‘Who is the “client” at a federal agency?’

A Few Considerations

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Environmental Law Forum

April 5, 2017

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I. Introduction

A. In the course of representing their agency clients, government attorneys frequently confront questions regarding the scope and duty of their representation, often phrased as "Who is the client?" and "Are a government attorney's ethical obligations different than a private attorney's?" While acknowledging that the lawyer-client relationship in government is often recognized as somehow "different," noted ethics scholar Professor Geoffrey Hazard has concluded that "the rules of ethics and the rules of common law governing government lawyers are, for the most part, the same as those governing lawyers generally,"[2] albeit with some nuances regarding how the attorney client relationship plays out. In short, "although the terrain in which the government lawyer must follow the ethical map may be different, the ethical map itself is of standard issue."[3] Some of these differences and similarities are discussed below.

II. Choice of law: Whose code of ethics governs federal agency attorneys? ('Badges? We don't need no stinking badges!'[4])

A. Following the assertion by two successive U.S. Attorneys General that certain state rules of attorney ethics did not apply to Department of Justice (DOJ) attorneys where those rules conflicted with statutorily authorized investigations,[5] Congress passed the "McDade Amendment," which provides that "[a]n attorney for the [federal] 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."[6] "Government attorneys" are defined as DOJ attorneys and those designated to act for DOJ.[7]

B. What of federal agency attorneys? At least in non-criminal matters,[8] and leaving aside the possible implications of the Constitution's Supremacy Clause, their practice generally is as above for DOJ attorneys: federal agency attorneys typically view

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[2] Geoffrey Hazard, *Symposium: Legal Ethics For Government Lawyers: Straight Talk For Tough Times: Conflicts Of Interest In Representation Of Public Agencies In Civil Matters*, 9 WIDENER J. PUB. L. 211, 211-12 (2000).
[3] *Id.*
[4] With apologies to John Huston and his 1948 film adaptation of the Treasure of Sierra Madre.
[5] In 1989 then-Attorney General Richard Thornburgh issued a memorandum asserting the inapplicability to DOJ attorneys of state ethics rules that would otherwise bar DOJ attorneys from directly contacting individuals represented by counsel. *See* Gregory B. LeDonne*, Recent Development: Revisiting The Mcdade Amendment: Finding The Appropriate Solution For The Federal Government Lawyer*, 44 HARV. J. ON LEGIS. 231, 231-33 (2007).
[6] 28 U.S.C. § 530B(a).
[7] *See* 28 CFR Part 77 - Ethical Standards For Attorneys For The Government.
[8] Several commentators have noted that the ethical obligations of government attorneys in civil matters may differ from those in criminal prosecutions. *See, e.g.* F. Dennis Saylor IV & J. Douglas Wilson, *Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459, 465 (1992) ("In contrast to civil litigation, where the imbalance between lawyers and nonlawyers is normally addressed by ethical rules, the balance between prosecutors and suspects or defendants is struck by the Constitution").

themselves as similarly bound by the code of ethics in the state in which they are licensed, and the jurisdictions in which they practice.[9]

III. Who is an agency attorney's client?

A. Identifying one's client is an essential part of a lawyer's duties. It is the client's interests which the lawyer must "zealously represent,"[10] and it is the client's confidences that must be maintained, all in accordance with the Rules of Professional Conduct.[11] Rule 1.13(a) provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." But what does this mean for a government agency? This issue has "vexed decision-makers and commentators for many years."[12]

B. In a comment the Rules expand upon, but do not particularly illuminate, the issue. "Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. . . . Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule."[13]

C. In accord with Rule 1.13 generally, one commentator, a former New York City Corporation Counsel, has stated that "[w]hat this means is that the chief government lawyer must never forget that his or her first obligation is to the governmental entity itself

[9] Standards of ethics applicable to all federal employees (lawyer and non-lawyer) are beyond the scope of this outline. See 5 CFR Part 2635, Standards Of Ethical Conduct For Employees Of The Executive Branch; 5 CFR § 6401 (Supplemental Ethics Standards for EPA Employees).

[10] 204 Pa. Code 81.1(2). Unless otherwise specified, "Rules" refer to the Pennsylvania Rules of Professional Conduct, found at http://www.padisciplinaryboard.org/attorneys/rules/pennsylvania-rules-of-professional-conduct.php and codified at 204 Pa. Code 81.

[11] 204 Pa. Code 81.1(8).

[12] Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991). *See also Note, Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1173–78, 1182–85 (2002) (focusing on attorneys for government agencies and noting the disagreement between commentators over the nature of the government lawyer's client).

[13] Comment (6) to Rule 1.13.

and that lawyer's job is not simply to advocate on behalf of individual members of the executive or legislative branch."[14] Thus the question remains, who is the client?

D. While there is a fairly broad spectrum of answers to the issue, commentators have identified two relatively clear cut poles between which most commentary falls: a narrow "single client" model and a broader "public interest" model.[15]

1. The single client model generally identifies the administrative agency itself as the client,[16] and requires the attorney to identify the person within the bureaucracy who has the statutory authority (direct or delegated[17]) for the particular decision at issue, "the officer who has the legitimate power to decide upon the course of action,"[18] the "client person" in Professor Hazard's formulation.[19]

a) In 1988 a special committee of the District of Columbia Bar issued a report on government lawyers and their duties under the Model Rules that concluded that "the agency, not the public interest, should be considered the government lawyer's client. . . . .[G]overnment officials "must believe that the lawyer will represent the legitimate interests the governmental client seeks to advance, and not be influenced by some unique and personal vision of the 'public interest.'"[20]

b) In short, within an agency, and in a given matter, the "client" could be the Administrator, an Assistant Administrator, a Regional Administrator, or a Regional Program director.

2. The "public interest" model typically begins with the single client model, but allows for the attorney to view some other, higher authority as their client in circumstances where the attorney believes there to be a conflict between that

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[14] Michael A. Cardozo, *The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer,* The Professional Lawyer, Vol. 22, Number 3, p. 1 (2014).

[15] *Note, Government Counsel and their Obligations*, 121 HARV. LAW REVIEW 1409, 1412-14 (2008). This discussion does not address those situations where government counsel is appointed to represent an individual government employee under express statutory or other authority, such as where the Attorney General determines that it is "in the interest of the United States" to provide such representation. 28 C.F.R. § 50.15(a) (2012).

[16] *See, e.g.,* Ronald I. Keller, *Note, The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government*, 62 B.U. L. REV. 1003, 1010-11 (1982) (identifying the relevant agency as the client to whom the attorney-client privilege applies).

[17] Federal environmental statutes give to specified agencies, and sometimes offices within agencies, authority to carry out specific duties. Such agencies and offices typically delegate these duties to specified personnel identified by their title, who in turn are sometimes authorized to redelegate the duties further, including to regional offices. Where the statute reposes authority in the President, the authorities have often been delegated in an executive order. *See, e.g.*. E.O. 12,580 (Jan. 23, 1987), delegating to various federal agencies the President's authority under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et. seq*.

[18] THE RESTATEMENT OF THE LAW GOVERNING LAWYERS, §§ 96 and 97 (2000), citing Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1296 n. 7 (1987).

[19] Hazard, *supra* n. 2, at 220.

[20] *Id. at* 421-22. See discussion of "public interest" below.

authority and the direction of the nominal individual agency decisionmaker.[21] Possible clients beyond the immediate "agency official with whom the lawyer works on a daily basis" include "the agency itself, the government as a whole, the "people," or the "public interest."[22]

a) At its broadest, the argument is that "the Government is a composite of the people" and "Government counsel therefore has as a client the people as a whole."[23] Allusions to this conception are sprinkled throughout both case law[24] and commentary. Judge Patricia Wald has observed that many judges at least opine that the "government lawyer's client is seen as being not simply the individual whose particular fate is being litigated but also the U.S. citizenry at large, a client whose ultimate objective is that justice be done."[25]

b) Most who have considered the issue find that, both practically and philosophically, the public interest model is unhelpful, if not fundamentally flawed. Who among the "people" should the attorney consult for direction? Should an attorney's personal view of a particular law trump that of the officeholder or appointed official with the delegated power?

c) Moreover, the "public interest" model understood broadly could undermine the Constitutional principle of separation of powers: "In a system of checks and balances it is not the responsibility of an agency attorney to represent the interests of Congress or the Court. Those departments have their own 'constitutional means and personal motives' to protect their prerogatives."[26]

d) Similarly, "an approach that defines the client broadly and views the attorney as a neutral adjudicator disserves the principle of democratic accountability: voters base their decisions in part on a candidate's legal

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[21] *See Note, Government Counsel and their Obligations, supra* n. 15 at 1412-13.
[22] *See* Catherine Lanctot, *The Duty Of Zealous Advocacy And The Ethics Of The Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 967 (May, 1991), Kathleen Clark, *Conflicts, Confidentiality and the Client of the Government Lawyer Part I,* 21 THE PUB. LAWYER 1, 1 (Winter 2013).
[23] Cramton, *supra* n. 12, at 298. *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 789–802 (2000).
[24] *See* Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983) ("[G]overnment counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large").
[25] Patricia M. Wald, "*For the United States": Government Lawyers in Court*, 61 LAW AND CONTEMP. PROBL. 107, 110 (Winter 1998).
[26] Miller, *Government Lawyers' Ethics*, supra n. 18, at 1296

agenda and an unelected government attorney should not block it or blur the elected official's responsibility."[27]

e) Even a more limited version of the public interest model, in which a higher office within a branch, or another part of government, is deemed to be the client in lieu of one's immediate agency employer, poses difficulties. "If a Justice Department lawyer represents the entire government, then she can reveal information to a member of Congress, but if she represents the executive branch, she cannot. If a state natural resources department lawyer represents her agency, then she cannot reveal information about wrongdoing at the department to anyone outside of the department, including the state attorney general."[28]

f) As Professor Geoffrey Miller has concluded "[d]espite its surface plausibility, the notion that government attorneys represent some transcendental 'public interest' is, I believe, incoherent. It is commonplace that there are as many ideas of the 'public interest' as there are people who think about the subject."[29] Similarly, "[t]he public interest approach … leads to a government of lawyers, not of laws, a result as objectionable as a government of people, not of law."[30] Indeed, even advocates for the "public interest" model recognize the need for some discernable, limiting principles.[31]

g) Having identified the relevant agency decisionmaker as the "client," however, does not end the discussion of whether an agency lawyer operates under ethical obligations that are somehow "different" than that facing counsel for private entities, as discussed below under IV. Zealous Advocacy.

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[27] *See Note, Government Counsel and their Obligations, supra* n. 15 at 1413.
[28] Clark, *Conflicts, supra* n. 22 at 1.
[29] Miller, *Government Lawyers' Ethics*, *supra* n.18, at 1294.
[30] William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOWARD L.J. 539, 569 (1986).
[31] "Execution of the public interest serving role for government attorneys is not the equivalent of attorneys following their individual policy preferences . . . . Rather, application of the standard techniques of legal analysis and merit, bureaucratic accountability, and democratic governance . . . can provide adequate constraints against lawyers running amok in pursuit of their personal policy preferences." Berensen, *supra* n. 12, at 846.

E. Unitary Executive Theory

1. One further element of the 'who is the client' issue bears noting, when dealing with federal agencies and departments: the "unitary executive" theory. This theory holds that the President and all parts of the executive branch are part of a unitary whole.[32] While its antecedents stretch back to the federalism debates in the earliest days of the Republic,[33] its modern incarnation in the context of the current topic are ascribed to the administration of Ronald Reagan, whose Attorney General Edwin Meese undertook a number of steps to consolidate and clarify that the various federal agencies, the Solicitor General, and the Attorney General spoke, and were treated, as one.[34] The Unitary Executive Theory has been the topic of much debate in recent years, the subtleties of which are beyond the scope of this paper.[35] Some of the practical implications for agency attorneys are as follows:

a) With a few exceptions, DOJ and only DOJ represents the United States, including its subordinate agencies, in court.[36] This can lead to some practical challenges when two agencies have conflicting interests, as for example, when EPA is exercising its regulatory and enforcement authority under federal statutes against other federal agencies. In accord with the Unitary Executive theory, EPA cannot sue another federal agency

[32] Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era*, 1945–2004, 90 IOWA L. REV. 601.

[33] In Federalist No. 51, James Madison wrote that an undivided executive would strengthen the ability of the executive to resist encroachments by the legislature. "As the weight of the legislative authority requires that it should be thus divided [into branches], the weakness of the executive may require, on the other hand, that it should be fortified." James Madison, Federalist No. 51 (February 6, 1788).

[34] *See* James R. Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1585 (1996).

[35] *See, e.g.,* Harvey, *Loyalty in Government Litigation*, *supra n. 34 passim*, (discussing history of the Unitary Executive theory in light of the Watergate break in and subsequent events, and the many nuances of the "who is the client" issue for DOJ); Harris, *The Rule Of Law And The War On Terror*, *supra* n. 45*,* (discussing government attorney ethical obligations in the context of the memoranda approving the use of certain interrogation techniques).

[36] "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516 (2016). Only a few agencies, such as the Department of Labor, can litigate on their own behalf, while most other executive agencies are represented by DOJ. *See* Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1345–49 (2000); James R. Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569 (1996).

in court (although it can issue administrative orders against such agencies, in accordance with the terms of particular statutes).[37]

b) Even where one agency's interests are not directly adverse to another, DOJ is sometimes called upon to temper the positions of one agency in the interest of another.[38]

c) The Rules address both of these considerations in Comment (17) (Scope):

"Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority."[39]

IV. Zealous advocacy

A. While the "who is the client?' issue is fairly well settled for the agency attorney, in representing that client the government attorney may have obligations that differ from the attorney representing a private client. Generally, an attorney is to represent their

[37] For example, under Section 106(a) of CERCLA, the President may issue an administrative "as may be necessary to protect public health and welfare and the environment." 42 U.S.C. § 9606(a). Pursuant to Exec. Order 12580, the President's authorities under 106(a) CERCLA have been delegated to the EPA, except that CERCLA authorities "to seek information, entry, inspection, samples, or response actions from Executive departments and agencies may be exercised only with the concurrence of the Attorney General." E.O. 12580, Sec. 4(e). In contrast, Section 1431 of the Safe Drinking Water Act, 42 U.S.C. §300i, provides EPA broad authority to issue Administrative Orders to a Federal agency when EPA receives information that a contaminant is present or likely to enter a public water system or underground source of drinking water, and may present an imminent and substantial endangerment to human health.

[38] *See* Harvey, *Loyalty in Government Litigation*, *supra n. 34,* at 1587-90.

[39] Rules, Scope, Comment 17.

client "zealously."[40] However, numerous commentators have suggested that this obligation is at least more nuanced for government attorneys, even in the civil context.[41]

B. Aspirational references to some special duties of government attorneys is found in both case law and commentary, the former perhaps most famously in *Berger v. United States* in which the Supreme Court stated, albeit in the context of a criminal prosecution, the prosecutor 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."[42] Similarly, then Attorney General Eric Holder stated that government lawyers have an independent duty to "do justice" different from those representing private clients. "This, after all, is the essential duty to which all of us — as attorneys general — have been sworn: not just to win cases, but to see that justice is done."[43]

C. The ABA Model Code of Professional Responsibility (predecessor to the current Model Rules) included as Ethical Consideration ("EC") 7-14 the following: "A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. . . A government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results."[44] In furtherance of this Ethical Consideration, in 1973 the Federal Bar Association adopted "Federal Ethical Considerations" to supplement the Model Code, and promulgated a related formal opinion, Professional Ethics Opinion 73-1, which stated "[t]he immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency."[45] Interestingly, this EC is not echoed in the Model Rules, and the Single Client model appears to be more favored, for reasons discussed above.

D. Significantly, Comment 6 to Rule 1.13 (Organization as client) does recognize that a government lawyer may have authority under applicable law to question "conduct

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[40] *Compare* Pennsylvania Rules of Professional Conduct (PRPC) Preamble 8.1.(2)("[a]s a representative of clients, a lawyer performs various functions. . . . As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system" *with* 8.1(4) "[i]n all professional functions a lawyer should be competent, prompt and diligent").

[41] *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 813-35, 844-45 (2000) ("Just as the public prosecutor under the 'do justice' maxim owes a duty to the defendant to work towards a substantively fair outcome to the proceedings, so too does the civil government litigator owe a duty of substantive fairness to the defendants …"); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation*, 9 WIDENER J. PUB. L. 235, 280 (2000) ("[S]urely the question of whether government lawyers have a duty to 'seek justice' is sufficiently important for them to give the issue serious consideration, before they reflexively assume the mantle of the zealous advocate.")

[42] *Berger v. United States,* 295 U.S. 78, 88 (1935) 1935), *overruled on other grounds*, S*tirone v. United States*, 361 U.S. 212 (1960).

[43] Eric H. Holder, Att'y General, Remarks as Prepared for Delivery at the National Association of Attorneys General Winter Meeting (Feb. 25, 2014), transcript *available at* http://www.justice.gov/iso/ opa/ag/speeches/2014/ag-speech-1402251.html.

[44] MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1980).

[45] George C. Harris, *The Rule Of Law And The War On Terror*, 1 JNL. OF NAT. SEC. LAW & POL. 409, 421 (2005), *discussing*

[of a government official] more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. . . . See Scope."

E. More narrowly, there is support for the proposition that a government lawyer can at least refuse to act contrary to the direction of the designated 'client person,' and/or compromise their duty of confidentiality, if necessary, in their view, to comply with the statutory law or the "public interest," in ways that may be less available to counsel for private parties whose options in similar situations are often limited to "quiet" or "noisy" withdrawals.[46]

V. Conclusion.

A. While most government lawyers appear to hew to the single client model to identify their client, while vigorously counselling that 'client person' as to what the law is and how best to achieve its goals, these issues continue to crop up in ways both quiet and profound.

1. "Although there is generally settled law that 'the Agency is the client,' government lawyers are still fond of exploring the notion that the public, voters, citizenry, or even the statutes themselves are really the client."[47]

2. On Friday, January 27, 2017 President Trump issued an Executive Order imposing a ban on travel from seven specified countries.[48] On Monday, January 30, 2017, Acting Attorney Sally Yates issued a letter stating that DOJ "will not present arguments in defense of the Executive Order until I become convinced that it is appropriate to do so."[49] A close review of her January 30, 2017 letter highlights several of the issues discussed above.

a) After noting that the Executive Order had been challenged in "a number of jurisdictions," Ms. Yates acknowledged that it had been reviewed on its face for form and legality by DOJ's Office of Legal Counsel.[50] She further noted that "in litigation, DOJ Civil Division lawyers are charged with advancing reasonable legal arguments that can

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Professional Ethics Opinion 73-1 ("The Government Client and Confidentiality") issued by the Committee on Professional Ethics of the Federal Bar Association.

[46] *See Note, Government Counsel and their Obligations, supra* n. 15 at 1418-19.

[47] Marcia E. Mulkey, *A Crisis Of Conscience And The Government Lawyer* 14 TEMP. POL. & CIV. RTS. L. REV. 649, 649 (Spring, 2005).

[48] *See* https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states; *New York Times, (Jan. 27, 2017), avail. at* https://www.nytimes.com/2017/01/27/us/politics/refugee-muslim-executive-order-trump.html?_r=0.

[49] https://assets.documentcloud.org/documents/3438879/Letter-From-Sally-Yates.pdf

[50] *Id.*

be made supporting an Executive Order," implying that such could be done here.

b) "But my role as leader of this institution is different and broader. My responsibility is to ensure that the position of the Department of Justice is not only legally defensible, but is informed by our best view of what the law is after consideration of all the facts. In addition, I am responsible for ensuring that the positions we take in court remain consistent with this institution's solemn obligation to always seek justice and stand for what is right. At present, I am not convinced that the defense of the Executive Order is consistent with these responsibilities nor am I convinced that the Executive Order is lawful."[51]

c) Several hours later Ms. Yates was fired, and newly appointed Attorney General Dana Buente reversed her directive to DOJ attorneys to not appear in court to defend the Executive Order.[52]

[51] *Id.*

[52] Michael D. Shear, Mark Landler, Matt Apuzzo and Eric Lichtblau, *Trump Fires Acting Attorney General Who Defied Him*, New York Times, Jan. 30, 2017, *available at* https://nyti.ms/2jOiH8q.