

INSTITUTIONAL INDEPENDENCE: LAWYERS AND THE ADMINISTRATIVE STATE

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The institutional structure where federal government lawyers practice is fraught with political and economic pressures that undermine the ability of lawyers to exercise independent professional judgment. A lack of candid legal advice in this space not only removes a pivotal fail-safe between legal and illegal state action but also precariously imbalances the powerful administrative state, exposing it to undue political influence. For these reasons, this Article argues that structural changes to administrative institutions must be made to support and nurture lawyers' ability to independently determine the bounds of legality.

Previous scholarship has examined the role of professional independence for lawyers generally; however, the legal academy has yet to explore the centrality of professional independence to administrative law or the structural pressures influencing its exercise. This Article joins a body of work that adopts a new institutionalist approach to professional misconduct. In doing so, this Article makes three principal contributions: (1) it outlines why institutionally sustained professional independence is essential to the federal administrative state; (2) it identifies institutional failings that impede government lawyers' exercise of professional independent judgment; and (3) it proposes institution-based solutions to facilitate professionally independent conduct by government lawyers. By insulating government lawyers from excessive interference on core professional judgment calls, civil society may rely on these lawyers to help protect the basic structure of the rule of law.

INTRODUCTION.....	1938
I. PROFESSIONAL INDEPENDENCE, GOVERNMENT LAWYERING, AND BUREAUCRATIC EXPERTISE	1940

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A. <i>Threshold Inquiries in Lawyering</i>	1941
B. <i>Independent Judgment and Lawyering</i>	1942
C. <i>Lawyers in the Administrative State</i>	1944
1. Balance of Power	1945
2. Judicial Review and the Role of Expertise	1947
II. INSTITUTIONAL TENSIONS THAT UNDERMINE PROFESSIONAL INDEPENDENCE	1949
A. <i>Reporting to Nonlawyers</i>	1950
B. <i>Reporting to Political Appointees</i>	1951
C. <i>The Role of the Inspector General</i>	1952
D. <i>Limited Supervisor Accountability</i>	1954
E. <i>Limited OPR Effectiveness</i>	1954
F. <i>Lack of a Lawyer-Specific Culture</i>	1955
III. SOLUTIONS	1957
A. <i>Nonlawyer Supervision: Agency-Level Modifications</i>	1957
B. <i>Tempering Political Appointees</i>	1958
C. <i>Increased Supervisor Accountability</i>	1959
D. <i>Supporting a Lawyer-Specific Culture</i>	1961
CONCLUSION	1963

INTRODUCTION

When the basic pillars of democratic governance (the free press, the integrity of courts, the openness and reliability of elections, and even the evenhanded enforcement of laws) are attacked, the government lawyer is the primary, and at times the only, line of defense. To fill this role, she must be a civil servant, an expert, and always a legal professional who wields independent judgment over her field of autonomy.¹

Independent judgment is easily marred. A civil servant's independent judgment is predicated on institutions that allow and facilitate independence. Already-weak existing supportive norms are further destabilized when executive branch leaders fire employees, remove longstanding job protections, and attack prominent government lawyers for carrying out their

1. At a minimum, this entails decoding what the law requires. I note here that this Article takes a very limited, lowest-common-denominator view of professional independence in government practice and recognizes that the topic of what constitutes professional independence is itself a point of substantial attention. See, e.g., Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1934 (2008) (exploring professional independence as self-reliance and personal detachment, and how rigid detachment may be tempered by discipline). For the purposes of this Article, when I refer to professional independence, I am referring only to those aspects of professional independence that are least in dispute: freedom from undue influence in discerning whether the goal set by the client (agency, agency head, executive, or the public) is legal, and if so, whether the means sought to attain that goal are legal.

professional duties.² Such actions privilege loyalty to those currently in office over both expertise and commitment to an agency's statutory mandate. This partisan crucible removes an important internal check on uninformed or illegal action by compromising the lawyer-client relationship and a lawyer's function as an independent adviser and evaluator of law.

Although scholars have commented on the role of professional independence for lawyers generally, the legal academy has yet to fully explore the centrality of professional independence in administrative law or the structural pressures influencing its exercise. Instead, the law governing lawyer conduct continues to focus on the failures of individual lawyers to act in accordance with codified expectations of professional independence.³ This Article joins a body of work that adopts an institutionalist approach to professional misconduct.⁴ This school posits that the norms and context of legal practice can either support or undermine ethical action.⁵ Consequently, the opportunity to address ethical problems does not lie in increasing individual accountability (at least not on its own) but, rather, in altering institutions.⁶ Thus, if society values the work of government lawyers,

2. Lisa Rein, *Trump's Fight with Federal Employee Unions Gets Real on Monday*, WASH. POST (July 8, 2018), https://www.washingtonpost.com/politics/trumps-fight-with-federal-employee-unions-gets-real-on-monday/2018/07/08/55e52e9e-7bba-11e8-aaaa-4d04c8ac6158_story.html [https://perma.cc/P6W9-DBLR] (covering the presidential order to reopen collective bargaining with federal employees to negotiate terms that would lessen union activity and make discharge of employees more expedient); Noam Scheiber, *Trump's Power to Fire Federal Workers Curtailed by Judge*, N.Y. TIMES (Aug. 25, 2018), <https://www.nytimes.com/2018/08/25/business/trump-federal-workers-unions.html> [https://perma.cc/EJ6H-QL2X] (reporting that a district court struck down provisions of an executive order that would have allowed federal employees to be fired more easily).

3. See MODEL RULES OF PROF'L CONDUCT r. 1.2, 5.4 (AM. BAR ASS'N 2016).

4. This Article is not the first to explore the institutional conditions that would support professional conduct. See, e.g., Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1175 (2003) (suggesting more active participation by legislatures in setting professional norms); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 33–38 (1988) (listing nine factors that may impact institutions of professional independence, including strong norms, organization of practice, market position, and client relationships); Ted Schneyer, *On Further Reflection: How “Professional Self-Regulation” Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 585 (2011) (discussing the creation of “ethical infrastructures” in law firms to support desired lawyer conduct). However, this Article looks specifically at the administrative-government context and takes a closer and more current look at the issue as it pertains to professional independence.

5. Melissa Mortazavi, *Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession*, 96 MINN. L. REV. 1482, 1484–85 (2012) (arguing that law firm institutional structure must be altered to change ethical norms of practice).

6. There is also a live debate over whether government lawyers owe a general duty to the public interest that supersedes their duty to an agency or administration. See Berger v. United States, 295 U.S. 78, 88 (1935) (stating that the duty of prosecutors is owed to the public: “The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 294 (2017) (describing the debate regarding the duty government lawyers hold to the public). This Article does not

institutional structures in the government must support professional independence.

It is worth noting that this Article does not use the term “institution” to refer purely to traditional physical places and finite groups of actors. Rather, in its discussion of institutions, this Article adopts a new institutionalism perspective. New institutionalism understands institutions as fluid sets of rules derived from “routines, procedures, conventions, roles, strategies, organizational forms, and technologies.”⁷ This analytical framework argues that behavioral patterns structure conscious decision-making and provide a different framework for understanding the work of actors in complex institutional settings.⁸ Institutions so described command adherence through hierarchies, sanctions, rewards, procedures, and rules.⁹

Focusing exclusively on federal government lawyers, this Article makes three principal contributions: (1) it outlines why institutionally sustained professional independence is essential to the federal administrative state; (2) it identifies institutional failings that impede government lawyers’ exercise of professional independent judgment; and (3) it proposes institution-based solutions to facilitate professionally independent conduct by government lawyers. By insulating government lawyers from undue interference on core professional judgment calls, civil society may rely on these lawyers to help protect the basic structure of the rule of law.

I. PROFESSIONAL INDEPENDENCE, GOVERNMENT LAWYERING, AND BUREAUCRATIC EXPERTISE

This Part outlines the centrality of independent judgment to a government lawyer’s professional duties and obligations. It begins with a general point: threshold legal inquiries made at the outset of any representation, including candid assessment of the law, constitute the bedrock of a lawyer’s function.

engage that question directly. Rather, it focuses on making clear why professional independence for lawyers is valuable and important in the government context, and it presumes that democratic institutions and the rule of law are to the benefit of either of these potential “clients.” It is also worth noting that under either paradigm, professional legal norms are in tension: either the nonlawyer government officials who supervise lawyers place those lawyers in breach of prohibitions on nonlawyers controlling their professional independence, or nonlawyer government officials are viewed as clients (on behalf of the agency as an entity) and therefore can control the ends of the representation, but not the means. *See MODEL RULES OF PROF’L CONDUCT* r. 1.2, 5.4 (AM. BAR ASS’N 2016).

7. JAMES G. MARCH & JOHAN P. OLSON, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* 22 (1989); *see also* Paul J. DiMaggio & Walter W. Powell, *Introduction to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 1, 1–3 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

8. WENDELL GORDON, *INSTITUTIONAL ECONOMICS: THE CHANGING SYSTEM* 16 (1980) (“[A]n institution is a grouping of people with some common behavior patterns, its members having an awareness of the grouping. . . . It is not especially helpful to reify institutions in the sense of thinking of them as buildings or groups of people. . . . So, the essence of the institution is the commonly held behavior pattern.”).

9. Thomas A. Koelble, *The New Institutionalism in Political Science and Sociology*, 27 COMP. POL. 231, 233 (1995) (book review) (describing enforcement mechanisms in new institutional structures).

Part I asserts that independence is particularly warranted in the administrative context for two reasons: to preserve (1) meaningful balances of power in administrative governance, and (2) the ability of administrative action to withstand judicial review.

A. Threshold Inquiries in Lawyering

Professional independence is an accepted and central aspect of a lawyer's professional identity, regardless of the context within which a lawyer practices. Legal academics have long debated the boundaries and importance of professional independence, but it is a question of extent rather than inclusion.¹⁰ Some argue that independence from clients is less important than independence from the judiciary,¹¹ while others argue that a lawyer must maintain independence from clients, their own interests, and the interests of the state.¹² Tied to ideas gleaned from Alexis de Tocqueville, these conceptions of professional independence defend it in terms of creating a separate estate in society that would moderate abusive executives and populist groupthink.¹³ Others have been more utilitarian and have argued that role differentiation (and with it, independence not only from the influence of others, but from the self and moral conviction) leads to an advantageous prudential independence that supports more effective advocacy.¹⁴

These different rationales converge around a baseline understanding: professional independence is an essential characteristic of lawyering because it increases objectivity and fairness by setting limits to layperson or economic

10. See, e.g., Louis Brandeis, *The Opportunity in the Law*, reprinted in BUSINESS—A PROFESSION 313, 321 (1933) (framing the ideal role of lawyers as being in “a position of independence, between the wealthy and the people, prepared to curb the excesses of either”).

11. Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281, 1281 (2003) (“[T]he ethical rules for protecting the professional independence of the bar need to take into account the role of the legal profession as an independent bulwark between individuals or organizations and the political branches of government.”); Gordon, *supra* note 4, at 7–9 (discussing a taxonomy of types of independence, including independence from the state or from clients, and independence as a political force); Bruce A. Green, *Lawyers’ Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 602 (2013) (noting the importance of lawyers being independent from the judiciary in order to criticize judges, disobey unlawful orders, and resolve issues of professional conscience without undue interference).

12. See Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 185–87 (2000) (discussing professional independence from coercive client expectations); Peter Margulies, *Lawyers’ Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939, 981 (2006) (arguing that the term “independence” carries with it very little meaning).

13. Gordon, *supra* note 4, at 14 (“In the republican vocabulary, independence from the dominant factions of civil society was the essential precondition to the ‘civic virtue’ or ‘patriot capacity’ that lawyers needed to perform these functions.”).

14. Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1399 (2008) (defending the virtues of role differentiation as providing systemic benefits, including emotional detachment and objectivity).

influence.¹⁵ Essentially, only from a position of professional independence can a lawyer aspire to determine what the law says and thereby make the essential minimal threshold determinations necessary for effective and ethical representation. The division of client and lawyer autonomy recognizes clients' rights to determine the goals of representation and charges lawyers to devise means to attain that goal.¹⁶ It bifurcates power in a way that, when combined with the power of courts and third parties, balances the needs of the client, the power of the state, and the role of the justice system in a dynamic equilibrium.

However, the autonomy of lawyers, clients, and the court as conceived in the law regulating lawyer conduct is bound by finite constraints.¹⁷ A representation of a client must begin with two threshold inquiries: First, is the client's goal legal? Second, what are the legally permissible means to attain the client's goals? Lawyers may not aid clients in pursuing an illegal goal.¹⁸ They also may not try to attain the client's goals by using illegal means.¹⁹ The client's interests must be harmonized with what is legal: "At the barest minimum lawyers have to translate clients' desires into something that can be processed by the legal system, and investigate the various ways in which legal officials might, in turn, process them."²⁰ The accurate resolution of both questions is predicated on the independent, objective application of specialized knowledge and expertise to the specific facts of the representation at hand. It is this raw baseline that this Article adopts.

B. Independent Judgment and Lawyering

Regardless of whether the legal academy has fully embraced the value and scope of professional independence, the American Bar Association (ABA) Model Rules of Professional Conduct show a substantive commitment to

15. In his landmark work on professionalism, Eliot Freidson discusses specialized knowledge in conjunction with self-regulation as necessary elements of a professional identity, with self-regulation acting as a mechanism by which a profession may exercise its unencumbered expertise and preserve its independence. ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC 17 (2001) ("[P]rofessionalism is a set of institutions which permit the members of an occupation to make a living while controlling their own work. It cannot exist unless it is believed that the particular tasks they perform are so different from those of most workers that self-control is essential." (footnote omitted)).

16. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016).

17. Gordon, *supra* note 4, at 10 ("Everyone concedes that even the most zealous advocate must remain within the framework of professional ethical rules and the 'law.'").

18. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2016) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent."). Model Rule 1.2, Comment 1, states that the rule "confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within limits imposed by law." *Id.* r. 1.2 cmt. 1.

19. *Id.* r. 1.16 cmt. 2 ("A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law."); *see also* Nix v. Whiteside, 475 U.S. 157, 173 (1986) (noting that, even in the criminal context, clients do not have a right to engage in criminal action, in this case, perjury).

20. Gordon, *supra* note 4, at 73.

independent judgment as a core lawyerly value.²¹ The preamble to the ABA Model Rules notes that “[s]elf-regulation also helps maintain the legal profession’s independence from government domination.”²² Self-regulation is justified in terms of creating the necessary conditions for the exercise of professional independence.²³

More specific charges to protect professional independence are peppered throughout the Model Rules. For example, Model Rule 1.2 requires only that a lawyer “consult” with a client about the means of attaining client goals, not that they abide by a client’s view.²⁴ The rule governing third-party payment of lawyers’ fees considers lawyer autonomy separate from client relations and insists that such payment may only be accepted where “there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.”²⁵

The rules regarding the lawyer’s role as advisor make it imperative that, “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”²⁶ The comments to these rules go on to elucidate that a lawyer must discuss her “honest assessment” even where “unpleasant.”²⁷ In these situations, “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”²⁸ The commitment to professional independence culminates in ABA Model Rule 5.4, which prohibits a lawyer from sharing lawyer’s fees with a nonlawyer or engaging in a partnership that includes law practice with a nonlawyer.²⁹ The justification for these limitations is to “protect the lawyer’s professional independence of judgment.”³⁰ The Model Rule goes on to prohibit practicing “with or in the form of a professional corporation or association authorized to practice law for a profit where . . . a non-lawyer has the right to direct or control the professional judgment of a lawyer.”³¹

A growing chorus of scholars and practitioners have called attention to the potential benefits of nonlawyer ownership of law practices, including increased access to justice, superior client service, and broader market power.³² Despite indicators in other common-law jurisdictions, such as the

21. See Wendel, *supra* note 6, at 282 (arguing that the need to provide objective legal advice is not “aspirational . . . [but a] basic, mandatory obligation[] for all lawyers”).

22. MODEL RULES OF PROF’L CONDUCT pmbL. (AM. BAR ASS’N 2016).

23. See Green, *supra* note 11, at 604.

24. MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2016).

25. *Id.* r. 1.8(f)(2).

26. *Id.* r. 2.1.

27. *Id.* r. 2.1 cmt. 1.

28. *Id.*

29. *Id.* r. 5.4(a)–(b).

30. *Id.* r. 5.4 cmt. 1.

31. *Id.* r. 5.4(d)(3).

32. Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1709–11 (2008) (arguing in favor of nonlawyers providing legal services); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 10–11 (2012) (arguing that nonlawyer ownership would increase access to civil remedies); Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 179–80 (2014)

United Kingdom, that opening up the legal-services market to nonlawyers may have some social benefits, the ABA has reiterated its commitment to excluding laypeople from partnerships with lawyers.³³ This demonstrates at minimum a strong facial commitment to maintaining lawyer autonomy from layperson control, despite potential benefits.

C. Lawyers in the Administrative State

While independent judgment is a universally important element of the professional conduct of lawyers, it carries even greater weight in the context of the federal government, where lawyers play an integral part in our modern system of administrative law. There, professional independence critically supports effective administrative action and balanced power structures within the American system of governance. Professional independence also justifies administrative power in traditional terms, adding both expertise and bureaucratic neutrality.

Given the power of the state, legal missteps can have massive consequences.³⁴ Moreover, civil servants and elected officials rely heavily on government lawyers' pronouncements of law. Lawyers channel state power, set work parameters for federal employees, and can act as the final bulwark between illegal action and the breakdown of legal institutions.³⁵ As such, their independence is much more than a conceptual nicety; it is a critical player in administrative action being accurate, surviving judicial review, and retaining the legitimacy that is derived from party neutrality. The loss of that claim to neutrality can render agency action improper in the eyes of the public and the courts.³⁶

The independence of government lawyers to provide expertise-based advice has two distinct advantages in the context of administrative agencies. First, lawyers provide legal guidance to the civil service, enabling it to play a necessary role in a delicate balance of power with political actors. Second, professionally independent legal advice fulfills process requirements that allow agency action to withstand judicial scrutiny on review. The following, Part I.C.1, sketches out the particular role independent lawyers play in supporting a healthy balance of power within the administrative state. Part

(contending that barriers to nonlawyer ownership increase inequity and are unconstitutional); Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1, 15–16 (2016).

33. See Alison Frankel, *Lawyers Remain Deeply Skeptical of Non-Lawyers Investing in Law Firms*, REUTERS (May 9, 2016), <http://blogs.reuters.com/alison-frankel/2016/05/09/lawyers-remain-deeply-skeptical-of-non-lawyers-investing-in-law-firms/> [https://perma.cc/6AU3-8MFN].

34. See *infra* Part II.D; see also Andrew Cohen, *The Torture Memos, 10 Years Later*, ATLANTIC (Feb. 6, 2012), <https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/> [https://perma.cc/MLJ9-FTQJ].

35. See, e.g., Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 I/S 33, 36 (2005) (discussing how civil servants draft, analyze, and design policy).

36. Eric Lipton & David Johnston, *Gonzales's Critics See Lasting, Improper Ties to White House*, N.Y. TIMES (Mar. 15, 2007), <https://www.nytimes.com/2007/03/15/washington/15justice.html> [https://perma.cc/JTP9-C9Z6].

I.C.2 examines how agency lawyers' professional independence interacts with judicial review of agency action.

1. Balance of Power

Traditionally, scholars have understood constitutional separation of powers between the legislative, judicial, and executive branches as the primary limiting agent on administrative power.³⁷ However, more recent scholarship suggests that the true force moderating administrative action is not these three branches externally vying for influence but a dynamic equilibrium between regulatory rivals within administrative agencies.³⁸ In this paradigm, it is the tension and interplay between different actors within the administrative state that are responsible for tempering administrative abuses of power.³⁹ Such focus on intra-agency separation of powers facilitates interplay between political, technocratic, and legalistic norms. In a "self-regulating administrative ecosystem,"⁴⁰ normative concerns are addressed by maintaining the delicate balance between the relative power of political appointees, civil servants, and the public.⁴¹ Understood in this way, all civil servants are meant to have unmediated allegiances directly to law rather than contingent loyalties mediated through the whims of political appointees.⁴²

37. See, e.g., Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 93–94 (1992); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011) ("Perhaps the main topic in administrative law is the allocation of power among legislatures, courts, the President, and various types of agencies.").

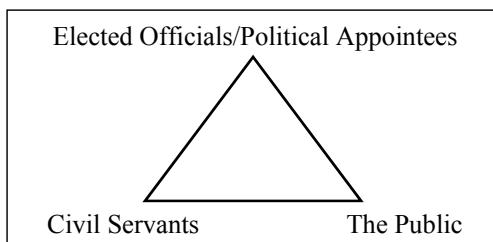
38. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316–17 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 424–25 (2010).

39. Magill & Vermeule, *supra* note 37, at 1035.

40. Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 231 (2016).

41. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 529–70 (2015) (discussing the concept of a tripartite administrative power system).

42. 5 U.S.C. § 3331 (2012) (setting forth the civil service oath of office: "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.").

Figure 1: *Administrative Power*⁴³

Within this tripartite system, lawyers may populate the realm of political appointees or act as members of public civil society, but, most consequentially, they serve as civil servants (in constitutional terms, “inferior officers”). In these positions, government lawyers enforce, prosecute, adjudicate, make rules, and create barriers and boundaries for other civil servants by interpreting legality. Often, these lawyers provide a counterweight to raw political power and public will.

Dependence on independent professional assessment of legality differentiates civil servants from political appointees. This separation is integral to a government lawyer’s role as a shepherd to the civil servant branch of the administrative apparatus. By both “inclination and training,” civil servants “often feel bound by legal, moral, or professional norms to certain courses of action.”⁴⁴ Lawyers guide civil servants in understanding the legal parameters of their duties.⁴⁵ However, the weight of lawyers’ advice is contingent on it being viewed as free from political influence. Without clear guidance that is viewed as apolitical, civil servants are limited in the actions they will be willing to take. Because civil servants “are committed to enforcing the governing statutory regime that sets out the parameters of their authority and regulatory responsibilities,” the importance of articulating legal authority for their actions is heightened as compared to political appointees, nongovernmental employees, or even the public.⁴⁶ Independent lawyering plays a critical role in supporting the civil service and, by extension, maintaining the administrative tripartite ecosystem of civil servants, political appointees, and the public.

43. See Michaels, *supra* note 41, at 529–70 (suggesting the concept of a tripartite system, as demonstrated in Figure 1).

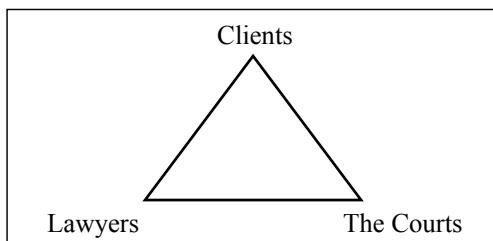
44. See DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 30 (2008).

45. Evan Osnos, *Trump vs. the “Deep State,”* NEW YORKER (May 21, 2018), <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state> [http://perma.cc/96W9-4B98] (discussing how civil servants traditionally view their role as very strictly bounded by law); see also Bill Chappell, “I Don’t Believe That Torture Works,” CIA Nominee Gina Haspel Tells Senators, NPR (May 9, 2018, 9:29 AM), <https://www.npr.org/sections/thetwo-way/2018/05/09/609681289/gina-haspel-confirmation-hearing-cia-nominee-faces-senators-questions> [https://perma.cc/8H2G-9ANR] (reporting Haspel justifying torture at CIA black sites because counsel had told her it was legal).

46. Metzger, *supra* note 38, at 445.

Such lawyers may also supply an additional check on power by moderating the influence of the client (whether the client is conceived of as the agency, the executive branch, or the public) through the lawyer-client relationship itself. This suggests a model analogous to Professor Michaels's account of limitations on administrative power as being a balance of power between three administratively internal factions.⁴⁷ Similarly, here, the power of the law is moderated and limited by the triumvirate of client, lawyer, and court autonomy. Spheres of autonomy are preserved not purely for the benefit of the lawyer or the client in any given situation, but for the benefit of reaching a balanced outcome, since no one side can complete the work alone. Rather, clients control goals, lawyers lay out plans of attack, and courts set boundaries on both the actions of lawyers and clients to comport with the court's understanding of legal requirements, rules of engagement, and professional conduct.

Figure 2: Power Vested in Law



Reliance on core lawyering norms and this diffused structure of legality may also inform Congress's willingness to allocate power to the executive branch and administrative agencies in the first place. Expecting that power yielded to the executive would be diffused by checks from lawyerly professional expertise and training, Congress can "justify or at least address concerns about the increase in power at the executive level."⁴⁸ As such, the law of lawyering, and particularly lawyer autonomy, becomes a precondition for power transfer, interwoven with the intrabranch power ecosystem. In this paradigm, Congress never meant for the executive to have unchecked power—only power bounded by lawyers' norms of professional conduct.⁴⁹

2. Judicial Review and the Role of Expertise

Moreover, lawyers' professional independence also protects agency action from claims of invalidity on judicial review. Here, the actions of lawyers fall under the greater umbrella of valid agency action designed to survive judicial

47. Michaels, *supra* note 41, at 529–70.

48. Bruce Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 49 (2018). "Prosecutorial independence has become a cornerstone of American democracy, built into the way the country is governed." *Id.* at 4.

49. *Id.* at 49; see also Adrien Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1201–03 (2013) (discussing how the structure of American government is interwoven with conceptions of prosecutorial independence).

scrutiny. Whether tethered to the Administrative Procedure Act (APA) or in the context of statutory ambiguity governed by the standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁵⁰ the work of government lawyers, and agency action in general, is only entitled to deference on judicial review where it is not “arbitrary and capricious.”⁵¹

Bureaucratic neutrality and expertise are key components of determining whether an agency action passes judicial review.⁵² In the seminal case *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*,⁵³ the U.S. Supreme Court made clear that administrative action cannot be justified in purely political terms, but instead must be neutral, technocratic, and based in statutory law.⁵⁴ To surpass the admittedly deferential arbitrary and capricious standard, the agency must “examine the relevant data and articulate a satisfactory explanation for [the agency’s] action, including a ‘rational connection between the facts found and the choice made.’”⁵⁵ In doing so, the Court’s ruling in *State Farm* juxtaposes action that is purely political with rational action.⁵⁶ In 2007, the Court reaffirmed this assertion in *Massachusetts v. EPA*,⁵⁷ where it compelled the EPA to scientifically determine whether emissions endanger public health before the appellate court would recognize the agency’s action as complying with procedural requirements.⁵⁸ By tying judicial deference to the agency’s exercise of expert judgment based in fact analysis, rather than exclusively on direct political pressure, the federal courts force expertise and bureaucratic

50. 467 U.S. 837 (1984).

51. 5 U.S.C. § 706(2)(A) (2012) (stating that agency action is to be set aside where it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); *Chevron*, 467 U.S. at 843 (inquiring into “whether the agency’s answer is based on a permissible construction of the statute”). This Article acknowledges that arbitrary and capricious review pursuant to the APA can be treated as coterminous with the second step of the *Chevron* analysis. See, e.g., Nat'l Ass'n of Regulatory Util. Comm'r's v. Interstate Commerce Comm'n, 41 F.3d 721, 726 (D.C. Cir. 1994); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997).

52. Some scholars have advocated for more weight and consideration to be given to political actions. This, however is not the law as it currently stands. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 7–9 (2009).

53. 463 U.S. 29 (1983).

54. *Id.* at 47–57; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2381 (2001) (describing how *State Farm* demanded that an agency “justify its decision in neutral, expertise-laden terms to the fullest extent possible”).

55. *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

56. CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 183 (1990) (noting that *State Farm* “entails a conception of politics as distinguishable from and in opposition to the required rationality of agency decision making”).

57. 549 U.S. 497 (2007).

58. *Id.* at 534–35. Although the Court was not applying the APA, the applicable provision of the Clean Air Act closely hews to the APA’s, rendering them virtually coterminous. See 42 U.S.C. § 706(2)(A) (2012) (calling for the reversal of agency action “found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”). But see *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (plurality opinion) (permitting a shift in agency policy where the change was “spurred by significant political pressure from Congress” but also had factual support).

neutrality into a central position in agency function.⁵⁹ This external judicial pressure may have the added benefit of producing better policy outcomes and increasing public confidence.⁶⁰

In rulemaking and adjudication, the procedural structure of administrative action will also award the work of government lawyers substantial deference where a full and robust record has been developed.⁶¹ The creation of a record and justification in terms that are evidence-based have long been necessary to create stable administrative policy, even where a partisan agenda pushed such policy change to the fore.⁶² The current presidential administration has made it a norm of practice to not keep notes or create records while engaging in many administrative functions.⁶³ This is problematic for a government lawyer in two respects. First, any lawyer who meets minimum professional requirements of diligence and competence must create records in the regular course of practice.⁶⁴ Second, a government lawyer knows that the failure to create a record places the agency's action in a vulnerable position on judicial review. An insufficient or scant record is often responsible for a failure of agency action to withstand scrutiny by the court.

II. INSTITUTIONAL TENSIONS THAT UNDERMINE PROFESSIONAL INDEPENDENCE

The previous Part laid out the importance of professional independence to lawyering with a focus on the unique context of federal administrative law. Part II identifies institutional structures in the current administrative system that fail to support robust (or, arguably, adequate) independent professional judgment. Rather than focusing on the accountability of individual lawyers, which is of limited utility, this Article instead casts a spotlight on institutional risks that arise from current workplace structures as well as from a lack of a cohesive lawyer culture.

59. Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: *From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (drawing attention to the Supreme Court's opinions that set aside agency action where "executive expertise had been subordinated to politics").

60. See STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 55–56, 59–60 (1993) ("A depoliticized regulatory process might produce better results, hence increased confidence, leading to more favorable public and Congressional reactions.").

61. 5 U.S.C. § 706(2)(A), (E) (2012) (requiring evidentiary support for rulemaking). Under normal circumstances, the record on judicial review is limited to that considered by the administrative agency itself. Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 718 (9th Cir. 1993).

62. United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 249 (2d Cir. 1977) (insisting on the existence of an "adequate [administrative] record" to ensure "meaningful [judicial] review").

63. This may not always be the preference for politically motivated actors thinking in the short term. See Osnos, *supra* note 45 (noting that "on controversial issues, the Administration is often not writing down potentially damaging information" and reporting that some felt the administration to be "deliberately avoiding creating records").

64. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.3 (AM. BAR ASS'N 2016) (requiring "competence" and "diligence" in the practice of law).

A. Reporting to Nonlawyers

Traditionally, lawyers exert oversight over other lawyers. Lawyers are uniquely well-situated to understand the expectations of practice and the parameters of law essential to the twin core inquiries regarding legality that underlie any attorney-client relationship.⁶⁵ Thus, professional conduct, particularly independent professional conduct, is best fostered when lawyers are supervised by parties who are subject to the same professional expectations and norms.

It is the longstanding recognition of the coercive imbalance of a work environment where the client is also the supervisor that animates the bar's prohibition on nonlawyer ownership of legal practices. The thought is that when nonlawyers control the work of lawyers, those nonlawyer supervisors are not guided by the same concepts of professional conduct or subject to the same state bar controls.⁶⁶ Since the professional responsibility of lawyers includes a complex weighing of duties to the client and the court, as well as a multitude of other intricate concepts, laypersons may lack the ability to appreciate the boundaries of professional action.

For a lawyer to exercise professionally independent judgment regarding the threshold questions that all lawyers must answer, lawyers need the autonomy to make those assessments without coercion. However, pervasive agency culture, coupled with the particular policy mission of a given leadership regime, can create an environment in which lawyers will likely be hesitant, if not loath, to point out interpretations of law contravening policy objectives even where the failure to do so is a breach of their duties. Since a nonlawyer supervisor is under no obligation to the bar, has not been immersed in the norms and customs of lawyering, and may feel no adherence to principles of limited advocacy (meaning advocacy limited by law), the likelihood of such pronouncements being respected is low in the first place.

Moreover, a layperson is more likely to lack the ability to meaningfully review the quality of a lawyer's work and may use outcome-oriented metrics to assess performance. Any student of professional conduct knows that lawyers do not breach their professional duties by not reaching the outcome a client wants (including winning the case). A lawyer breaches professional duties when the process of representation is compromised—when the lawyer has not been diligent, competent, or provided an independent professional opinion.

Government lawyers practice in an environment where they are often supervised by laypeople and are subject to review by entities that oversee all employee misconduct and are not lawyer-oriented. This adversely impacts the institutional context of practice by introducing norms of layperson employment, namely the expectation of compliance with supervisorial

65. See *supra* Part I.A.

66. 28 U.S.C. § 530B(a) (2012) ("[A]ttorney[s] for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.").

direction, “loyalty” to mission as determined by supervisors, and limited autonomy for a party viewed as an employee.

While the Department of Justice is headed by the Attorney General (a lawyer), many lawyers in government service answer directly to department heads or agency chiefs who are nonlawyers.⁶⁷ This creates a fraught institutional structure for the attorney who must communicate to a person who is simultaneously her boss and her client. The difference between a supervisor, who can control a lawyer’s decision-making, and a client, who has a limited field of autonomy, is a pivotal one. Lawyers require a work environment where they have the independence to discern the legal parameters of the actions taken and the strategies legally applied. It is in the space between the client’s right to choose the goal and the lawyer’s prerogative to discern the means of representation that lawyers must wield expertise that is not only to their client’s benefit, but also in conformance with the law.

B. Reporting to Political Appointees

Whether supervisors are lawyers or not, the fact that agency heads are often subject to direct appointment and removal without cause creates institutionally conflicted motivations for lawyers. Superior officers in executive agencies are subject to the appointment and removal powers of the president of the United States.⁶⁸ As such, appointees are arguably more democratically accountable to the executive branch than the attorneys they supervise. However, these appointees are also vulnerable. Because the president can often remove them from their positions without cause, the pressure on appointees occupying these executive offices to engage in partisan activity is high.

As current executive action makes clear, senior lawyers may often find themselves on the receiving end of harsh and unwanted pressure, and even employment action, for failure to respond to political pressure.⁶⁹ History is littered with principled lawyers who resigned or were fired (or were not considered for positions in the first place) based on their commitments to a professionally independent assessment of legal requirements.⁷⁰ Likewise,

67. It is worth noting that even the Attorney General, who heads the Department of Justice, and who thus far has always been a lawyer, is not required to be an attorney by law. 28 U.S.C. § 503 (2012). Still, normative custom is a significant part of institutions, perhaps even more so than positive assertions of values or goals.

68. U.S. CONST. art. II, § 2, cl. 2.

69. See Elisha Fieldstadt, *Trump Attacks Jeff Sessions: “I Don’t Have an Attorney General,”* NBC NEWS (Sept. 19, 2018), <https://www.nbcnews.com/politics/donald-trump/trump-attacks-jeff-sessions-i-don-t-have-attorney-general-n910986> [https://perma.cc/33YE-T6FZ]; Tucker Higgins, *Trump Attacks Justice Department Official Bruce Ohr, Putting Pressure on Attorney General Jeff Sessions to Fire Him*, CNBC (Aug. 20, 2018), <https://www.cnbc.com/2018/08/20/trump-pressures-jeff-sessions-to-fire-bruce-ohr-for-murky-dossier-link.html> [https://perma.cc/QNB5-CUBN]; see also 5 U.S.C. § 2302(b)(2) (2012).

70. See, e.g., Michael D. Shear & Matt Apuzzo, *FBI Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired.html>.

history also gives us examples of those who have bowed to the pressure and faced negative consequences as a result.⁷¹ It often appears that lawyers are the public scapegoat for poor executive policy choices: damned if they do, and damned if they don't. However, this Article does not argue that lawyers as a group have been systematically unwilling to defend the rule of law or render candid judgments regarding legality. Rather, it asks: Why do the institutional structures in which they practice make it so hard for them to do so? Why do we ask agency lawyers to give up their livelihoods instead of creating better avenues for redress?

The Hatch Act, which prohibits garden-variety civil servants from engaging in partisan political activities,⁷² is Congress's attempt to curtail the pressure on civil servants to "perform political chores in order to curry favor with their superiors."⁷³ This statute attempted to support the expectation that agency officials shall not request or consider a recommendation based on political connections or influence.⁷⁴ In reality, however, these explicit prohibitions against political consideration do little to insulate civil servants who take an unpopular political view.⁷⁵

C. The Role of the Inspector General

In addition to direct in-office oversight by immediate supervisors subject to political pressure, all federal employees, including most lawyers, are subject to some review by that agency's Office of the Inspector General.⁷⁶ Post-Watergate, Congress attempted to craft a system of internal agency

comey-fired-fbi.html [<https://perma.cc/428S-TL75>]; Michael D. Shear et al., *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html> [<https://perma.cc/LS3Q-G3D9>].

71. Eric Lichtblau & Scott Shane, *Gonzales, Loyal to Bush, Was Firm on War Policies*, N.Y. TIMES (Aug. 28, 2007), <https://www.nytimes.com/2007/08/28/washington/28gonzales.html> [<https://perma.cc/XCR9-M9CX>]; Kenneth Noble, *Bork Irked by Emphasis on His Role in Watergate*, N.Y. TIMES (July 2, 1987), <https://www.nytimes.com/1987/07/02/us/bork-irked-by-emphasis-on-his-role-in-watergate.html> [<https://perma.cc/2AC8-D2QS>].

72. Hatch Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147 (codified at 5 U.S.C. §§ 7321–7326 (2012)).

73. U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565–66 (1973).

74. *Id.*

75. However, the Hatch Act does not begin to attack the problem of being "turkey-farmed"—a term used in the civil service to describe the practice of using obscure, dead-end assignments as a way of punishing employees who are viewed as out of sync with the current administration. See, e.g., Osnos, *supra* note 45 (detailing how experts who are viewed as asking the wrong questions are sidelined or placed in jobs designed to demoralize them and encourage retirement).

76. After Watergate, Congress was concerned about executive overreach and, more generally, the misuse and abuse of government power. See Archibald Cox, *Watergate and the Constitution of the United States*, 26 U. TORONTO L.J. 126, 129 (1976); see also Philip Shabecoff, *Presidency Is Found Weaker Under Ford*, N.Y. TIMES (Mar. 28, 1976), <https://www.nytimes.com/1976/03/28/archives/presidency-is-found-weaker-under-ford-curbs-on-exerting-power-seen.html> [<https://perma.cc/P7RJ-UWVH>].

accountability that culminated in the Inspector General Act of 1978.⁷⁷ The Act mandates that each executive agency have an inspector general (IG) to oversee issues of employee fraud and abuse.⁷⁸ The IG is frequently nominated and confirmed by the Senate and therefore has an independent status equivalent in many ways to the agency head, who the IG both reports to and oversees.⁷⁹

When the Act was first passed in 1978, Congress specifically deferred to the Department of Justice (DOJ) on how to apply IG oversight.⁸⁰ Because of concerns about political interference and executive overreach in law enforcement, Congress explicitly exempted DOJ attorneys from IG investigations of professional misconduct and opted instead to place such investigative and disciplinary authority in the politically insulated Office of Professional Responsibility (OPR).⁸¹ The law requires that the IG refrain from investigating and refer to the OPR all “allegations of misconduct involving [DOJ] attorneys, investigators, or law enforcement personnel, where the allegations relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice.”⁸² The OPR is headed by a counsel appointed by the Attorney General who reports directly to the Attorney General and the Deputy Attorney General.⁸³

77. Brian Naylor, *Inspecting for Trust: The Role of Inspectors General*, NPR (May 4, 2010), <https://www.npr.org/templates/story/story.php?storyId=126511407> [<https://perma.cc/N4JQ-6Z33>].

78. WENDY GINSBERG & MICHAEL GREEN, CONG. RESEARCH SERV., R43814, FEDERAL INSPECTORS GENERAL: HISTORY, CHARACTERISTICS, AND RECENT CONGRESSIONAL ACTIONS 1 (2016), <https://fas.org/sgp/crs/misc/R43814.pdf> [<https://perma.cc/MUR4-DAHY>].

79. *Id.* at 7.

80. GEN. ACCOUNTING OFFICE, B-256322, REPORT TO CHAIRMAN OF THE SENATE JUDICIARY COMMITTEE 2 (1994), <http://www.gao.gov/assets/400/390452.pdf> [<http://perma.cc/8GSK-DMUG>] (recounting the history of government oversight legislation).

81. In pertinent part, the statute reads:

In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of Justice . . . shall refer to the Counsel, Office of Professional Responsibility of the Department of Justice, allegations of misconduct involving Department attorneys, investigators, or law enforcement personnel, where the allegations relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice, except that no such referral shall be made if the attorney is employed in the Office of Professional Responsibility.

5 U.S.C. app. § 8E(b)(3) (2016); *see also* 28 C.F.R. § 0.39a(4) (2017).

82. 5 U.S.C. app. § 8E(b)(3) (outlining special provisions concerning the Department of Justice). Other agencies also have Offices of Professional Responsibility, but only the DOJ OPR enjoys a statutory exception from the general mandate of IG oversight. These other offices cover much more than attorney misconduct and often act as advisory bodies that recommend positional punishments to the subjects of their investigations. The Internal Revenue Service’s OPR reviews the work of lawyers and nonlawyers who appear before the IRS, but not allegations of internal misconduct. *See Office of Professional Responsibility*, IRS, <https://www.irs.gov/tax-professionals/office-of-professional-responsibility> [<https://perma.cc/LD85-AXPS>] (last visited Mar. 15, 2019). Immigration and Customs Enforcement’s OPR investigates employee misconduct and inspects detention facilities by delegation from the Department of Homeland Security’s IG office. *See Office of Professional Responsibility (OPR)*, ICE, <https://www.ice.gov/leadership/opr> [<https://perma.cc/7LGH-DTV8>] (last visited Mar. 15, 2019).

83. 28 C.F.R. § 0.39a(a)(7)–(8).

While DOJ attorneys have some insulation from political pressure and nonlawyer oversight of professional judgment through OPR review, all other agency lawyers face investigation for both professional and generalized employee misconduct under the agency IG's general oversight jurisdiction.⁸⁴

D. Limited Supervisor Accountability

Administrative law draws virtually no distinction between nonlawyers supervising lawyers as opposed to laypeople. While supervisors face general oversight and potential discipline through the agency's IG (particularly for actions taken against whistleblowers),⁸⁵ there are insufficient mechanisms for subordinate lawyers to seek redress for interference with candid assessments of legal requirements. If a lawyer is supervising, they are likely to be subject to direct review by a political appointee if the supervisor is not a political appointee herself. If nonlawyers are given supervisory power over lawyers, as they are in many agencies, then they have no requirements to be trained in or aware of the professional requirements placed on lawyers under their charge. Once again, the burden is placed on the individual person, the subordinate, who is unfortunate enough to be both lawyer and employee—a position that is suboptimal at best.

E. Limited OPR Effectiveness

Even when the OPR has had oversight over lawyer conduct and has condemned a lack of independent professional judgment, narrow interpretations of the scope of the office's disciplinary power have impeded the ability of the OPR to be effective. A recent and vivid example of this is the OPR's finding that John Yoo and Jay Bybee's Office of Legal Counsel memos, which attempted to legally justify torture, violated professional conduct rules requiring "thorough, objective, and candid" legal analysis.⁸⁶ One could argue that this finding comported with the profession's generalized self-regulatory view of the line between a reasonable legal

84. The IG's office focuses on issues arising from "waste, fraud, abuse, misconduct, or whistleblower reprisal relating to a Department of Justice (DOJ) employee, program, contract, or grant." *Hotline*, OFF. INSPECTOR GEN., <https://oig.justice.gov/hotline/index.htm> [<https://perma.cc/5B3X-QRSX>] (last visited Mar. 15, 2019).

85. Bringing attention to noncompliance with the rules of professional conduct is a form of whistleblowing, but it is not necessarily considered "whistleblowing" under the law protecting employees from retaliation. See Kathleen Clark, White Paper on the Law of Whistleblowing 3 (2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176293&download=yes [<http://perma.cc/T5GY-6GE7>] (discussing the different ways law treats whistleblowing and concluding that the protections afforded are narrow).

86. OFFICE OF PROF'L RESPONSIBILITY, REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 11, 251–54 (2009), <http://www.hsl.org/?abstract&did=28555/> [<http://perma.cc/QU65-W6BB>].

interpretation and one that was based on impermissible influence and policy-driven bias. However, the OPR’s report was ultimately not adopted.⁸⁷

Instead, the OPR’s report was subject to review by a more senior member of the DOJ, David Margolis, who rejected its findings.⁸⁸ Margolis applied a standard that professional misconduct exists “when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation imposed by law, rule of professional conduct or department regulation or policy.”⁸⁹ Margolis concluded that this was a closer question of law than the OPR thought, particularly given the exigent circumstances surrounding the memo’s importance.⁹⁰

F. Lack of a Lawyer-Specific Culture

Federal agencies are often defined by a specific ethos, an internal Kool-Aid, that articulates their mission and approach. For the DOJ, that Kool-Aid is infused with an independent conception of lawyering, forged in the fires of Watergate. There, the language of commitment to objectivity and evenhandedness—and against bias—runs as a steady stream in official guidance, informal guidance,⁹¹ internal mentoring, and public statements.⁹² The FBI views political interference as antithetical to the agency’s mission and a misuse of agency power. Such institutional norms are strong enough to touch the appointment process, where candidates must justify their fitness in terms of commitments to objective and independent judgment.⁹³ Such an environment provides a more fertile one to foster attorney independence.

However, thousands of attorneys provide legal advice outside of the DOJ, and there the culture of the agency may be at odds with, silent on, or actively

87. Eric Lichtblau & Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. TIMES (Feb. 19, 2010), <https://www.nytimes.com/2010/02/20/us/politics/20justice.html> [https://perma.cc/NF79-GHNZ].

88. *Id.*

89. Memorandum from David Margolis, Assoc. Deputy Att’y Gen., Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists 11 (Jan. 5, 2010), <https://fas.org/irp/agency/doj/opr-margolis.pdf> [https://perma.cc/6WVB-XFF2].

90. *Id.* at 10–11.

91. 110 CONG. REC. S6930 (daily ed. July 17, 2008) (statement of Sen. Leahy) (noting the FBI motto, “fidelity, bravery, and integrity”).

92. 110 CONG. REC. S6930–31 (daily ed. July 17, 2008) (statement of FBI Director Robert Mueller) (“The rule of law, civil liberties, and civil rights—these are not our burdens. They are what make us better. And they are what have made us better for the past 100 years.”).

93. Because of this public expectation for nonpartisan action, nominees for the Attorney General of the United States are often evaluated during confirmation hearings in terms of their commitment to objectivity and independence. Green & Roiphe, *supra* note 48, at 22. *But see* Spaulding, *supra* note 1, at 1935 (“[T]here 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.”).

agnostic to the issue of the lawyer's independent judgment.⁹⁴ In these contexts, agencies impress on new employees, lawyers or not, the agency mission in slogans, swag, and substance. For example, NASA's mission is the "peaceful exploration of space,"⁹⁵ while the National Labor Relations Board highlights its independent agency status and views its charge as "protect[ing] the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions."⁹⁶ Each agency focuses on a substantive mission that may or may not value and foster lawyers' autonomous judgment. Even within law-oriented federal agencies, the duty to provide candid, informed advice may be muddied. For example, in the Office of Legal Counsel, some have argued that it is an open question whether the function of that office is to provide "independent court-like advice" or "attorney's advice to a client about what you can get away with and what you are allowed to do."⁹⁷

Currently, there is nothing institutionalized into the federal administrative structure to tie lawyers across agencies together as a cohesive professional group.⁹⁸ The lack of uniformity across administrative agencies prevents lawyers from forming alliances across departments that would allow them to solidify their professional identities, first as lawyers, and second as members of a given agency. Thus, there is a stronger incentive to identify with intra-agency, nonlawyer coworkers rather than lawyers who would understand the challenges and expectations of professional practice.

It is important that lawyers maintain a professional legal culture, since laypeople often misunderstand the limits of advocacy, lawyer-client autonomy, and the lawyer's duty of loyalty. Loyalty in the vernacular is absolute: to some, it means taking orders without asking questions or even pointing out inconsistencies. This type of loyalty is incompatible with lawyering. Even laying aside commitments to rendering candid advice, on a granular level duties of diligence and competence, coupled with communication, require lawyers to explore different options and then lay them out before a client. It is well established that failure to do so, and thoroughly explain attendant risks, is professional misconduct subject to malpractice action.⁹⁹

94. *Federal Legal Employment Guide*, PSJD, <https://www.psjd.org/federal-legal-employment-guide> [https://perma.cc/TE96-4YA4] (last visited Mar. 15, 2019) (noting that there are 111,000 employees with law-related positions in executive and independent agencies alone, with 37,146 being general attorney positions).

95. *NASA: 60 Years and Counting*, NASA, <https://www.nasa.gov/specials/60counting/overview.html> [https://perma.cc/GDB9-DNWD] (last visited Mar. 15, 2019).

96. *Who We Are*, NLRB, <https://www.nlrb.gov/about-nlrb/who-we-are> [https://perma.cc/YV5C-WYPX] (last visited Mar. 15, 2019).

97. Memorandum from David Margolis, *supra* note 89, at 18 (quoting former Office of Legal Counsel Assistant Attorney General Jack Goldsmith).

98. While there is a Federal Bar Association, this group is voluntary and is independent from government sponsorship. *FBA Mission and Vision*, FED. B. ASS'N, <http://www.fedbar.org/About-Us/FBA-Mission.aspx> [https://perma.cc/JAK4-YPEG] (last visited Mar. 15, 2019).

99. See, e.g., *Nichols v. Keller*, 19 Cal. Rptr. 2d 601 (Ct. App. 1993) (finding that a lawyer committed malpractice where the client reasonably believed that the lawyer he consulted with

III. SOLUTIONS

Part III.A lays out ways in which agency relationships can be modified to better allow for lawyers' professional independence. Part III.B examines remedies to temper the influence of political appointees, while Part III.C proposes mechanisms to help hold supervisors accountable. Finally, Part III.D advocates for a stronger lawyer-specific culture across agencies.

A. Nonlawyer Supervision: Agency-Level Modifications

Since the likelihood of having every administrative agency headed by a lawyer is low, alternatives to pure lawyer supervision provide the clearest path forward. If immediate supervision by another lawyer is not possible or is politically infeasible, the creation of an independent administrative body charged with attorney oversight for all agencies would provide some insulation from administrative capture by nonlawyers. While the academy has long extolled the virtues of an administrative agency taking on the self-regulatory functions of bar organizations, creating one specifically for government lawyers may be more feasible in actuality.¹⁰⁰ This is partially because a limited version of such an organization already exists within the Department of Justice: the OPR.

As noted above, the OPR functions by having lawyers regulate other lawyers' conduct and does not extend to non-DOJ lawyers.¹⁰¹ The availability of OPR review in lieu of IG review, coupled with institutional norms discussed below, may in part explain why DOJ attorneys have been more willing to take public stances against the political pressure of the executive or agency heads: they have more protection from pressures to compromise their legal judgment. An expansive view of OPR-exclusive jurisdiction could provide an additional check for a nonlawyer supervisor.¹⁰²

would advise him on all available remedies following his workplace injury, but the lawyer only advised on workers compensation claims); *Togstad v. Vesely*, 291 N.W.2d 686 (Minn. 1980) (finding a lawyer who declined representation to a person inquiring about a medical malpractice claim liable for legal malpractice because he was negligent in suggesting that the claim lacked merit).

100. See Martin Garbus & Joel Seligman, *Sanctions and Disbarment: They Sit in Judgment*, in *VERDICTS ON LAWYERS* 47, 56–60 (Ralph Nader & Mark Green eds., 1976) (advocating the legislative creation of “an agency independent of the state and local bar associations” to govern lawyer discipline). See generally David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) (advocating for an independent administrative structure for regulating lawyer conduct).

101. Lest one is tempted to think this distinction between the politically appointed IG and the Office of Professional Responsibility is arcane or semantic, recent events indicate otherwise. See Manu Raju et al., *Internal FBI Report Shows Discrepancy Between McCabe and Comey Accounts*, CNN (Mar. 31, 2018), <https://www.cnn.com/2018/03/30/politics/mccabe-comey-fbi-report/index.html> [<https://perma.cc/8KQ3-6897>]; Matt Zapotosky, *FBI Disciplinary Office Recommends Firing Former Deputy Director Andrew McCabe*, WASH. POST (Mar. 14, 2018), https://www.washingtonpost.com/world/national-security/fbi-disciplinary-office-recommends-firing-former-deputy-director-andrew-mccabe/2018/03/14/c1d0dc1a-208a-11e8-86f6-54bfff693d2b_story.html [<https://perma.cc/YN4F-QSLG>].

102. The ongoing status and scope of DOJ OPR's power is an open question; however, so far, proposals would abrogate, rather than expand, the OPR's power. On June 6, 2018, a

OPR findings themselves should also be infused with a stronger presumption of validity and should only be subject to deferential review by a group of the attorney's professional peers. This could be accomplished in several ways, including: (1) setting the standard of review at the rational basis level; and (2) having the reviewing body be composed of lawyers drawn at random from the pool of government lawyer employees, who would be given time off from their other duties for their service. Since the parties applying the deferential standard would be decidedly unpredictable, the ability to wield biased or partisan influence would be lessened.

If a government attorney is subject to impermissible employment pressures, he or she could seek redress (ideally a confidential review) through the attorney-staffed OPR, rather than the generalized Merit Systems Protection Board.¹⁰³

Procedures that mandate record creation could also address the problem of rewarding principled insubordination with "cold turkey" assignments. Such a system could require that, prior to reassigning any attorney to a different department or geographic locale, supervisors would need to submit a report for OPR review detailing the reasoning behind the personnel shift.

If the IG structure is maintained, then the clear adoption of administrative regulations regarding lawyer-specific conduct requirements is key to creating a more autonomous environment. The Inspector General Act defines protected whistleblowing to include reporting a violation of "any law, rule, or regulation."¹⁰⁴ Thus, clearer rules concerning what constitutes professional misconduct for lawyers and supervisory misconduct regarding undue interference (ideally adopted by agencies directly) would protect attorneys reporting up and allow them to act as their own watchdogs.¹⁰⁵

B. Tempering Political Appointees

The power and capriciousness of political appointees, often at the top of the agency hierarchy, require a combination of increased specificity in legal obligations coupled with diffusion of oversight power. One way to achieve this is to broaden good-cause removal requirements in the administrative structure. These good-cause removal provisions could incorporate violations of professional conduct standards into their determination of fitness, thereby incentivizing supervisors to act accordingly. If one prefers the stick to the carrot, interference with lawyer professional independence could presumptively constitute good cause for removal. Such a rule would remove

Senate bill was introduced that would place such investigations squarely back under IG control and eliminate the existing exclusive powers of the OPR. S. 3003, 115th Cong. (2018).

103. This is the general semijudicial agency charged with processing mistreatment claims by federal civil servants. *See supra* Part II.A.2.

104. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 3(a), 103 Stat. 16, 19 (codified as amended at 5 U.S.C. § 2302(b)(8)(A)(i) (2012)) (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats).

105. *See, e.g., supra* Part II.C. As the McDade Amendment makes clear, agencies need to take affirmative action to make sure that their rules assure compliance with rules of professional conduct. 28 U.S.C. § 530B(b) (2012).

the ability of agencies to keep compromised parties in powerful positions while supporting underlings to upward report impermissible infringements on decision-making. One could also clarify and strengthen mechanisms that allow agency lawyers to go directly to Congress in more extreme situations, a practice utilized during the Watergate era to circumvent the Attorney General's review power.¹⁰⁶

The “special counsel” provisions of Title VI of the Ethics in Government Act of 1978, which were allowed to sunset in 1999, provide another thoughtful alternative to the current status quo.¹⁰⁷ Under this Act, the “special counsel” attorneys were selected by a three-judge panel at the request of the Attorney General rather than by a single individual.¹⁰⁸ In subsequent case law, the Supreme Court defended Congress’s ability to abrogate the Attorney General’s power in this way and found a federal statutory scheme that established certain special counsel outside of direct Attorney General control to be constitutional.¹⁰⁹ Thus, using a multimember judicial panel or even a board in situations where allegations of impeding professional misconduct are in play might be a plausible way to insulate that party from hostile supervisory action.

Forcing fact-finding and transparency can also help preserve the independence of government lawyers and protect them from adverse action. Former Attorney General Griffin Bell suggested (and his successor agreed) that disagreements between prosecutors and their supervisors should be memorialized in writing.¹¹⁰ One could also require that communications from the White House or Congress regarding specific cases be filtered through the Attorney General’s office. Creating a clear path for attorneys to present fact-finding directly to Congress where they felt their supervisors were compromised could also give employees a venue to report “up and out” in the event of pervasive agency limitations.¹¹¹

C. Increased Supervisor Accountability

Creating institutional climates ripe for supervisor accountability requires a shift in oversight both in terms of detection and substance. To detect and enforce, systems of investigative peer review can protect against supervisory abuses. For example, IGs of the United States are subject to peer review by

106. Charlie Savage, *Legal Experts Urge Release of Watergate Report to Offer Mueller a Road Map*, N.Y. TIMES (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/us/politics/mueller-report-grand-jury-watergate.html> [https://perma.cc/KFL6-C6SR].

107. JACK MASKELL, CONG. RESEARCH SERV., R43112, INDEPENDENT COUNSELS, SPECIAL PROSECUTORS, SPECIAL COUNSELS, AND THE ROLE OF CONGRESS 2 (2013), <https://fas.org/sgp/crs/misc/R43112.pdf> [https://perma.cc/V5MD-VVN9].

108. *Id.*

109. Morrison v. Olson, 487 U.S. 654, 660–65 (1988) (describing the special counsel provisions).

110. Memorandum from Benjamin R. Civiletti, Dep’t of Justice, to Heads of Offices, Bds., Bureaus & Divs., Communication from the White House and Congress (Oct. 18, 1979), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/10-18-1979.pdf> [https://perma.cc/C4VS-XL5W].

111. That said, it would also require allocation of congressional resources to the task.

other IG offices or a council of IGs gathered from different agencies.¹¹² If agency heads were called to preside over the accountability of one another, it may have a positive impact on attorney oversight, provided that enough agency heads were sufficiently committed to the rule of law.

Substantively, several rule reforms would, at minimum, add clarity and meaning to lawyer-supervisors' obligations to safeguard professional independence. The alchemy of disciplinary action between the bar and other coterminous forms of lawyer regulation is a fascinating and changeable plane where the efficacy of action, economic efficiency, and political viability all collide in a perfect (often inscrutable) storm. As such, this Article will dispense with the obligatory suggestion that the state bar lead the charge to actively discipline lawyers who find themselves at the top of the federal hierarchy for failure to adhere to norms of rendering independent professional judgment. While it takes no genius to see that political figures who are also attorneys, like Bill Clinton or Scott Pruitt, have violated lawyer codes of professional conduct and that bar associations would be resting on sure doctrinal footing in disciplining them as lawyers, the state bar as an entity appears to have enough of a self-preservation instinct to stay out of the tumult until the dust has settled—and then to cheerfully provide the exclamation point.¹¹³

Rather, the state bar should be active by clarifying rules of professional conduct to place stronger limitations and responsibilities on supervisors. The current rules hold supervisors accountable for the misdeeds of those they supervise in limited circumstances—predominately where they themselves order the action or have specific knowledge of the specific conduct at issue.¹¹⁴ Those supervised lack affirmative rights vis-à-vis the supervisor—they are only entitled to “reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer.”¹¹⁵ There is no

112. 5 U.S.C. app. § 6(e)(7) (2002) (“[T]he exercise of the law enforcement powers by each Office of Inspector General shall be reviewed periodically by another Office of Inspector General or by a committee of Inspectors General. The results of each review shall be communicated in writing to the applicable Inspector General and to the Attorney General.”).

113. For example, the Arkansas bar suspended President Bill Clinton for five years and fined him \$25,000 for his failure to be honest and act with candor in relation to testimony made in the Paula Jones sexual harassment investigations. Staff Writer, *Clinton Resigns from Bar, Beats Deadline for Disbarment*, WASH. TIMES (Nov. 10, 2001), <https://www.washingtontimes.com/news/2001/nov/10/20011110-031024-7822r/> [https://perma.cc/83TL-8BPQ]. Likewise, Richard Nixon was disbarred in 1976 due to his involvement in Watergate. Tom Goldstein, *New York Court Disbars Nixon for Watergate Acts*, N.Y. TIMES, July 9, 1976, at A1, <https://www.nytimes.com/1976/07/09/archives/new-york-court-disbars-nixon-for-watergate-acts-nixon-disbarred-by.html> [https://perma.cc/2JKB-LY2N].

114. MODEL RULE OF PROF’L CONDUCT r. 5.3 (AM. BAR. ASS’N 2016) (“[A] lawyer shall be responsible for the conduct of such a person . . . if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”).

115. *Id.* r. 5.3(a).

provision for disciplining a supervisor directly for removing an attorney from a case or even discharging them for their insistence on compliance with professional rules. The best possible fit for holding a supervisor accountable for such action is Model Rule 8.4(d), the catchall punishing a lawyer who “engage[s] in conduct that is prejudicial to the administration of justice.”¹¹⁶ However, if one wants to preserve the professional independence of lawyers, then employment pressure is a real concern to be reckoned with. Therefore, the bar should consider adopting a rule that, at minimum, parallels the common-law rule set forth in *Wieder v. Skala*,¹¹⁷ which protects at-will employees from being fired for complying with professional rules of conduct.¹¹⁸

The mandatory reporting requirements under Model Rule 8.3 regarding “honesty, trustworthiness or fitness” should also be broadened to include improper supervisory action.¹¹⁹ This could be achieved by adding comments clarifying what “fitness” in the supervisory context entails. A supervising attorney is unfit if he or she is using supervisory power to coerce lawyers against their own independent judgment. Revising Rule 8.4’s reporting requirements shifts leverage between supervisor-lawyer and employee-lawyer and creates an incentive for lawyers to report upward and participate in the oversight of supervisors.¹²⁰ Model Rule 8.4 should also make clear that failure to cooperate and be forthcoming in the investigation of a supervisor is a form of action “prejudicial to the administration of justice.”¹²¹

The state bar likewise would do well to clarify when professional rules apply to nontraditional lawyer practice. There is a tendency to think of the context of the rules of professional responsibility as rules that govern litigation only, not rules that apply to nonlitigation settings. This can be particularly problematic when many administrative entities are not employing lawyers as litigators but as policymakers, drafters, or adjudicators.

By tightening up the expectations of supervisors and marrying them to employment concerns and the reporting requirements of all lawyers, the ABA would support a cultural shift in professional independence that would empower individual attorneys to fully engage with assessing a client’s goals and pursuing them using legal means.

D. Supporting a Lawyer-Specific Culture

Establishing a lawyer culture begins with counting professional development activities as the equivalent of “billable” ones. Ultimately, all the conferences or lawyer-oriented interactions in the world are meaningless

116. *Id.* r. 8.4(d).

117. 609 N.E.2d 105 (N.Y. 1992).

118. *Id.* at 108–10 (holding that the discharge of an attorney for compliance with professional rules violates the implied obligation of good faith and fair dealing).

119. MODEL RULE OF PROF’L CONDUCT r. 8.3 (AM. BAR. ASS’N 2016).

120. There remains the question about whether one can fulfill this reporting requirement. To the extent one is concerned about abuse, the lack of anonymity in the reporting requirement would moderate against flippant or tactical misuse.

121. MODEL RULE OF PROF’L CONDUCT r. 8.4(d) (AM. BAR. ASS’N 2016).

unless they are facilitated by the lawyer's employer (here, the federal government). This means not only allowing lawyers to participate in such professional development, but also deliberately creating time for such activities and casual lawyer interactions in day-to-day life (like a coffee break station).

The military provides an extreme but useful example to examine conscious community building. First, membership in the military comes with introduction to its principles and an absolute allegiance to those principles. Lawyer codes could be treated similarly, with a "legal boot camp" that all agency lawyers from different departments participate in at the outset of hiring. Both attending and eventually running the boot camp would serve to create a "federal lawyer" ethos. Given the DOJ's existing successful culture of professional independence, perhaps an initial rotation through the DOJ for a period of one to two years would be advisable for eligibility to apply for lawyer positions elsewhere.¹²²

Second, the military spends extended amounts of time geographically isolated from nonmilitary personnel and sharing nonworking activities together (eating, sleeping, and generally living together). While anyone could argue that sounds like being on a particularly heinous trial team, there is something to the misery-loves-company bonding mechanism (see 1L year). During a "legal boot camp," lawyers could also have geographic autonomy from nonlawyers and share regular interactions with one another.

The continuation of these interactions once in the workplace is equally important to maintain cohesiveness. Labor norms, including lack of scheduled breaks and lunch times, contribute to a failure to build an ethic of independence among lawyers. Eating together is an important factor in building affinities. Thinking through how to maintain meal interactions and create physical separation and autonomy within a building, or by lawyers being housed in their own federal building, sends a strong signal of social unity. Rather than lawyers working within different agency-specific buildings, the agencies could create a law-office setting where lawyers from all different agencies work side by side. It would signal to the public, the agencies, and lawyers themselves that they are lawyers first. Building daily time into the work structure for lawyer interaction solidifies commitments to lawyerly values. Another option could rotate federal government lawyers in and out of different agency positions as a matter of course, with term-limited assignments in each office.¹²³ While this might weaken some agency-specific institutional memory, it would accomplish more than buttressing

122. This would require a large expansion of the DOJ's training division. However, that may be a necessary and worthwhile endeavor.

123. A pilot program that was created during the New Deal and existed until the end of World War II, the Board of Legal Examiners, sought to emulate the British civil service and move skilled lawyers methodically throughout different lawyer positions in the executive branch. Unfortunate timing with war-related recruiting led to the program's demise. See generally Daniel R. Ernst, "*In a Democracy We Should Distribute the Lawyers*": *The Campaign for a Federal Legal Service, 1933–1945*, 58 AM. J. LEGAL HIST. 1, 51–52 (2018).

lawyer solidarity; each agency lawyer would have deeper comparative knowledge and a better understanding of sister agencies and their challenges.

However, one need not adopt such grand-scale reforms. The IGs from all agencies have an annual national conference where they reconnect and share common challenges and problems. Federal lawyers could do this, too. Creating physical spaces for lawyers, even as simple as grouping them all on the same floor in a single building, would be useful. Encouraging meal interactions could be as straightforward as making clear the labor norms: “Everyone is expected to be here from eight to five, with a one-hour lunch from noon to one.” If all agencies have approximately the same lunch time, then organic connections between parties can continue and grow from the annual meetings.

A cross agency legal community allows lawyers to access a network of attorneys who are not subject to the same direct employment pressures and to reaffirm normative professional commitments. If we accept as a goal that we want lawyers to identify as lawyers first and agency-specific employees second, then institutions must be crafted to instill, cultivate, and nourish a lawyer-specific culture that values independent judgment.

Finally, engaging with public expectations regarding government lawyers is an important part of institutional redesign. The public’s view of how important it is for lawyers to maintain their independence steels the nerves of and drives confirmation processes for political appointees.¹²⁴ The public doesn’t like a Justice Department head who is not independent—such a DOJ would be viewed as having compromised governance. This supports the FBI’s conception of professional independence. Here, a charm offensive might be in order to make clear that not just DOJ lawyers oversee protecting the public from political abuses of power and to demonstrate that all lawyers must independently tell their superiors the hard facts about the legal parameters of their choices. This is not an obstructionist tendency—this is the slowness that the law, properly executed, requires.

CONCLUSION

This Article began with the goal of outlining the importance of independent professional judgment in the context of federal administrative practice, where the federal government’s power can overwhelm not only individual citizens, but also cities, municipalities, and even states. The stakes pinned on lawyers being willing and able to provide candid advice about the law are high.

124. Karoun Demirjian & Joby Warrick, *Trump’s Pick for CIA Leader Says He Would Refuse to Restart Enhanced Interrogation Techniques*, WASH. POST (Jan. 12, 2017), https://www.washingtonpost.com/world/national-security/trumps-pick-for-cia-leader-faces-tough-first-job-explaining-trump/2017/01/11/be983b9c-d85b-11e6-9a36-1d296534b31e_story.html [<https://perma.cc/6RY8-4JAB>]; Eric Lichtblau & Matt Apuzzo, *Jeff Sessions Says He Would Be Independent and Stand Up to Trump*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/us/politics/jeff-sessions-attorney-general.html> [<https://perma.cc/9WSJ-R2BY>].

Yet, while lawyers are charged with this task professionally, they are put in the position where they must meet their professional obligations at the risk of sacrificing their own livelihood and personal needs. This burden is too great. If we want lawyers to act independently, then we must provide them with an institutional environment where such action is the path of least resistance. Justice Joseph Story once said: "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."¹²⁵ One cannot be a sentinel with no post from which to see and with no alarm to sound. Turns out, Uncle Sam's lawyers could do better if they had more than a stool and a whistle.

125. JOSEPH STORY, A DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR, AS DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY, ON THE TWENTY-FIFTH DAY OF AUGUST, 1829, at 25 (1829).