law School, and Ellen Yaroshfsky, who directs Hofstra Law School’s Freedman Institute for the Study of Legal Ethics. My thanks to them as well as to Kathleen Clark and Lisa Fairfax who presented additional works in progress on government lawyers at the Colloquium. And most especially, I am grateful to the student editors and staff of the *Fordham Law Review* for their characteristically sterling editorial contributions to this collection.

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17. Shugerman, *supra* note 5, at 1994.

18. Mortazavi, *supra* note 1.

19. *Id.*; Wendel, *supra* note 1.

20. Wendel, *supra* note 1, at 2000.

21. *See id.*

22. Green & Roiphe, *supra* note 6.

23. *See* Mortazavi, *supra* note 1.