

INTRODUCTION: LEGAL ETHICS IN THE AGE OF TRUMP*

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The *North Carolina Law Review* has had a long tradition of excellent symposia on significant legal developments, but its timing this year may be the Review's best ever. Just a few weeks before the symposium convened in October, the Speaker of the United States House of Representatives, Nancy Pelosi, authorized the initiation of a formal impeachment inquiry against President Donald Trump.¹ Over the subsequent nine weeks, the House moved expeditiously, and controversially, to impeach the President for abuse of power for (1) soliciting the President of Ukraine, Volodymyr Zelensky, to open a criminal investigation into one of his political rivals, former Vice President Joseph Biden, and for (2) obstruction of Congress for ordering others in his administration not to comply and refusing to comply himself with lawful congressional subpoenas to elicit information about the Ukraine affair.² In the span between January 16, 2020, and February 6, 2020, the Senate acquitted the President after conducting the shortest impeachment trial yet for a President and the only impeachment trial ever conducted in the Senate without witnesses.³ Yet, throughout it all, the President did not act alone: the hearings

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Editor's Note: Professor Gerhardt testified in front of the House Judiciary Committee on July 12, 2019, on constitutional options for addressing presidential misconduct, and again on December 4, 2019, regarding the constitutional grounds for the impeachment of President Donald J. Trump. He was one of three such scholars (along with Professor Noah Feldman from Harvard Law School and Professor Pamela S. Karlan from Stanford Law School) invited by House Democrats to serve as witnesses in the Trump proceeding. He also served as CNN's impeachment expert throughout the proceedings against President Trump, reprising a role that he performed for CNN during President Clinton's impeachment proceedings. In the latter, he testified as the only joint witness before the House Judiciary Committee when it considered grounds for impeaching President Clinton.

1. Nicholas Fandos, *Nancy Pelosi Announces Formal Impeachment Inquiry of Trump*, N.Y. TIMES (Sept. 24, 2019), <https://www.nytimes.com/2019/09/24/us/politics/democrats-impeachment-trump.html> [http://perma.cc/M2KK-9ANZ (dark archive)].

2. See H. COMM. ON THE JUDICIARY, THE IMPEACHMENT OF DONALD J. TRUMP PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 116-346, at 4–5 (2019); see also Grace Panetta, *Everything You Need To Know About Trump's Impeachment Process: What's Happened, Who the Players Are, and What Comes Next*, BUS. INSIDER (Jan. 27, 2020) <https://www.businessinsider.com/trump-impeachment-major-players-timeline-what-comes-next-2019-11> [https://perma.cc/3VZQ-5T3D].

3. See Peter Baker, *Impeachment Trial Updates: Senate Acquits Trump, Ending Historic Trial*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/05/us/politics/impeachment-vote.html>

and news reports revealed involvement of several White House, National Security, State Department, and Office of Management and Budget lawyers whose actions were legally and ethically dubious, both in the Ukraine affair and the ensuing impeachment process in Congress.⁴ Additionally, in the Senate trial, the President's lawyers not only skirted but often clearly breached ethical rules. How the decisions and actions (or nonactions) of these lawyers are worked out in the long run will be crucial for clarifying how far lawyers may go to justify and facilitate a President's refusals to comply with a legal process he or she deems illegitimate, especially one that falls within the unique, or sole, power of another branch.

Considering ethical and legal constraints on what government lawyers, and lawyers who represent government officials, including the President, may say or do when Congress exercises its impeachment authority is hardly new. Watergate and its aftermath come quickly to mind as the most apt of precedents.⁵ In the wake of President Richard Nixon's resignation from office in August 1974, a serious effort was undertaken to require the teaching of legal ethics in law schools.⁶ This was done with the hope that such instruction would inculcate in young lawyers the ethical rules and constraints with which they must abide, even when they are working for the most powerful political leader in the world—the President of the United States.⁷ The contributions to our symposium provide valuable insights on how well that planned instruction has worked, particularly since lawyers were closely involved in each step of how the administration handled, or arranged, to delay national security funding for

[<https://perma.cc/QV4F-KAKY> (dark archive)]; Jennifer Haberkorn et al., *Senate Votes Against Calling Witnesses in Trump Impeachment Trial*, L.A. TIMES (Jan. 31, 2020), <https://www.latimes.com/politics/story/2020-01-31/senate-impeach-trump-trial> [<https://perma.cc/RJ8H-L89W>].

4. See, e.g., Letter from Pat Cipollone, White House Counsel, to House Leaders (Oct. 8, 2019), <https://games-cdn.washingtonpost.com/notes/prod/default/documents/7cb26618-e770-45ef-9c45-bdd5554ce201/note/9608d380-f0df-4e07-8b08-8f326b723626.pdf#page=1> [<https://perma.cc/6L2P-HBCP>]; Deb Reichmann, *Impeachment Inquiry Focuses on 2 White House Lawyers*, ASSOCIATED PRESS (Nov. 1, 2019), <https://apnews.com/01f2000ce18f44e89a8079ba6af2b546> [<https://perma.cc/ENZ3-RFG8>]. See generally H.R. REP. NO. 116-346, at 2–3, 5 (2019) (chronicling the Ukraine call and the involvement of the President's private attorney, and the President's urging of executive officials to refuse to comply with congressional subpoenas).

5. Though the *Model Rules of Professional Responsibility* were already in effect at the time of Watergate, the discussion of their relevance to the proceedings (and to the conduct of the President, who was a lawyer) largely occurred after the proceedings, particularly with respect to the necessity for teaching them in law school. See generally Michael Ariens, *The Agony of Modern Legal Ethics, 1970–1985*, 5 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 134 (2015) (chronicling the renewed attention given to legal ethics in the wake of the Watergate scandal and the impetus behind mandating the instruction of ethics in ABA-approved law schools).

6. Mark Hansen, *1965–1974: Watergate and the Rise of Legal Ethics*, A.B.A. J. (Jan. 1, 2015), http://www.abajournal.com/magazine/article/1965_1974_watergate_and_the_rise_of_legal_ethics [<https://perma.cc/426P-RXPX>].

7. See *id.*

Ukraine in an apparent exchange for its leader's announcement of opening a criminal investigation into former Vice President Biden and his son, Hunter.

The symposium's subject—ethics in the age of Trump—was concededly broad but not unbounded. Such a subject could go well beyond the President and the lawyers in his administration to encompass lawyering more generally over the past decade, which, admittedly, has raised a disturbing range of ethical dilemmas, including a managing partner of one of the nation's most elite law firms paying intermediaries to defraud colleges to improve his daughter's chances for admission;⁸ lawyers who used the power of their offices to intimidate witnesses and to expose the identity of a whistleblower in violation of federal law;⁹ and a former Attorney General who had refused to comply with a legislative subpoena to produce internal documents relating to the so-called Fast and Furious Operation.¹⁰ This symposium focused specifically on private and public lawyering associated with the President and his administration that preceded and is likely ongoing since the activities that gave rise to the President's impeachment. The event brought together some of the nation's leading scholars to discuss the legal and ethical ramifications of prosecutorial discretion in the Trump Administration; the efforts and duties of White House and other administration lawyers doing the President's bidding and perhaps facilitating his misconduct, as set forth in the Articles of Impeachment; and the private lawyers representing the President and other administration officials with respect to the House Intelligence Committee and House Judiciary Committee investigations that culminated in the President's impeachment.

Several themes emerged from the contributions to the symposium. Here are just three: issues surrounding situational ethics, concerns about possible violations of ethical norms particularly in the context of interactions between the Trump Administration and Ukraine, and opportunities for ethical reforms to the practice of law in this country.

8. Nick Anderson, *Ex-Leader at New York Law Firm Gets One Month in Prison in College Admissions Scandal*, WASH. POST (Oct. 3, 2019), <https://www.washingtonpost.com/education/2019/10/03/ex-leader-new-york-law-firm-gets-one-month-prison-college-admissions-scandal/> [http://perma.cc/P9DH-BG2F (dark archive)].

9. Igor Derysh, *Texas GOP Rep. Louie Gohmert Names Alleged Whistleblower at Televised Impeachment Hearing*, SALON (Dec. 12, 2019), <https://www.salon.com/2019/12/12/texas-gop-rep-louie-gohmert-names-alleged-whistleblower-at-televised-impeachment-hearing/> [https://perma.cc/2C6M-C6XQ]; Rachel Frazin, *Impeachment Witnesses Come Under Threats, Harassment*, HILL (Nov. 23, 2019), <https://thehill.com/homenews/house/471703-impeachment-witnesses-come-under-threats-harassment> [http://perma.cc/27K7-443N]; Dan Sweeney, *Florida Bar Will Investigate U.S. Rep. Matt Gaetz over Potential Witness Intimidation*, SUN-SENTINEL (Ft. Lauderdale May 8, 2019), <https://www.sun-sentinel.com/news/politics/fl-ne-gaetz-cohen-bar-investigation-20190508-vrdxkbjyrcqzfyxwnxtmiq-story.html> [https://perma.cc/U59B-T5YB].

10. Tim Ryan, *Justice Dep't Settles with House Panel on "Fast and Furious" Records*, COURTHOUSE NEWS SERV. (Mar. 7, 2018), <https://www.courthousenews.com/justice-dept-settles-with-house-panel-on-fast-furious-records/> [https://perma.cc/P9NU-UU9G].

First, a dominant concern throughout the Articles is “situational ethics”—the idea that the ethics of specific acts and decisions should be assessed within their context.¹¹ Numerous factors come into play when assessing the situational ethics of any act or decision.¹² Specifically in the context of the presidency, where someone is within the hierarchy of the administration, to whom (and to what extent) people inside and outside of the administration owe duties of candor and truthfulness, and the acts and decisions themselves, are all essential considerations for any analysis. For example, some of the people in the current administration, including the President and the Secretary of State, are not lawyers, and therefore their actions and duties are not governed by any code of professional conduct but by the Constitution, our laws, and determinations (in the context of impeachment proceedings) on whether they abused power, breached the public trust, and/or seriously injured the Republic.¹³ Thus, the two Articles of Impeachment approved against President Trump charged him with no criminal misconduct or violations for which he could go to prison.¹⁴ Instead, the House determined that the President’s abuse of powers and obstruction of Congress violated the Constitution, the supreme law of the land.¹⁵ As such, the actions were illegal and sufficiently serious misconduct to warrant his impeachment.

Impeachment articles aside, President Trump, along with every other official in his administration, is also subject to possible legal sanctions for refusing to comply with congressional subpoenas.¹⁶ Congressional subpoenas are lawful orders, the violations of which provide the bases for contempt of Congress and possible fines and even jail time.¹⁷ It is useful to remember as well that federal law requires executive branch employees to refrain from taking any personal benefits in exchange for doing their jobs.¹⁸ Even if this law does not

11. See generally Randall Grometstein, *Prosecutorial Misconduct and Noble-Cause Corruption*, 43 CRIM. L. BULL. 63, 66–67 (2007) (discussing the elements of situational ethics).

12. See *id.*

13. See Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019).

14. *Id.*

15. *Id.*; see also Richie Duchon & Alex Johnson, *House Judiciary Committee Publishes Full Impeachment Report*, NBC NEWS (Dec. 16, 2019), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/house-judiciary-committee-publishes-full-impeachment-report-n1102531> [<https://perma.cc/97TT-35P5>].

16. See Jan Wolfe, *Explainer: How Powerful Are Congress Subpoenas, Contempt Citations?*, REUTERS (May 2, 2019), <https://www.reuters.com/article/us-usa-trump-congress-subpoena-explainer/explainer-how-powerful-are-congress-subpoenas-contempt-citations-idUSKCN1S81FP> [<https://perma.cc/6TVU-G5H2>]. But see Comm. on Judiciary v. McGahn, 951 F.3d 510, 516–22 (D.C. Cir. 2020) (holding that the judiciary lacks the power to adjudicate operations disputes between the other branches of government, and that as such, federal courts are unable to force a member of the executive branch to comply with a legislative subpoena), *reh’g en banc granted sub nom.* U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. 2020).

17. Wolfe, *supra* note 16.

18. See 18 U.S.C. § 201(b)(2) (2018).

apply directly to the President, it does apply to his cabinet secretaries and everyone else within his administration,¹⁹ and any of them could be terminated for such misconduct.²⁰ For many members of Congress, the fact that the President has done something for which everyone else in the administration could be fired justifies his impeachment rather than any absolution.²¹ There is no presidential immunity for a President's abuse of power or any other impeachable offense.²² In addition to issues of executive immunity, serving in Congress does not protect a member, or a member's staff, from punishment for violating federal laws (for instance, failing to protect the identity of a whistleblower) or intimidating witnesses who appear before them.²³

All the aforementioned laws and ethical strictures apply to others in the administration besides the President, such as the Attorney General, the White House Counsel, the Counsel to the National Security Council, and the President's legal counsel, including the lawyers who defended him before the House and the Senate. Two of the four Presidents who previously faced serious impeachment—Richard Nixon and Bill Clinton—were lawyers and were disbarred (at least temporarily) for some of their misconduct.²⁴ Lawyers who occupy these positions in the current administration and were, in the words of the President's Ambassador to the European Union, "in the loop" of the scheme to pressure Ukraine's leader to make an announcement beneficial to the President's reelection²⁵ are subject to similar sanctions for facilitating any illegal activity, which includes any abuse of power. As lawyers, their involvement with these activities needs to be viewed in light of the ethical rules that bind the profession. It is not clear whether some of these lawyers may seek refuge in Rule 5.2 of the Model Rules of Professional Conduct, which says that "[a]

19. *See id.* § 201(a).

20. *Id.* § 201(b).

21. *See* Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019).

22. *See* Susan Davis, *Precedent Favors Democrats in Power Struggle with Trump, but It Could Take Awhile*, NPR (May 15, 2019), <https://www.npr.org/2019/05/15/722872600/precedent-favors-democrats-in-power-struggle-with-trump-but-it-could-take-a-while> [<https://perma.cc/F4LA-D3BA>].

23. *See generally* TODD GARVEY, CONG. RESEARCH SERV., R45043, UNDERSTANDING THE SPEECH OR DEBATE CLAUSE (Dec. 1, 2017), <https://fas.org/sgp/crs/misc/R45043.pdf> [<https://perma.cc/3TVG-WJK6>] (discussing the limitations and protections of the Speech or Debate Clause of the Constitution).

24. *See e.g.*, Tom Goldstein, *New York Court Disbars Nixon for Watergate Acts*, N.Y. TIMES (July 9, 1976), <https://www.nytimes.com/1976/07/09/archives/new-york-court-disbars-nixon-for-watergate-acts-nixon-disbarred-by.html> [<https://perma.cc/E37M-Y5W4> (dark archive)]; David A. Graham & Cullen Murphy, *The Clinton Impeachment, as Told by the People Who Lived It*, ATLANTIC (Dec. 2018), <https://www.theatlantic.com/magazine/archive/2018/12/clinton-impeachment/573940/> [<https://perma.cc/YGX3-DGFK> (dark archive)] (discussing the five-year suspension of President Clinton's law license).

25. Editorial Board, *'Everyone Was in the Loop': Gordon Sondland Makes Two Stunning Points*, WASH. POST (Nov. 20, 2019), https://www.washingtonpost.com/opinions/global-opinions/everyone-was-in-the-loop-gordon-sondland-makes-two-stunning-points/2019/11/20/c57ea992-0bbf-11ea-8397-a955cd542d00_story.html [<https://perma.cc/F3QF-6KNM> (dark archive)].

subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."²⁶ Yet, that rule is not a safe harbor for either the Attorney General or the Chief White House Counsel since neither is "subordinate" to any attorney. Nor is that rule refuge for committing illegal and inappropriate activity.²⁷ One significant lesson of Watergate, as well as the Nuremberg Trials, is that merely following orders is not a defense to the participation in cover-ups or other crimes ordered by superiors.²⁸ All such actors are "in the loop" and covered by the ethical rules taught in law schools since Watergate and adopted, in some form, in every state.²⁹ These actors are also subject to departmental or agency regulations governing their conduct, the violations of which are also grounds for dismissal and other sanctions. Thus, when assessing the ethics of administration lawyers or private counsel for the President, such as Michael Cohen (who went to jail) and Rudy Giuliani (whom the President acknowledged after the trial was, in fact, doing his bidding in looking for dirt on the Bidens in Ukraine³⁰), the particular circumstances of the attorneys at the time of possible misconduct should be the focus of attention. Serving in the government or representing the President is not a get-out-of-jail-free card or a pass on complying with the rules of professional responsibility.

Second, I hasten to acknowledge that much is still not known about what particular lawyers said and did (or did not do) with respect to the Ukraine affair and refusals to comply with lawful subpoenas. When, for example, the Counsel to the National Security Council, John Eisenberg, told Lieutenant Colonel Alexander Vindman, who had concerns about the propriety of the July 25, 2019, phone call between the President and Ukraine's newly elected President, not to talk to anyone else, and then proceeded to store the transcript on the nation's most secret server (which is meant for protecting sensitive codes),³¹ it is not

26. MODEL RULES OF PROF'L CONDUCT r. 5.2(b) (AM. BAR ASS'N, 2019).

27. Douglas R. Richmond, *Academic Silliness About Model Rule 5.2(b)*, 19 PROF. LAW. 15, 18 (2009) ("In short, subordinate lawyers always have a duty to question supervisory lawyers' ethical judgments and oppose illegal commands even in the presence of Rule 5.2(b).").

28. See Hansen, *supra* note 6; Anthony Lewis, *The Argument of "Acting Under Orders" Doesn't Work*, N.Y. TIMES (Jan. 15, 1975), <https://www.nytimes.com/1975/01/05/archives/the-argument-of-acting-under-orders-doesnt-work-lessons-of.html> [<https://perma.cc/E5ZY-PL7L> (dark archive)].

29. Hansen, *supra* note 6.

30. See Marshall Cohen, *Trump Contradicts Past Denials, Admits Sending Giuliani to Ukraine*, CNN (Feb. 14, 2020), <https://www.cnn.com/2020/02/13/politics/trump-rudy-giuliani-ukraine-interview/index.html> [<https://perma.cc/AER3-BVSB>]; see also Jordan Fabian & Bill Allison, *Giuliani's Tangled Role with Trump Skirts Conflicts, Tests Laws*, BLOOMBERG (Jan. 17, 2020), <https://www.bloomberg.com/news/articles/2020-01-17/giuliani-s-tangled-role-with-trump-skirts-conflicts-tests-laws> [<https://perma.cc/68PW-YGYT> (dark archive)].

31. Jeremy Herb, *Impeachment Testimony: Vindman Was Told Not To Discuss Trump-Zelensky Call*, CNN (Nov. 2, 2019), <https://www.cnn.com/2019/11/01/politics/alexander-vindman-john-eisenberg-testimony/index.html> [<http://perma.cc/P2YU-ZL8W>].

clear, at least yet, whether he was taking any of these actions as parts of a cover-up or an effort to do an investigation of the President's possible misconduct. So many lawyers involved in the circumstances leading to the President's impeachment refused to testify before Congress or participate in any inquiry into those circumstances. Their refusal raises significant questions about the lawyers' compliance with Rule 3.3.³² The Rule requires *all* lawyers, even those in the highest reaches of the executive branch, to be candid and truthful in their statements and actions in legal proceedings, including legislative ones.³³

The concerns about Trump's lawyers violating Rule 3.3 became more acute—and more apparent—in his Senate trial. I have made this argument before, both in commentary on air with CNN and in print.³⁴ Nor am I alone in thinking the lawyers violated Rule 3.3. The rule requires that lawyers not “make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”³⁵ The comments to the Rule make clear that legislative bodies such as the Senate count as tribunals for purposes of the rule. Rule 8.4 forbids lawyers from “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation” and from “conduct that is prejudicial to the administration of justice.”³⁶ Rule 3.7 forbids

32. See MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 3 (AM. BAR ASS'N, 2019) (“There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”); see also *id.* r. 3.3 cmt. 12 (“[3.3(b)] requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person . . . has engaged in criminal or fraudulent conduct related to the proceeding.”).

33. See *id.* r. 3.3.

34. See Michael J. Gerhardt, *Four Fundamental Flaws in President Trump's Impeachment Trial Memo*, JUST SECURITY (Jan. 21, 2020), <https://www.justsecurity.org/68181/four-fundamental-flaws-in-president-trumps-impeachment-trial-memo/> [<https://perma.cc/9M7E-HUZS>]; Michael J. Gerhardt, *Trump's Impeachment Defense Boils Down to This: Treat Me Like a King*, WASH. POST (Oct. 12, 2019), <https://www.washingtonpost.com/outlook/2019/10/12/trumps-impeachment-defense-boils-down-this-treat-me-like-an-english-king/> [<http://perma.cc/L52R-XXT4> (dark archive)] [hereinafter Gerhardt, *Boils Down*]. I cite these in response to Professor Jonathan Turley's taking me to task for questioning the White House lawyers' ethics without substantiating my claim. Indeed, he claims the aspersion, without foundation, is an ethical problem. It was not hard to find the claims I made, including in Professor Turley's hometown newspaper, and it is sadly ironic that he stoops to an attack on me personally, the go-to method made by the President and his defenders when they cannot and do not argue substance. Professor Turley's equating zealous lawyering with breaking the rules is problematic too. A good lawyer never practices close to the ethical boundaries, while ethically challenged lawyers are eager to take refuge in their overstated protections accorded for zealous advocacy. The rules themselves do not call for zealous advocacy but instead place a number of ethical constraints on lawyers not just bending but breaking the law or the rules to please their clients. Nor am I alone in raising concerns about the White House lawyers' over-zealous advocacy. See, e.g., Stephen Gillers, *Impeachment Trial and Legal Ethics: Cipollone Should Be a Witness, Not a Trump Lawyer*, JUST SECURITY (Jan. 27, 2020), <https://www.justsecurity.org/68264/impeachment-trial-and-legal-ethics-pat-cipollone-should-be-a-witness-not-a-trump-lawyer/> [<https://perma.cc/RH23-J5G6>]. The House Managers made this same argument in a January 21 letter to Mr. Cipollone. See *id.*

35. MODEL RULES OF PROF'L CONDUCT r. 3.3(a).

36. See *id.* r. 8.4 (c)–(d).

lawyers from being advocates and witnesses on the same matter, which raises a problem for Chief White House Counsel Pat Cipollone, whom John Bolton says was present when the President pushed him to pressure Ukraine.³⁷

I need not mention all the statements of White House lawyers that skirt or run afoul of Rules 3.3 and 8.4, but here are some examples of troublesome conduct:

(1) Mr. Cipollone telling the Senate that the House Managers “hid evidence” from the Senate (there is nothing to support that assertion);³⁸

(2) Mr. Cipollone claiming that the House Managers did not “believe in the facts of their case” (completely contrary to the facts);³⁹

(3) Mr. Cipollone complaining that “[n]ot even Mr. Schiff’s Republican colleagues were allowed into” the special room where witnesses were testifying before the Committee on the Ukraine affair (completely false, the Republican committee members were all allowed to be present);⁴⁰

(4) President Trump’s personal attorney, Jay Sekulow, telling the Senate that the President was “denied the right to access evidence” and “the right to have counsel present at hearings” (the President and his counsel were invited to participate in the House Judiciary Committee hearings but declined);⁴¹

(5) Mr. Sekulow saying the Mueller Report showed “no obstruction” (in fact it listed multiple instances of it);⁴²

(6) Mr. Cipollone commenting that the Ukraine aide was given “on time” (in fact the delay caused by the President prevented all the aid from being given to Ukraine in time to meet the deadline set for the appropriation);⁴³

37. *Id.* r. 3.7 (limiting the ability of an attorney to “act as an advocate at a trial in which [he] is likely to be a necessary witness” except in those circumstances when “(1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client”); *see also* Gillers, *supra* note 34.

38. Calvin Woodward, *AP Fact Check: Trump’s Impeachment Defense and the Facts*, ASSOCIATED PRESS (Jan. 25, 2020), <https://apnews.com/2ce0cdd506b5347b69607a1cabe7d1ab> [<https://perma.cc/XY3Z-DTRJ>].

39. *Id.*

40. Max Boot, *Trump’s Lawyers Are Playing a Bad Hand Badly*, WASH. POST (Jan. 22, 2020), <https://www.washingtonpost.com/opinions/2020/01/22/democrats-are-winning-argument-even-though-theyll-lost-senate-trial/> [<https://perma.cc/49FW-83Z9> (dark archive)]; Aaron Rugar, *Trump’s Lawyers Began the Impeachment Trial with a Blizzard of Lies*, VOX (Jan. 21, 2020), <https://www.vox.com/2020/1/21/21075791/trump-impeachment-lawyers-jay-sekulow-pat-cipollone-opening-statement> [<https://perma.cc/KVL9-8NUM>].

41. *See* Rugar, *supra* note 40.

42. Daniel Dale, *Fact Check: Trump Lawyers Make At Least Three False Claims During Impeachment Arguments*, CNN (Jan. 22, 2020), <https://cnn.com/2020/01/22/politics/trump-lawyers-impeachment-false-claims-scif/index.html> [<https://perma.cc/NW4H-JEFA>]; *see also* Boot, *supra* note 40 (discussing Mr. Sekulow’s commentary on the Mueller Report).

43. Bart Jansen et al., *Senate Adopts Rules for Trump Impeachment Trial Following Marathon Session, 11 Defeated Amendments*, USA TODAY (Jan. 22, 2020) <https://www.usatoday.com/story/news/>

(7) Deputy White House Counsel Michael Purpura declaring “[t]here was no quid pro quo on the call” in spite of the President’s own chief of staff admitting there was;⁴⁴

(8) Professor Alan Dershowitz claiming that a President who thought his reelection was in the nation’s best interest could solicit foreign interference on his behalf (even though neither the law nor the Constitution allow a President to do this);⁴⁵

(9) Mr. Cipollone charging that Adam Schiff “manufactured a fraudulent version of [the] phone call”⁴⁶ and that his paraphrase of the call was “a complete fake” (in fact, the call transcript was already public at the time and Schiff’s characterizations were consistent with it); and

(10) Deputy White House Counsel Patrick Philbin asserting that Rudy Giuliani was not engaged in “foreign policy” on behalf of the United States (though Giuliani and others say he did just that, and the President admitted that after the trial) and that it was not illegal for the President to solicit foreign assistance for his reelection (neither the Constitution nor any law of this land allows a President to do this).⁴⁷

In denying the assertion made in John Bolton’s forthcoming book that he was present at a meeting when the President urged Bolton to pressure Ukraine’s President to make the announcement of the opening of a criminal investigation of the Bidens, Mr. Cipollone made himself a witness in the same matter in which he was performing as an advocate. (And the President waived any claim of executive privilege to keep private conversations he had with Bolton when he publicly declared Bolton’s account false.⁴⁸)

Apart from the impeachment hearings, Attorney General William Barr, too, has been the subject of ethical concerns. Since the beginning of the year there have been multiple complaints made by the New York Bar Association

politics/2020/01/21/senate-impeachment-trial-trump-rules-witnesses/4493149002/ [https://perma.cc/5T4R-ZZ4D].

44. The New York Times, *Trump Impeachment: Highlights of Saturday’s Trial*, N.Y. TIMES (Jan. 25, 2020), <https://www.nytimes.com/2020/01/25/us/politics/trump-impeachment-hearings-saturday.html> [https://perma.cc/F44D-PNU8 (dark archive)].

45. Eliza Relman & Sonam Sheth, *Trump Lawyer Alan Dershowitz Argues Trump Can Do Whatever He Wants To Get Reelected If He Believes Another Term Is in the Public Interest*, BUS. INSIDER (Jan. 29, 2020), <https://www.businessinsider.com/alan-dershowitz-trump-re-election-public-interest-2020-1> [https://perma.cc/B3XZ-3SFA].

46. See Rugar, *supra* note 40.

47. Dareh Gregorian, *White House’s Philbin Suggests President Will Keep Using Giuliani as International ‘Confidante,’* NBC NEWS (Jan. 30, 2020), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/live-blog/trump-impeachment-trial-live-coverage-senators-ask-questions-witness-battle-n1126271/ncrd1126941#liveBlogHeader> [https://perma.cc/DSL9-65BR].

48. See Barbara McQuade, *Trump Waived Executive Privilege When He Called Bolton a Liar*, WASH. POST (Jan. 27, 2020), <https://www.washingtonpost.com/outlook/2020/01/27/trump-waived-executive-privilege-when-he-called-bolton-liar/> [https://perma.cc/X64B-CC7K (dark archive)].

concerning Barr and speeches he made in the fall of 2019.⁴⁹ On January 8, 2020, the Association sent a letter to both chambers of Congress requesting an investigation into the activities of Attorney General Barr citing concerns that they “threaten[] public confidence in the fair and impartial administration of justice.”⁵⁰ Later, on February 12, the New York City Bar Association wrote a letter to the Department of Justice Inspector General and the leaders of both the House and Senate Judiciary Committees requesting formal investigations into Barr’s and the Department’s “making prosecutorial decisions based not on neutral principles but in order to protect President Trump’s supporters and friends.”⁵¹ Presumably, the Inspector General and House and Senate Judiciary Committees might identify whether Barr and/or any other high-ranking departmental officials have committed any violations of any laws, regulations, or ethical rules warranting impeachment or other possible sanctions for their misconduct. At the time of the publication of our Symposium, neither the Inspector General nor either Judicial Committee had yet taken any steps to investigate the circumstances relating to apparent preferential treatment given to the President’s friends and supporters.

Last but not least, the Symposium considered what reforms may be needed to prevent any further circumvention of ethical norms and rules. It is naïve to think that merely requiring the instruction of legal ethics in law schools will ensure lawyers comport themselves in perfect accordance with the rules of professional responsibility. Such instruction might have diminished the numbers of lawyers who engage in unethical conduct, but there is no proof of such a consequence and, as we all know, much unethical lawyering goes undetected because of efforts to keep it below radar. For example, in refusing to comply with legislative subpoenas to elicit information about possible abuse of power, White House lawyers make it more difficult, if not impossible for the public to hold them accountable for their ethical breaches. If such non-compliance goes unchecked, these lawyers leave office with the confidence of knowing they leave behind—hidden from any authorities that could hold them accountable—their subversions of law, support for or participation in abuses of power, and failures to abide by the Rules of Professional Conduct.

49. Greg Farrell, *NYC Bar Association Asks Congress To Investigate AG Barr for Bias*, BLOOMBERG (Jan. 9, 2020), <https://www.bloomberg.com/news/articles/2020-01-09/investigate-barr-for-bias-n-y-bar-association-tells-congress>, [https://perma.cc/64M4-SWGS (dark archive)].

50. Amanda Robert, *NYC Bar Calls for Investigation into AG Barr over Conduct that Threatens ‘Impartial Administration of Justice,’* A.B.A. J. (Jan. 10, 2020), <https://www.abajournal.com/news/article/new-york-city-bar-association-calls-for-investigation-into-ag-barr> [https://perma.cc/G997-994G].

51. Jennifer Rubin, *The New York City Bar Goes After William Barr*, WASH. POST (Feb. 13, 2020), <https://www.washingtonpost.com/opinions/2020/02/13/bar-goes-after-barr/> [https://perma.cc/9R8V-GNJZ (dark archive)].

Perhaps most confounding is the question of whether lawyers' justification for the forced silence of so many witnesses passes constitutional muster because it has been done arguably in service of a (dubious) theory of absolute executive entitlement to maintain control over information produced within and by the executive branch. The claim of any such entitlement is grounded in the unitary theory of the executive, which posits that all executive power must be under the control of the President.⁵² The problem is that the theory has no grounding in constitutional law, except for Justice Scalia's sole dissent in *Morrison v. Olson*.⁵³ Judicial precedents, as well as legislative practice, cut in the other direction.⁵⁴ When the Chief White House Counsel grounds his refusal to comply with a legislative inquiry and legislative subpoenas on the basis of such a theory, he seeks refuge in the dangerous and legally unsound principle that he, like the President, is above the law.⁵⁵ The Symposium may not have fully addressed the question of whether the silence of lawyers and their refusals to comply with legislative inquiries and subpoenas is illegal and unethical, but it hopefully will enrich lawyers' understandings of how to analyze their ethical obligations when asked to support or defend unconstitutional abuses of power or illegal conduct.

52. *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting) (arguing that there is a "constitutional principle that the President ha[s] to be the repository of all executive power").

53. *Id.*

54. See, e.g., Susan Hennessey & Benjamin Wittes, *The Disintegration of the American Presidency*, ATLANTIC (Jan. 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/trump-myth-unitary-executive/605062/> [<https://perma.cc/2K8M-UHF4> (dark archive)] (chronicling the declining applicability of the unitary theory of the executive hastened by the development of the executive bureaucracy and the fracturing of the executive branch under the Trump Administration); History News Network, *A Brief History of the 'Unitary Theory' that Trump and Barr Are Using To Resist Congressional Oversight*, RAWSTORY (June 4, 2019), <https://www.rawstory.com/2019/06/a-brief-history-of-the-unitary-theory-that-trump-and-barr-are-using-to-resist-congressional-oversight/> [<https://perma.cc/885L-V3LT>] (discussing the fact that the unitary theory of the executive is not mentioned in the Constitution, that U.S. political history suggests that "[t]he concept of Congressional oversight over the executive branch is a long-established precedent," and that the Supreme Court has "ruled twice on the unitary executive theory, and both times rejected the concept"); Jed Shugerman, *Stare Scalia*, SLATE (Apr. 27, 2018), <https://slate.com/news-and-politics/2018/04/republican-senators-obsession-with-antonin-scalia-is-leading-them-to-make-sloppy-mistakes.html> [<https://perma.cc/5SHM-5ZCE>] (discussing the difficulty of reconciling Justice Scalia's view of the unitary theory of the executive (as portrayed by his dissent in *Morrison*) with U.S. history and judicial precedent); see also Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649, 1661–66 (2016) (describing the now-defunct Tenure in Office Act and Supreme Court cases concerning the removal powers of the President as historical limitations on the President's control over the executive branch); Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339, 1350–54 (2018) (discussing the concept of executive stare decisis as a means of preserving credibility and showing the fact that agency policies "transcend specific administrations" as well as the "fact that the [current President may have] particular views about the presidency's legal and constitutional status and power is no more than a tactical consideration"). See generally Michael J. Gerhardt, *Constitutional Construction and Departmentalism: A Case Study of the Demise of the Whig Presidency*, 12 U. PA. J. CONST. L. 425 (2010) (describing the evolution of the power of the executive over time with a focus on circumstances when other theories of the executive were favored over the unitary theory of the executive).

55. See Gerhardt, *Boils Down*, *supra* note 34.

Each of the four symposium Articles⁵⁶ offers significant insights into this compelling question. First, in *Congressional Subpoenas in Court*, Amandeep Grewal, professor of law at the University of Iowa Law School, looks at the question of whether Congress has standing to enlist judicial enforcement of the subpoenas that President Trump and other administration officials refused to comply with. To answer the question, he adopts a “public trust approach” for understanding that Congress and its individual members “exercise authority only in representational capacities.”⁵⁷ Therefore, he suggests, the only harm Congress or its members may incur as a result of refusals to comply with the House’s subpoenas is not personal. Without any *personal* injury, Congress lacks standing to ask for judicial enforcement of its subpoenas. He goes further to examine the complications that are likely to arise if the Court is asked to enforce such subpoenas. This is precisely the question the Supreme Court has agreed to hear in cases set for argument this year.⁵⁸

Next, Rebecca Roiphe, a professor of law at New York Law School and former prosecutor, examines in *A Typology of Justice Department Lawyers’ Roles and Responsibilities* the ethical norms and institutional practices of Justice Department lawyers that the President has attacked. She suggests that the answer to how Justice Department lawyers should comport themselves “depends on the position that the lawyer holds and the work that the lawyer is doing.”⁵⁹ There is no one-size-fits-all for Justice Department lawyers but instead “the Department of Justice ought to strike a proper balance between responsiveness and independence, ensuring effectiveness and accountability while maintaining enough independence from the President to guarantee the orderly development of the law and its fair application.”⁶⁰ This means, as she explains, that department lawyers have “different roles” and are bound by “the ethical obligations that ought to accompany those roles.”⁶¹ In determining these obligations, she states, “[t]he goal is to maintain the neutrality of law and its even-handed application to objectively determined facts, so that the

56. One participant in the Symposium, Richard Painter, professor of law at the University of Minnesota Law School, has published his contributions to the Symposium in his recent book, RICHARD W. PAINTER & PETER GOLENBOCK, *AMERICAN NERO: THE HISTORY OF THE DESTRUCTION OF THE RULE OF LAW, AND WHY TRUMP IS THE WORST OFFENDER* (2020).

57. Amandeep Grewal, *Congressional Subpoenas in Court*, 98 N.C. L. REV. 1043 (2020).

58. Order Granting Writ of Certiorari, *Trump v. Vance*, 140 S. Ct. 659 (2019); Order Granting Writ of Certiorari, *Trump v. Mazars USA*, 140 S. Ct. 660 (2019); Order Granting Writ of Certiorari, *Trump v. Deutsche Bank*, 140 S. Ct. 660 (2019); see also Josh Gerstein, *Supreme Court To Hear 3 Cases Seeking Access to Trump’s Financial and Tax Records*, POLITICO (Dec. 13, 2019), <https://www.politico.com/news/2019/12/13/supreme-court-to-hear-three-cases-seeking-access-to-trumps-financial-and-tax-records-084824> [http://perma.cc/9Q67-XLDP].

59. Rebecca Roiphe, *A Typology of Justice Department Lawyers’ Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1079 (2020).

60. *Id.*

61. *Id.* at 1080.

Department of Justice can remain a constraint on power while not unnecessarily hobbling the elected officials in their ability to implement policy.”⁶² As she illustrates through a series of examples, this “goal” informs department lawyers’ decisionmaking and ethical obligations in practice.

In *Defending the Constitutionality of Federal Statutes*, Andrew Hessick, a professor of law at the University of North Carolina School of Law, examines the role of Justice Department lawyers defending federal statutes, a role that he suggests lacks ethical foundation. This role is further complicated when it is unclear whether “defending” the constitutionality of a federal statute “is in the interest of the United States.”⁶³ In practice, an omnipresent concern is that there is pressure on Justice Department lawyers to do the bidding of their superiors and, therefore, they may have far less interest in protecting congressional prerogatives, or none, than they do in protecting the President from Congress. He uses the example of the Affordable Care Act to illustrate the phenomenon of how, in pushing the executive branch’s self-interest in litigation, the Department of Justice has undermined Congress’s role as policymaker.

Finally, in *Training Law Students To Maintain Civility in Their Law Practices as a Way To Improve Public Discourse*, Nancy Rapoport, professor of law at the University of Nevada-Las Vegas, turns her attention to the challenges of training law students at a time of severe political divisiveness, the very challenges that the push to teach professional responsibility in every law school was designed to address. Students are prone to reflect the same disdain for an opponent’s arguments as our leaders do. To combat this, she suggests a renewed commitment to teaching students how to have a civil discussion when arguing about the law or asserting their positions in court or other venues.⁶⁴ This is easier to describe than to do, but she shows us how focusing on the issues, respecting other people’s views, and acting with genuine humility may restore lawyers’ valuable contributions to society, including becoming models for the nation as a whole. Professor Rapoport’s invaluable reminder of lawyers’ constructive role in society—not just in courts, the executive branch, and legislatures—captures well the purpose of our collective undertaking in this issue. And it raises a direct challenge to government or White House lawyers who see their duty as covering up a President’s misdeeds. These lawyers learned nothing from the Watergate saga.

62. *Id.*

63. F. Andrew Hessick, *Defending the Constitutionality of Federal Statutes*, 98 N.C. L. REV. 1185 (2020).

64. See Nancy B. Rapoport, *Training Law Students To Maintain Civility in Their Law Practices as a Way To Improve Public Discourse*, 98 N.C. L. REV. 1143, 1146 (2020).

