TRUMPIAN ETHICS AND THE RULE OF LAW

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I. INTRODUCTION

This essay accompanies the 2017 Creighton Law Review Symposium and TePoel Lecture delivered by the author as a part of the symposium's topic, "The Lawyer's Leadership Role: A Tour of Legal Ethics." A focus on the leadership role of lawyers could not be more timely as our country faces ethical leadership challenges emanating from the executive branch and playing out in courts, the media, and the daily lives of Americans. With a newly elected President issuing controversial executive orders, some with constitutional ramifications, government leaders and especially government lawyers may be called upon to sacrifice the security of their jobs in the defense of ideals and the rule of law.

In the first part, this Article examines the author's controversial firing as United States Attorney in 2007, along with several others in a scandal that shook the United States Department of Justice, which resulted in the resignation of the Attorney General and many top officials of the Department.[1] In the second part, the author analyzes an ethical conundrum brought about by failed United States policies in Israel and Palestine during his service in the West Bank from 2013-15.[2] The third part establishes a construct for ethical leadership in which ethics and integrity "trumps" self-interest and examines today's controversial firing of Justice Department officials who have taken stands against unfettered executive authority.[3] The Article concludes by considering the ethical leadership required of government lawyers—indeed all who care about justice—the face of unlawful and unethical demands by elected officials and their subordinates.[4]

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1. *See infra* notes 5-26 and accompanying text.
2. *See infra* notes 27-42 and accompanying text.
3. *See infra* notes 43-45 and accompanying text.
4. *See infra* notes 46-52 and accompanying text.

II. ASPIRE TO BE FIRED

Now more than ten years old, the 2007 firing of the United States Attorneys may seem like a fading scandal.[5] Recent events, however, including the firings of Deputy Attorney General Sally Yates and Federal Bureau of Investigation ("FBI") Director James Comey, suggest that the ethics and integrity of government lawyers are once again dramatically before the American public.[6] A brief examination of the 2007 firings may cast light on the challenges facing lawyers of integrity serving in the Trump Administration.

A. Background to the 2007 United States Attorney Firings

Sally Yates and James Comey were not the first, and likely not the last, government lawyers fired while in the midst of performing their duties within the United States Department of Justice. In 2007, during the second term of President George W. Bush, seven United States Attorneys were ordered to resign before the President's term in office ended, including the author of this essay. It would later come to light that a total of nine presidentially appointed United States Attorneys had been fired. Now known as the "Fired U.S. Attorneys" scandal, the dismissals occupied the national attention for many months in 2007 and ultimately resulted in the resignation of the Attorney General, Deputy Attorney General, and numerous senior Justice Department officials.

In the case of the fired United States Attorneys, each was given no explanation for their dismissal, and most were led to believe they alone were being dismissed. Those dismissed uniformly cited the maxim that they "served at the pleasure of the President" and initially most sought to avoid publicly disputing the Justice Department or the White House. All nine United States Attorneys eventually tendered their resignations and departed their offices as instructed, most with little or no public comment. Similarly, the Justice Department made

5. *See* Charlie Savage & Maggie Haberman, *Trump Abruptly Orders 46 Obama-Era Prosecutors to Resign*, N.Y. Times (Mar. 10, 2017), https://www.nytimes.com/2017/03/10/us/politics/us-attorney-justice-department-trump.html?_r=0; Dan Eggen & Paul Kane, *Gonzales: 'Mistakes Were Made'*, Wash. Post (Mar. 4, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031300776_pf.html. *See also* U.S. Dep't of Justice Office of Inspector Gen. & U.S. Dep't of Justice Office of Prof'l Resp., An Investigation into the Removal of Nine U.S. Attorneys in 2006 (2008), https://oig.justice.gov/special/s0809a/final.pdf.

6. John McKay, *The Bush Administration Fired Me from the Justice Department over Politics*, Vox (May 15, 2017), https://www.vox.com/the-big-idea/2017/5/15/15641318/us-attorneys-gonzales-bush-trump-justice-rule-of-law-scandal. *See generally*, John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 Seattle U. L. Rev. 265 (2008). These articles, in part, have been drawn upon for this Article.

no public statements and offered no public explanation for the unusual number and timing of these resignations.

This changed on January 18, 2007, when Attorney General Alberto Gonzales testified before the Senate Judiciary Committee and faced questioning by Senator Diane Feinstein (D-CA) about growing rumors that a number of United States Attorneys had been forced out. Gonzales attempted to portray the firings as routine "personnel" matters, but Senator Feinstein would not buy it.

> SENATOR FEINSTEIN: All right. Now, let me get at where I am going. How many U.S. Attorneys have been asked to resign in the past year?
> ATTORNEY GENERAL GONZALES: Senator, you are asking me to get into a public discussion about personnel.
> SENATOR FEINSTEIN: No. I am just asking you to give me a number, that is all.
> ATTORNEY GENERAL GONZALES: I do not know the answer.
> SENATOR FEINSTEIN: I am just asking you to give me a number.
> ATTORNEY GENERAL GONZALES: I do not know the answer to that question. But we have been very forthcoming—
> SENATOR FEINSTEIN: You did not know it on Tuesday when I spoke with you. You said you would find out and tell me.
> ATTORNEY GENERAL GONZALES: I am not sure I said that.
> SENATOR FEINSTEIN: Yes, you did, Mr. Attorney General.[7]

This testimony kicked off a series of controversial and misleading statements made by the Attorney General to the Congress and the public. Among these issues was the apparent reliance by the Justice Department on new powers granted to the executive branch following the attacks of 9/11. In fact, it became clear the Justice Department planned to name interim United States Attorneys under the new powers granted them in the USA PATRIOT Act[8] and its amendments.[9]

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7. *Dep't of Justice Oversight: Hearing before the S. Comm. on the Judiciary*, 110th Cong. 23 (2007) (testimony of Alberto Gonzales).

8. Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8 U.S.C., 15 U.S.C., 18 U.S.C., 22 U.S.C., 31 U.S.C., 42 U.S.C., and 50 U.S.C.).

9. *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 502, 120 Stat. 192 (2006). With no debate, the Attorney General was given the authority to appoint interim United States Attorneys for indefinite terms without a Presidential nomination or confirmation by the Senate. Led by Senator Feinstein, the interim appointment authority was revoked, returning the interim appointment authority to the United States District Courts, in the absence of a Presidential appointment. *See* Preserving United States Attorney Independence Act of 2007, Pub. L. No. 110-34, 121 Stat. 224 (2007).

Fired United States Attorneys confirmed similar patterns in San Francisco and San Diego, and it was later revealed that an interim United States Attorney appointed under the USA PATRIOT Act and avoiding Senate confirmation had been serving in Kansas City for many months.[10]

Far from being the "overblown personnel matter" Alberto Gonzales would later call it,[11] he had managed in one exchange with a United States Senator to drive the fired United States Attorneys together, convince them that he was hiding a sinister purpose in their dismissals, and show he was lying to the Senate to cover it up.[12] Later testimony by the Deputy Attorney General Paul McNulty made it clear that the public could not expect an honest assessment of their intentions, when he described the firing of most of the United States Attorneys as "performance related."[13]

As public scrutiny increased, Gonzales, McNulty, and other Justice Department officials would have difficulty keeping their stories straight about the reasons for the United States Attorney dismissals. While a number of the fired United States Attorneys had received out-

10. United States Attorney Todd Graves had resigned on March 10, 2006, and was replaced by a former Civil Rights Division attorney, Bradley Schlozman. It would later be revealed that Graves had been ordered to resign as well, in order to make way for Schlozman and to facilitate voter fraud indictments previously rejected by Graves as lacking merit. Schlozman resigned as interim United States Attorney, never having been nominated by the President or having faced Senate confirmation. In contentious hearings before the Senate Judiciary Committee on June 5, 2007, Mr. Schlozman denied wrongdoing in bringing indictments for voter registration fraud against four employees of the Association of Community Organizations for Reform Now ("ACORN"). *Preserving Prosecutorial Independence: Is the Dep't. of Justice Politicizing the Hiring and Firing of U.S. Att'ys?*, 110th Cong. 264-99 (2007) (testimony of Bradley Schlozman).

11. In an op-ed piece timed for publication on the day six of the fired United States Attorneys were testifying under subpoena on Capitol Hill, then-Attorney General Gonzales wrote, "[w]hile I am grateful for the public service of these seven U.S. Attorneys, they simply lost my confidence. I hope that this episode ultimately will be recognized for what it is: an overblown personnel matter." Alberto R. Gonzales, *They Lost My Confidence*, USA TODAY (Mar. 7, 2007), http://www.usatoday.com/printedition/news/20070307/oppose07.art.htm. He later testified that he regretted the characterization. *Dep't of Justice Oversight: Hearing before the S. Comm. on the Judiciary*, 110th Cong. 23-26 (2007) (testimony of Alberto Gonzales, in response to question from Senator Feingold).

12. Kyle Sampson, then Gonzales' Chief of Staff, had already outlined the Justice Department's plan to bypass Senate confirmation with the appointment of replacement United States Attorneys. *See* E-mail from Kyle Sampson, then Chief of Staff and Counselor to U.S. Att'y Gen. Roberto Gonzalez, to White House Counsel (Sept. 13, 2006) (stating "I strongly recommend that, as a matter of policy, we utilize the new statutory provisions that authorize the AG to make USA appointments."). *See also* Dan Eggen & John Solomon, *Firings Had Genesis in White House*, WASH. POST (Mar. 13, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/03/12/AR2007031201818_pf.html.

13. *Preserving Prosecutorial Independence: Is the Dep't. of Justice Politicizing the Hiring and Firing of U.S. Att'ys?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 57-66 (2007) (testimony of Paul J. McNulty).

standing performance evaluations,[14] officials testified at various times to alleged performance, policy, administrative, and personality issues not mentioned in the reports, in an obvious effort to avoid claims of political motivation.[15]

Summoned to Capitol Hill, Justice Department officials, led by the Attorney General, displayed an appalling loss of memory and inconsistent accounts of the firings. In closely watched hearings in both the House and Senate, officials were forced to deny that the White House or Department of Justice was attempting to influence ongoing criminal investigations with political ramifications for the Bush Administration and the Republican Party. As described below, one easily finds parallels in the firings of United States Attorney Preet Bharara

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14. The Justice Department's evaluation process for United States Attorneys and their offices is overseen by the Executive Office for United States Attorneys. Periodic field visits conducted by professional staff and career attorneys and staff are reported on a multi-year basis in Final Evaluation ("EARS") Reports. *See* U.S. DEP'T OF JUSTICE: OFFICES OF THE U. S. ATT'YS, http://www.justice.gov/usao/eousa (last updated Aug. 17, 2016). The EARS Report for the Western District of Washington was based on approximately 170 interviews by twenty-seven inspectors during March, 2006 (report on file with U.S. Dep't of Justice).

15. *See, e.g.*, Memorandum of John Conyers, Jr., Chairman of H. Comm. on the Judiciary, to members of the H. Comm. on the Judiciary 25-26 (July 24, 2007), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/contempt_memo_072407.pdf.

> The case of John McKay is equally troubling. The Administration has now floated at least five different reasons for the placement of John McKay on the firing list. But those reasons appear pretextual. The Administration initially claimed that Mr. McKay was overly aggressive in a meeting on an information sharing program with Deputy Attorney General McNulty, and that he arranged the sending of a letter advocating for that program that put the Deputy in an uncomfortable position. Leaving aside the question whether a responsible Department of Justice would fire a well-performing U.S. Attorney for such apparently frivolous reasons, those events did not occur until late summer 2006, but John McKay was on Mr. Sampson's firing list as early as March 2005. At one point, the Administration claimed that Mr. McKay's office was not sufficiently aggressive in appealing certain criminal sentences that were below the Guidelines range, but that was an issue based on a January 2005 Supreme Court decision and there would not have been time for follow up litigation and collection of sentencing data for that controversy to have contributed to the decision to target McKay for firing two months later.
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> When further pressed for the reason why Mr. McKay might have been targeted for firing at that time, the Administration offered reasons that appear even more unlikely. One Department witness commented that Mr. McKay had asked some difficult questions of Attorney General Ashcroft in a public setting that may have put Administration officials "on the spot," which had occurred before McKay's name was placed on the March 2005 firing list. Kyle Sampson testified that he may have heard complaints about Mr. McKay pressing too aggressively for Department action in the aftermath of the murder of one of McKay's assistant U.S. Attorneys in the time period before the March 2005 list. These would not seem to be credible reasons for the firing of an effective U.S. Attorney such as John McKay. As suggested above, the available evidence suggests that improper political factors played an important role in his firing.

Id.

(Southern District of New York), Deputy Attorney General Sally Yates, and FBI Director James Comey.

In what was at the time a media bombshell, Attorney General Gonzales declared to gathered media that he "was not involved in seeing any memos, was not involved in any discussions about what was going on,"[16] as the United States Attorneys were being fired in his own Department. Later testimony by Chief of Staff Kyle Sampson, together with emails showing his presence at a pivotal meeting in which the list of fired attorneys was approved, would clearly demonstrate the Attorney General lied.[17] In his Senate testimony, Attorney General Gonzales repeatedly claimed not to recall important events surrounding the forced resignations, a performance roundly criticized in editorials from around the country, and parodied mercilessly by the nation's comedians and late night talk show hosts.[18]

Although the Bush White House refused to provide witness testimony or records under claim of executive privilege, emails discovered at the Justice Department revealed that the idea of replacing *all* of the United States Attorneys originated there.[19]

Even as the role of the White House remains shrouded in its claims of executive privilege,[20] later investigations revealed that certain White House employees were heavily involved in the dismissal of United States Attorney David Iglesias of New Mexico. White House officials were reacting directly to the complaints of then-Senator Pete Domenici (R-NM) and an investigation into public corruption in that state.

This apparent disregard for the importance of the role of United States Attorneys in the Bush Administration and the Justice Department seems to mirror the view of President Trump. The dismissal of every United States Attorney appointed by President Obama, while not unprecedented, indicates a disregard for the independent role of Federal Prosecutors. United States Attorneys are appointed to their offices by the President, who "shall appoint by and with the advice and

16. U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, (2008), https://oig.justice.gov/special/s0809a/final.pdf.

17. *U.S. S. Judiciary Comm. Holds a Hearing on U.S. Att'y Firings*, 110th Cong. 15 (2007) (testimony of Kyle Sampson, in response to questions from Sen. Specter), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/sampson_transcript 032907.html.

18. *See, e.g.*, *Uh, mmmm, maybe. . .*, SEATTLE TIMES (April 20, 2007), http://archives .seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=gonzaled20&date =20070420&query=alberto+gonzales; *see also, e.g.*, *The Daily Show* (Comedy Central television broadcast April 23, 2007).

19. Former White House Counsel Harriet Miers first broached the idea, but it was rejected by both Kyle Sampson and Gonzales. *See* Eggen & Solomon, *supra* note 12.

20. Conyers, *supra* note 15, at 42-47.

consent of the Senate, a United States Attorney for each Judicial District."[21] The statute further provides: "Each United States Attorney is subject to removal by the President."[22] In other words, the President appoints, the Senate confirms, and, while in office, United States Attorneys serve at the pleasure of the President. All United States Attorneys know this, yet all are aware that the President who appointed them to office dismisses very few United States Attorneys.[23]

United States Attorneys are considered the chief federal law enforcement official within their districts. They supervise most investigations in their districts by federal law enforcement agencies, including: the FBI; the Drug Enforcement Agency; Bureau of Alcohol, Tobacco, Firearms and Explosives; United States Marshal's Service; Bureau of Prisons; Immigration and Customs Enforcement; United States Secret Service; United States Coast Guard; Environmental Protection Agency; and many other agencies. In addition, important civil cases in which the United States is a party are overseen by civil divisions in each of the ninety-three United States Attorneys' offices across the country.[24]

That United States Attorneys wield enormous power is well understood, particularly when considering their direct investigative oversight of gun-carrying federal agents and their ability to seek criminal arrest, indictment by federal grand juries, and, if conviction is obtained, imprisonment or even execution. That such power should be wielded in a non-political fashion is seemingly clear, as set forth by the United States Supreme Court in *Berger v. United States*[25] and passionately defended by all who believe that law "trumps" naked political power:

> 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

21. 28 U.S.C. § 541(a) (2006).

22. *Id.* § 541(c).

23. KEVIN M. SCOTT, U.S. ATTORNEYS WHO HAVE SERVED LESS THAN FULL FOUR-YEAR TERMS, 1981–2006 (2007), *available at* http://leahy.senate.gov/issues/USAttorneys/ServingLessThan4Years.pdf. In his report, Mr. Scott finds that only eight United States Attorneys were dismissed or instructed to resign from office before expiration of their terms or the election of a new President. *Id.* at 6–7. Each of these circumstances had ample evidence of cause for their removals, including one in which it was alleged that an intoxicated United States Attorney bit a stripper. *Id.* at 7.

24. *See generally*, JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS (1978). Although somewhat dated, Dr. Eisenstein's book is seminal on the role of United States Attorneys and is read by many incoming appointees to the office.

25. 295 U.S. 78 (1935).

> shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[26]

The United States Attorneys Firing Scandal in 2007, together with President Trump's firing of James Comey from the FBI and Sally Yates from the Department of Justice all represent serious ethical challenges to our commitment to the rule of law. The following part of this Article explores ethical challenges derived from a very different part of the world. Here, the Kalashnikov rifle often supplants the rule of law.

III. RULE OF LAW IN PALESTINE

Naming the lands of the Palestinian people is a fraught political exercise. If you are speaking to an Arab, they will call it Palestine; to an Israeli settler, Judea and Samaria. An official of the United States Department of State would say the West Bank, and if searching in Google Maps, you would type Palestinian Territories. Whatever one might name it, the people of Palestine living in the West Bank region of the Jordan River have endured a fifty-year military occupation by Israel. Their tale of misery, failed leadership, futile "peace negotiations," and quest for nationhood under the rule of law became part of my story as an American lawyer.

A. An American in Ramallah

After receiving an unexpected email in March of 2013 inviting me to work in Palestine for the United States Department of State, like most anyone else, I considered such an upheaval only a remote possibility. Still, I didn't immediately say no, and about six weeks later, I was dropping two duffel bags in a bare-walled apartment in Ramallah, lodged between two mosques.

In this part, I will describe the Rule of Law Project I headed for the United States Department of State and describe the Rule of Law Project and some of its challenges, including difficult ethical choices. I hope to challenge American lawyers, judges, and people who care about the rule of law to speak out for the human rights of Palestinians, who suffer under this occupation. Further, I hope to advocate for

26. Berger v. United States, 295 U.S. 78, 88 (1935).

a nonviolent solution to a place in need of both compassion and the rule of law.

The Palestinian city of Ramallah is located about twenty-five minutes and often more than a few Israeli military checkpoints away from the Old City of Jerusalem. I served as the Chief of Team to an organization that executed a State Department contract for the Rule of Law.[27] My staff was embedded with Palestinian police, prosecution, and security services. We were engaged in an aggressive program with nearly twenty different project lines, training in human rights, and providing equipment for modern policing and prosecution.

Underlying these efforts was the United States policy in support of the creation of a Palestinian state. Officially known as the "Two State Solution" for the conflict and occupation of Palestine by Israeli forces, little progress has been made since the 1967 war. Many nations, including the United States, act as Donor Nations to the Palestinian Authority under a policy many consider to be futile. Still, these nations work to bolster otherwise failing sectors of the economy in furtherance of the creation of an independent Palestine. JSAP's justice sector programs during my time in Palestine included:

- Forensics Training to the Palestinian Police
- Development of case management software for Palestinian Police
- Enhancing cybercrime enforcement capacity
- Training on modern use of informants in criminal cases
- Improving capacity to investigate arson
- Improving systems to execute court ordered arrest warrants
- Providing management assistance to local prosecution offices
- Assisting prosecutors in reducing case backlog
- Working with Palestinian security services to enhance human rights and professional policing practices.

Some American lawyers might be surprised to learn that the Palestinians are engaged in self-policing within the occupation. Under the Oslo Accords,[28] the Palestinian Authority is responsible for the administration of lands designated as "Area A" within the West Bank. Roughly, this is comprised of the major population areas including Ramallah, Hebron, Jericho, Bethlehem, Nablus, and Jenin. Transiting between these areas requires crossing areas under the ex-

27. The Justice Sector Assistance Project ("JSAP") is a contract administered by the United States Department of State, Bureau of International Narcotics and Law Enforcement since 2009. *See INL Justice: Making a Difference around the World*, U.S. DEP'T OF STATE: BUREAU OF INT'L NARCOTICS & LAW ENF'T AFFAIRS, https://www.state.gov/documents/organization/267511.pdf (last visited July 12, 2017).

28. *See generally*, *The Oslo Accords and the Arab-Israeli Peace*, OFF. HISTORIAN https://history.state.gov/milestones/1993-2000/oslo (last visited July 12, 2017).

clusive control of the Israeli military, and pock marked by ubiquitous Israeli "settlements" built on Palestinian lands in violation of international law.[29]

Among the most important work being undertaken by the United States Rule of Law Project was to bring up the capacity of the Palestinian police services to utilize forensic evidence in criminal prosecutions. In an underdeveloped place like Palestine, there are really only two ways to try a criminal case: one is through witness testimony—and you can imagine the hearsay problems that would build on hearsay problems in trying to get a witness to a crime for which often there are no witnesses. The other is via confessions—and you can only imagine how confessions might be obtained in such a place. While I was never a witness to coercion or violence, my Palestinian colleagues would sometimes look away when the question was asked. This awkward situation only underscores the importance of human rights training (and screening out those accused of human rights abuses), forensics training to focus prosecutions on physical evidence, and capacity building in modern policing.

Palestinian justice sector officials were, for the most part, professional and well-trained. They liked the American program, not only because we offered high quality training, but also because we bought them equipment—from fingerprint platforms to software in cybercrime units, to the kinds of tools needed to bring in forensic evidence in criminal trials.

B. Understanding the Occupation of Palestine and its Rule of Law

Anyone working for human rights in troubled places of the world will question whether their work contributes to peace. Working in the Middle East alone neither answers the question of how such a conflict ends between Israel and Palestine, nor answers how Israel might live in peace with its neighbors. Like many Americans who work for Palestinian rights and statehood, I came to this region supporting and believing in the State of Israel, and I left supporting the State of Israel. However, when I became deeply aware of the political situation and, in particular, of the policy of the occupying Israeli forces toward the Palestinians, my reaction was shock and dismay.

As a law professor, lawyer, and human being, I condemn the violence that has been inflicted on both sides of this conflict. Scores of Palestinians have lost their freedom and many have lost their lives, as have Israeli soldiers and innocent civilians in both Israel and in Pales-

29. *See* S.C. Res. 2334 (Dec. 23, 2016).

tine. I cannot imagine, from the Palestinian side, how knife attacks against elderly couples in Tel Aviv or elsewhere in Israel, or against children, can ever be justified. Clearly the only path to a Palestinian state is the path of nonviolence, including the nonviolent refusal to cooperate in the Occupation. The peaceful paths of Gandhi and Martin Luther King are the only ones possible in this place. But for the Israeli side, the violence and slavery of nearly fifty years of occupation of the Palestinians, Israeli settlement-building, and the killing and imprisonment of Palestinian youth must end.

The biggest obstacle to peace in the region is the unfettered building of settlements by Israel in occupied Palestinian lands. Almost everywhere you travel in the West Bank, when you look up to the hills, you will see an Israeli settlement, illegal in every way under international law. And they are building all the time.

When asked whether I have hope for peace in the Holy Land, my answer has to be "No." I do not have hope about how this problem can be resolved. The Palestinians insist on a right of return, and to them—some of them—that means they want the olive groves of their grandparents that are now part of the State of Israel. This is not a reasonable starting point for peace negotiations on the part of the Palestinians. The Israelis will not stop building settlements and have no observable way to roll back those heavily armed settlers who now number well over half a million living inside the West Bank—a land to which they have absolutely no claim under law. My head says, No, there's no hope; but my heart and maybe my Irish view of the world say, Yes, let's proceed and let's talk about what some of the realities that are on the ground.

The total Jewish population of Israel is around 6.1 million.[30] If you combine the Palestinian populations in Israel, twenty percent of Israeli citizens are Palestinian. They are second-class citizens by all accounts. The Jim Crow laws that apply to the Palestinians inside of Israel would be the basis of another lecture.[31] But if you took that population, the population of Gaza, and the population of the West Bank, they total approximately 5.8 million Palestinians.[32] Therefore, 6.1 million people arguably are occupying 5.8 million people. This is the real threat to the State of Israel: by not making peace with Palestinians, by not allowing them the creation of their own state, they are doomed to a permanent occupation. You can imagine what this takes.

30. *Israel's Religiously Divided Society*, PEW RES. CTR. (March 8, 2016), http://www.pewforum.org/2016/03/08/israels-religiously-divided-society/.

31. *Palestinians to Outnumber Jewish Population by 2020*, HAARETZ (Jan. 1, 2013), http://www.haaretz.com/middle-east-news/palestinians-to-outnumber-jewish-population-by-2020-says-pa-report-1.491122.

32. *Id.*

It is the reason every single Israeli citizen, men and women, must serve in the military. It takes a lot of soldiers to occupy that many people.

But for peace to come about, Israel must eventually end its use of military laws of occupation. If one compares the situation to Northern Ireland, the only way out is to roll back the occupation, to roll back the laws that governments give themselves when peace is threatened from within. For example, laws passed in the United States after 9/11 conferred great surveillance power on the government[33] and strengthened the United States government's ability to gather intelligence, arrest, and prosecute suspected terrorists. Unlike the United Kingdom in the case of Northern Ireland and the United States after 9/11, the Israeli government has the unfettered ability to spy on Palestinians in Gaza and the West Bank.

Will a Palestinian State be created? Many young people in Palestine do not favor the "Two State Solution" but would take their chances as citizens of Israel. Palestinians may believe the most effective Palestinian weapon is their demographic growth, which is occurring at a much, much higher rate than that of Israeli Jews.[34] If those numbers stay the same, then you would see—some say within five years—a majority Palestinian block within Israel. With this impending disaster for the Jewish State of Israel, we would likely be looking at the beginning of an almost direct parallel to South Africa and its discredited policy of apartheid. Some argue that Israel has already created such a policy, in fact.[35]

There are now approximately 625,000 Israeli Jews living in the West Bank in over one hundred settlements.[36] I have no idea how this can ever be rolled back if there is to be a peace. But to look at the reality on the ground, these are all fortified mini-cities. As I personally observed, every one of them has an Israeli defense garrison close by. All are walled, all are surrounded by barbed wire, and the citizens are armed.[37] On one occasion, I attended a barbeque in an Arab village, above which there was an Israeli settlement. There was a swim-

33. *See, e.g.*, USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

34. *See Palestinians to Outnumber Jewish Population by 2020*, *supra* note 31.

35. Ruth Eglash, *Is Israel an 'Apartheid' State? This U.N. Report Says Yes*, WASH. POST (March 16, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/03/16/is-israel-an-apartheid-state-this-u-n-report-says-yes/?utm_term=.444a906120c5. *See also*, John McKay, *Israel's Security Means Ending Its Oppression of Palestinians*, SEATTLE TIMES (Aug. 8, 2015), http://www.seattletimes.com/opinion/israels-security-means-ending-its-oppression-of-palestinians/.

36. *Report on Israeli Settlements in the Occupied Territories*, FOUND. FOR MIDDLE E. PEACE (July 15, 2013), http://fmep.org/resource/report-on-israeli-settlement-in-the-occupied-territories-vol-23-4/.

37. *Id.*

ming hole,[38] and I, of course, invited the settlers to come and eat with us, which they refused to do. But as they turned away, I could see tucked into the back of their bathing suits that each had a nine-millimeter pistol. It was not only the soldiers who carried weapons; even the Israeli settlers were heavily, heavily armed in every possible way.

C. GAZA, SUMMER 2014

In the summer of 2014, the Israeli forces engaged in a military assault on Palestinians living in Gaza.[39] Responding to claims of Palestinian incursions into Israeli territory and following the murder of three Israeli youth near a West Bank settlement, Israel rained bombs on defenseless Palestinians huddled in their homes, hospitals, and schools. Over three thousand Palestinians were killed.[40] I was a witness to the unguided rockets fired by Hamas toward Tel Aviv after Israeli forces entered Gaza. I could see their fiery tails arcing across the night sky from my apartment in Ramallah, and knew well that many would die. While Hamas fighters tried to offer resistance, they were no match for the well-trained and equipped soldiers of the Israel Defense Forces and their sophisticated weaponry.

As disturbing as this was to witness personally, I was soon involved in an ethical dilemma caused by United States support of the Israeli military. Much to my shock, United States military assistance included the 2014 assault on Gaza, even as the United States condemned the Israeli attack and the mounting civilian casualties.

The United States government has maintained a secret supply depot in Israel for many years.[41] One might speculate that storing United States weapons there demonstrates to enemies of Israel that the United States has skin in the game and will protect Israel from outside attacks. Using the weapons to kill nearly defenseless Palestinians in Gaza surely was not part of the American policy.

During its assault on the Palestinians of Gaza, news reports indicated the Israeli military depleted its ready supply of mortars and grenades in Gaza, which they were launching into the most highly

38. Located in Palestinian lands abutting the Palestinian village of Der Ibzeia and located within Area B, lands ostensibly under both Israeli and Palestinian control. The swimming hole was considered part of the Arab village, outside of the settlement walls.

39. Steven Erlanger & Isabel Kershner, *Israel and Hamas Trade Attacks as Tension Rises*, N.Y. TIMES (July 8, 2014), https://www.nytimes.com/2014/07/09/world/middleeast/israel-steps-up-offensive-against-hamas-in-gaza.html.

40. Mairav Zonszein, *Israel Killed More Palestinians in 2014 Than in Any Other Year Since 1967*, GUARDIAN (March 27, 2015), https://www.theguardian.com/world/2015/mar/27/israel-kills-more-palestinians-2014-than-any-other-year-since-1967.

41. Luis Martinez, *U.S. Has Sold Ammunition to Israel Since Start of Gaza Conflict*, ABC NEWS (July 30, 2014), http://abcnews.go.com/blogs/politics/2014/07/u-s-has-sold-ammunition-to-israel-since-start-of-gaza-conflict/.

occupied zone in the world. The Israelis petitioned the United States government to resupply them from the United States secret supply depot so that the Israeli Defense Forces could continue their assault on Gaza unabated.[42] As the only American official allowed to live in the West Bank at this time—because I had a staff of Palestinians working in the Rule of Law Program—I had a terrible ethical crisis: how could I continue in my role as American trainer of Palestinians in human rights when my government was resupplying their occupiers so that it could kill the families of people that I was working with in Gaza?

I had a very, very difficult weekend in which I worked this through in my head. I did not want to resign. I did not want to put the jobs of my colleagues in jeopardy. But I decided I could not be silent. So I made an appointment with the Attorney General of Palestine, the Deputy Commander for the Palestinian Police, and the Chief Prosecutor for the West Bank.

I began with the Attorney General and said, "Mr. Attorney General, I feel that as only the American official in the West Bank and the only one whom you deal with, I have to tell you that I'm appalled at my government's cooperation here in the resupply and subsequent assault on Gaza. I know you know of it, and if I were you, I would question my leadership of the Rule of Law Program here. Consequently, if you confirm this to me, I will resign and turn this office over to my deputy, who is a Palestinian." He rose up from his chair, looked at me, shook his head and came around the table to kiss me three times and he put his hands on my shoulders. "Please stay," he said. "We're Palestinians. We're used to being killed." It was a very difficult and emotional moment for me as I considered the meaning and the weight of history in his remark.

This response was essentially repeated by the next two officials, and by the time I went to the fourth, for coffee and to ask his advice on how to proceed, he, another Palestinian, said, "Oh, don't talk to me." He said, "I already know. It's all over the government. You offered to resign. You are a good person. You should stay."

It wasn't my intention to try to enhance my standing with Palestinian officials. I was fully prepared to leave on principle, though I did not want to abandon my work or colleagues. I truly expected the Palestinian Attorney General to accept my offer of resignation. Instead, I stayed and learned a lesson: it was not about me. It was not about my view, or even about the rule of law in this moment. It was about the resiliency of the Palestinian people and their willingness to work

42. *Id.*

under the most trying circumstances to advance the possibility of statehood and the rule of law.

This may be how I came to appreciate a word commonly used by my Palestinian friends and colleagues working toward the rule of law in a troubled land: *Inshallah*, literally, "God willing." But it is used in Palestine in a way that we, especially lawyers, would find a little unsettling. For example, if you are dealing with an opposing lawyer, you might hear something like, "We'll get our submittals in by Friday, *Inshallah*." They would always end with *Inshallah*. I did not like to hear that. "No, no, no. Not *Inshallah*. You have to *promise* me I'm going to get this by Friday." My response was very American: "Forget about this *Inshallah* business. Don't say that to me."

But when you think about it, almost nothing goes right in the lives of Palestinians. Nothing is predictable. Forty percent of males over the age of twenty-five have been in Israeli prisons, so almost everyone I worked with or came into contact with has been in a prison or a jail. You can be detained at any time. Checkpoints can appear that were never there before. So, really, it is a pretty good word to have at your disposal.

Perhaps there will be peace in the Middle East one day. *Inshallah*.

IV. HOW ETHICS "TRUMPS" SELF-INTEREST IN GOVERNMENT SERVICE

A. Ethical Leadership and Doing the Right Thing

With controversy swirling around the White House in the early days of the Trump Administration, we turn our attention to ethical leadership and the role of lawyers who serve the public interest. With the first serious calls for impeachment since the Monica Lewinsky Scandal, the constitutional role of presidential impeachment returns to our public discourse.[43]

Lessons learned from my own firing from the Justice Department cannot be obtained from reference to the Rules of Professional Conduct ("RPC") or decisions by the courts. A lawyer may search in vain for guides to help him or her do the right thing within the rules, with very little to show for it.[44] In fact, I often tell my law students some-

43. Avantika Chilkoti, *House Democrat from California Seeks Support to Impeach Trump*, N.Y. Times (June 12, 2017), https://www.nytimes.com/2017/06/12/us/politics/brad-sherman-impeachment-trump.html; Jonathan Martin & Alexander Burns, *Democratic Leaders Try to Slow Calls to Impeach Trump*, N.Y. Times (May 18, 2017), https://www.nytimes.com/2017/05/18/us/politics/democrats-trump-impeachment.html.

44. The Preamble to the RPC does make some lofty claim about the lawyer's responsibility to improve the legal profession and serve those without adequate means to

what facetiously that the RPC boils down to two main prohibitions: do not sleep with your clients and do not steal from their trust accounts. Then, an amazing number of lawyers manage to do both of those things.

Rather, my relatively brief brush with public controversy demonstrated that turning to the RPC will do little good in times such as those now facing the current occupants of the White House Counsel's Office and Department of Justice. Unfortunately, these rules are more about protecting the business of law practice and providing a way to discipline wayward lawyers, especially those who stray too far from good business practices.

As part of my remarks in the *Symposium*, I offer here the following simple decision steps for lawyers serving in the public eye:

- First, determine what laws or ethical rules may apply to the matter at hand;
- Second, consult with inside colleagues—especially those with factual knowledge or experience;
- Third, if time allows, consult with a neutral advisor whom you respect (without improperly disclosing protected communications);
- Fourth, if possible, make the decision in your own time;
- Fifth, do the right thing—even if it is the most difficult for you personally and may result in you losing your job.

In essence, the simple answer is to do that thing you would be proud to share at your dinner table at home with your parents, your spouse, and your children. For government lawyers, the quintessential advice on wielding prosecutorial power wisely and fairly was provided by then-Attorney General (and later Associate Justice of the United States Supreme Court) Robert Jackson:

> The qualities of a good prosecutor are as elusive and as impossible to define as those which make a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[45]

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pay our outrageous legal fees. *See* MODEL RULES OF PROF'L CONDUCT Pmbl. & Scope (AM. BAR ASS'N 2011).

45. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

Humility and a sense that public lawyers must strive to serve the common good are at the core of Justice Jackson's advice, just as it lies at the core of how ethical lawyers should approach their service today.

B. The Perils of "Doing the Right Thing" Under President Trump

Shortly after taking office, President Trump ordered the resignations of nearly all of the United States Attorneys appointed by President Obama, still serving in office.[46] While not unprecedented, firing the presidentially-appointed, Senate-confirmed Federal Prosecutors is not typically how United States Attorneys are replaced. Typically, because their service is considered essential, occupants of these offices await newly appointed successors after the new President takes office. Unlike the 2007 Firing Scandal, even abrupt dismissals do not violate established norms since presidents are expected to make their own appointments.[47]

1. The Firing of Preet Bharara

Nevertheless, President Trump raised issues of improper influence by first assuring Preet Bharara, the United States Attorney for the Southern District of New York, that he would be expected to continue serving, only to fire him shortly thereafter.[48] By publicly misleading United States Attorney Bharara, President Trump raised the specter of interference in any one of a number of ongoing criminal investigations, some of which may have involved activities and associates of President Trump before he assumed office. This may well become an area of inquiry for the Special Counsel recently appointed by the Justice Department to investigate Russian influence and possible federal crimes by those serving in the White House.

2. The Firing of Deputy Attorney General Sally Yates

Prior to the firing of Mr. Bharara, then-acting Attorney General Sally Yates was fired for indicating her opposition to the Executive order on immigration, which was eventually stayed by the courts.[49]

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46. Michael D. Shear, *Months after Firing U.S. Attorneys, Trump Nominates Replacements*, N.Y. Times (June 12, 2017), https://www.nytimes.com/2017/06/12/us/politics/trump-nominates-us-attorneys.html.

47. Eisenstein, *supra* note 24, at 36-38.

48. Benjamin Weiser & William K. Rashbaum, *Preet Bharara Links Firing to Trump Team's 'Helter-Skelter Incompetence'*, N.Y. Times (April 6, 2017), https://www.nytimes.com/2017/04/06/nyregion/preet-bharara-interview-trump.html?_r=0.

49. *Trump Sacks Defiant Acting Attorney General Sally Yates*, BBC (Jan. 31, 2017), http://www.bbc.com/news/world-us-canada-38805944. *See also* Anamona Hartocolis, *Sally Yates Tells Harvard Students Why She Defied Trump*, N.Y. Times (May 24, 2017),

Ms. Yates' public dismissal differed in part from others in that she chose to indicate her opposition to the immigration policy and not its constitutionality. This was a mistake. As leader of the Justice Department, even temporarily, her duty was to advise the government on the law, not policy. Refusing to participate in unconstitutional acts is an act of principal. Defiantly stating opposition to policy was a political act and, frankly, justified her dismissal.

3. The Firing of FBI Director James Comey

President Trump's abrupt firing of FBI Director James Comey[50] offered the starkest comparison yet to the 10-year-old United States Attorney Firing Scandal. Like the firings of United States Attorney Bharara and Deputy Attorney General Yates, President Trump, in firing Comey, raised the specter of attempting to thwart a criminal investigation into Russian influence in the 2016 presidential campaign.[51]

Once again, the response of government officials, including in the Department of Justice, has been underwhelming. Thus far, the lessons of prior scandals have eluded both Attorney General Jeff Sessions and Deputy Attorney General Rod Rosenstein. As former United States Attorneys themselves, both should be aware of their personal obligation to protect the integrity of criminal investigations and defend them from political considerations. Rosenstein's appointment of a Special Prosecutor to examine Comey's firing does not completely erase his role in providing the President with cover by preparing a memorandum blaming Comey for mishandling the Hillary Clinton email investigation.[52]

That criminal investigations and prosecutions must be kept apart from politics is well familiar to those of us who raised our right hand

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https://www.nytimes.com/2017/05/24/us/sally-yates-trump-travel-ban-harvard-law.html.

50. *See* McKay, *supra* note 6.

51. With appointment of a Special Prosecutor, President Trump may well be facing an investigation for obstruction of justice in firing Mr. Comey. The elements of a *prima facie* case of obstruction of justice under 18 U.S.C. § 1503 (one of several criminal obstruction of justice statutes) are: (1) the existence of the judicial proceeding, (2) knowledge of or notice of the judicial proceeding, (3) acting "corruptly" with intent to influence, obstruct, or impede the proceeding in the due administration of justice, and (4) a nexus (although not necessarily one which is material) between the judicial proceeding sought to be corruptly influenced and the defendant's efforts. The omnibus clause of § 1503(a) is a "catchall" provision, which is broadly construed to include a wide variety of corrupt methods. United States v. Andreas, 39 F. Supp. 2d 1048, 1065 (N.D. Ill. 1998), *aff'd*, 216 F.3d 645 (7th Cir. 2000).

52. Aaron Blake, *The Justice Department's Case Against James B. Comey, Annotated*, WASH. POST (May 9, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/05/09/the-justice-departments-case-against-james-comey-annotated/?utm_term=.1b375c59f0d6.

and swore an oath to support and defend the Constitution of the United States. Indeed, some of us lost our jobs defending those ideals—including Mr. Bharara, Ms. Yates, and Mr. Comey. Ethical conduct includes the willingness to lose one's job (and in certain moments of history, much more than our jobs) rather than behave unethically.

Law enforcement in our country has drawn a line when it comes to using the power of federal agents with guns and badges to investigate and arrest political opponents or other innocent persons. That is what the United States Attorney Firing Scandal and more recent firings represent in an ethical context. Upholding those norms is what separates America from those pitiable countries in which the political enemies of those in power end up in jail.

V. CONCLUSION

Ethical conduct in the face of power can be daunting. Lessons drawn from the past, including the United States Attorney Firing Scandal, seem applicable in the glare of today's headlines. Demonstrating a willingness to elevate principle over self-interest, especially when defending the rule of law, is the mark of ethical leadership. Naked power, whether it be Israeli forces utilizing American weapons or emanating from a dysfunctional Oval Office exercise, is ultimately no match for singular acts of conscience.

As those of us who were fired a decade ago well know, there are some principles more important than holding on to an impressive government job title. It seems that the recent firings in the Trump Administration will not be the last. Government lawyers and leaders will be called upon to do the right and ethical thing as required by the law—even if doing so means they, too, might be fired.