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# LEGAL DILEMMAS FACING WHITE HOUSE COUNSEL IN THE TRUMP ADMINISTRATION: THE COSTS OF PUBLIC DISCLOSURE OF FISA REQUESTS

*Peter Margulies\**

## INTRODUCTION

Not every presidential administration can forge a new brand of government lawyering. Historically, government lawyering has swung between two poles: (1) dialogic lawyering, which stresses reasoned elaboration, respect for institutions, and continuity with unwritten norms embodied in past practice; and (2) insular lawyering, which entails opaque definitions, disregard of other institutions, and departures from unwritten norms.<sup>1</sup> Because President Trump regularly signals his disdain for institutions, such as the intelligence community, and unwritten norms, such as prosecutorial independence,<sup>2</sup> senior lawyers in the White House have added a new mode of legal representation that entails ad hoc adjustments to President Trump's mercurial decisions and triage among the presidential decisions they will try to temper. Call it: lifeboat lawyering.

Lifeboat lawyering, as practiced by Donald F. McGahn II—the first White House Counsel of the Trump administration<sup>3</sup>—and others, involves

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\* Professor of Law, Roger Williams University School of Law. B.A., Colgate University; J.D., Columbia Law School. I thank Bob Bauer and participants at the *Fordham Law Review* Colloquium on *The Varied Roles, Regulation, and Professional Responsibility of Government Lawyers* for comments on a previous draft. For more information on the Colloquium, which was hosted by the *Fordham Law Review* and the Stein Center for Law and Ethics on October 12, 2018, at Fordham University School of Law, see Bruce A. Green, *Lawyers in Government Service—a Foreword*, 87 *FORDHAM L. REV.* 1791 (2019).

1. See Peter Margulies, *Reforming Lawyers into Irrelevance?: Reconciling Crisis and Constraint at the Office of Legal Counsel*, 39 *PEPP. L. REV.* 809, 815 (2012) [hereinafter Margulies, *Reforming Lawyers*]; Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 *MD. L. REV.* 1, 66–70 (2008); Peter Margulies, *When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy*, 30 *FORDHAM INT'L L.J.* 642, 661 (2007). Professor Wendel also identified similar factors—particularly a common body of unwritten norms—as key to distinguishing between appropriate and inappropriate government lawyering. See W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 *HASTINGS L.J.* 275, 277 (2017).

2. See Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 *ALA. L. REV.* 1, 16–17 (2018).

3. McGahn resigned as White House Counsel in October 2018. See Michael S. Schmidt & Maggie Haberman, *McGahn, Soldier for Trump and Witness Against Him, Leaves White*

improvising adjustments to presidential policies or slow-walking action despite President Trump's urge to take more drastic actions, like firing Special Counsel Robert Mueller.<sup>4</sup> In this respect, those practicing lifeboat lawyering echo the familiar virtues of dialogic lawyering and preserve the legitimacy of the administration in the face of critics who contend that it is out of control. As we shall see, however, lifeboat lawyering's ongoing improvisations are themselves difficult to control and sometimes veer dangerously close to the excesses of insular lawyering.

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*House*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/us/politics/don-mcghahn-leaves-trump-administration.html> [<https://perma.cc/C4RV-PJTT>]. Beginning in late October 2018, Washington lawyer Emmet Flood directed the Office of White House Counsel on an interim basis as part of a transition to a new permanent counsel, Pat Cipollone. See John Wagner, Josh Dawsey & Felicia Sonmez, *Trump Vows Executive Order to End Birthright Citizenship, a Move Most Legal Experts Say Would Run Afoul of the Constitution*, WASH. POST (Oct. 30, 2018), [https://www.washingtonpost.com/politics/trump-eyeing-executive-order-to-end-citizenship-for-children-of-noncitizens-born-on-us-soil/2018/10/30/66892050-dc29-11e8-b3f0-62607289efee\\_story.html](https://www.washingtonpost.com/politics/trump-eyeing-executive-order-to-end-citizenship-for-children-of-noncitizens-born-on-us-soil/2018/10/30/66892050-dc29-11e8-b3f0-62607289efee_story.html) [<https://perma.cc/ZJK2-QWBF>]. Since President Trump regularly pushes to implement policies that rely on aggressive interpretations of applicable law, the issues described in this Article will likely persist. See *id.*

4. As of this writing, Robert Mueller is leading an investigation into the Trump campaign's possible collusion with Russian efforts to disrupt or influence the 2016 presidential election. Rebecca R. Ruiz & Mark Landler, *Robert Mueller, Former F.B.I. Director, Is Named Special Counsel for Russia Investigation*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/politics/robert-mueller-special-counsel-russia-investigation.html> [<http://perma.cc/8MZW-5J42>]. Several media outlets reported or commented on McGahn's efforts to persuade President Trump to deliberate before seeking to fire Mueller or former FBI Director James Comey. See, e.g., BOB WOODWARD, *FEAR: TRUMP IN THE WHITE HOUSE 163* (2018) (explaining that McGahn urged President Trump to follow a process for dismissing Comey and describing how White House staff increasingly invoked the necessity of following a process as a stall tactic); see also Editorial, *The Anonymous Resistance*, WALL ST. J. (Sept. 6, 2018, 7:23 PM), <https://www.wsj.com/articles/the-anonymous-resistance-1536276239> [<https://perma.cc/85UQ-NSTE>] (discussing internal administration moves to postpone or temper various actions by President Trump); Opinion, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html> [<https://perma.cc/FJZ2-MKZ3>]. Officials on and off the record have contested these accounts. See, e.g., Peter Baker & Maggie Haberman, *Trump Lashes Out After Reports of 'Quiet Resistance' by Staff*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/us/politics/trump-new-york-times-anonymous-editorial.html> [<http://perma.cc/LJ46-J297>]. Because these and similar stories have become pervasive with respect to the Trump administration, this Article assumes that the accounts are accurate. Nevertheless, an informed reader should always seek corroboration of such accounts and remain open to the possibility that particular accounts are inaccurate in whole or part. Moreover, this Article acknowledges that such attempts to moderate presidential behavior have occurred from time to time in past administrations. See *id.* (describing efforts in the Wilson, Reagan, and Nixon administrations to limit presidential activities). However, if current accounts are accurate, the incidence and intensity of such efforts have risen substantially in the current administration.

Any administration contains a mix of lawyering styles.<sup>5</sup> There are examples of dialogic lawyering in the Trump administration,<sup>6</sup> as well as insular and lifeboat modes.<sup>7</sup> To focus on what is distinctive about the current administration, this Article focuses on the interaction between the latter two approaches. A comprehensive understanding of continuity and change in the Trump administration's various lawyering styles will have to wait until another day, although that deeper understanding will be worth the effort.

The interaction of insular and lifeboat lawyering in the Trump administration often centers on unwritten norms. Sometimes called "soft law,"<sup>8</sup> unwritten norms are an important aspect of governance since they generally have bipartisan acceptance and thus form a backdrop for policymakers.<sup>9</sup> This Article treats departures from unwritten norms as insular lawyering. In certain situations, including advising President Trump against firing Special Counsel Robert Mueller, Trump administration lawyers have sought to *preserve* unwritten norms such as prosecutorial independence.<sup>10</sup> Those efforts, which often take place behind the scenes, are

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5. Professor Robert Bauer, a former White House Counsel, has provided an excellent descriptive and normative account of lawyering in the dynamic national security sphere. *See generally* Robert F. Bauer, *The National Security Lawyer, In Crisis: When the "Best View" of the Law May Not Be the Best View*, 31 GEO. J. LEGAL ETHICS 175 (2018). *But see* Mary DeRosa, *National Security Lawyering: The Best View of the Law as a Regulative Ideal*, 31 GEO. J. LEGAL ETHICS 277, 279 (2018); Christopher Fonzzone & Dana Remus, *What About When the Best View Is the Best View?*, 31 GEO. J. LEGAL ETHICS 305, 331 (2018) (suggesting that the goal of providing the "best view" under the law safeguards the independence of government lawyers); Jack Goldsmith, *Executive Branch Crisis Lawyering and the "Best View,"* 31 GEO. J. LEGAL ETHICS 261, 265–66 (2018) (cautioning against adopting Bauer's normative approach, while agreeing on the need for a measure of flexibility in legal advice to the executive branch on national security issues).

6. *See, e.g.*, Office of Legal Counsel, Opinion on April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities 1 (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download> [<https://perma.cc/8X9M-YWS5>] (arguing that President Trump's strikes against Syrian targets were consistent with the separation of powers and applicable legislation); *see also* Jack Goldsmith, *The New OLC Opinion on Syria Brings Obama Legal Rationales Out of the Shadows*, LAWFARE (June 1, 2018, 3:02 PM), <https://www.lawfareblog.com/new-olc-opinion-syria-brings-obama-legal-rationales-out-shadows> [<https://perma.cc/69JL-3ALP>] (suggesting that there is continuity between legal interpretations in the Obama administration and the Office of Legal Counsel's rationale for President Trump's Syria strikes).

7. *See* Steve Vladeck, *OLC's Formal (and Remarkably Broad) Defense of the April Syria Strikes*, JUST SECURITY (June 1, 2018), <https://www.justsecurity.org/57300/olcs-formal-and-remarkably-broad-defense-april-syria-strikes/> [<https://perma.cc/LXU5-W2TJ>] (arguing that the OLC's Syria opinion reflects an unprecedentedly broad view of executive power).

8. *See generally* Peter Margulies, *Global Cybersecurity, Surveillance, and Privacy: The Obama Administration's Conflicted Legacy*, 24 IND. J. GLOBAL LEGAL STUD. 459 (2017) (discussing the contrast between collaborative establishment of soft law on cybersecurity and aggressive approach of law enforcement in stressing access to content carried on new communications devices over consumers' privacy and information-security interests).

9. *See* Green & Roiphe, *supra* note 2, at 69 (discussing unwritten norms of prosecutorial independence); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2206–42 (2018) (describing unwritten executive branch norms).

10. *See* Michael S. Schmidt & Maggie Haberman, *Trump Ordered Mueller Fired, but Backed Off when White House Counsel Threatened to Quit*, N.Y. TIMES (Jan. 25, 2018),

examples of lifeboat lawyering. President Trump's persistent and public efforts to disrupt unwritten norms—displayed in tweets, public remarks, and other contexts—make the preservation of such norms a focal point.

Part I of this Article describes insular lawyering and discusses the legal opinions that authorized the George W. Bush administration's Terrorist Surveillance Program as an example of insular lawyering. Part II discusses insular lawyering in the Trump administration and centers on the unprecedented release of materials related to a Department of Justice (DOJ) request for a Foreign Intelligence Surveillance Act (FISA) warrant in its investigation of Russian meddling in the 2016 election. Finally, Part III sketches a model of lifeboat lawyering, which includes lawyers' adaptations to exigent circumstances and triage of troubling executive branch decisions. This final Part asks whether the lifeboat label applies to a letter by White House Counsel McGahn authorizing the release of FISA-related materials described in Part II. This Article argues that lifeboat lawyering—while sometimes necessary—is also risky because it can readily morph into the insular mode's excesses.

#### I. INSULAR LAWYERING IN THE EXECUTIVE BRANCH

Insular lawyering has been a mainstay of administrations of both parties. This Article links insular lawyering to several flaws: a lack of reasoned elaboration, hostility toward other institutions, and abrupt breaks with unwritten norms. A brief discussion of these terms will inform the reader.

“Reasoned elaboration” refers to the methodical provision of justifications.<sup>11</sup> Alexander Hamilton believed that a legal argument's assiduous search for ordered justifications would moderate the short-term impulses that can imperil constitutional republics.<sup>12</sup> The perception of moderation may also temper responses to executive action from other stakeholders, such as Congress, the courts, and the public, and reduce “pendular swings” that can disrupt republican governance.<sup>13</sup> In addition, the practice of providing justifications promotes sound *substantive* policy by clarifying issues and sharpening arguments on all sides.<sup>14</sup>

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<https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html> [http://perma.cc/FK8L-4D6M].

11. See BRYAN GARSTEN, *SAVING PERSUASION* 121 (2006) (contrasting giving reasons with political demagoguery, which relies on slogans, stories, and images with emotional resonance). Of course, reasoned discourse may also have a narrative and emotional component, and even demagoguery has its own brand of logic. A full examination of the role of emotion in reasoned elaboration is beyond the scope of this Article.

12. See *THE FEDERALIST* NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

13. See *Boumediene v. Bush*, 553 U.S. 723, 742 (2008).

14. Cf. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 144–56 (2007) (discussing Goldsmith's decision to withdraw DOJ memoranda on interrogation of detainees due to the overly broad justifications in those documents and the indignation at Goldsmith's decision displayed by other administration officials, who wished to continue the ill-advised approach that the prior memoranda had defended).

Such a moderated process is also likely to both embody and convey respect for other institutions and for past practice that exemplifies unwritten norms. Lawyers weighing legal authority will likely consider the interests of relevant stakeholders, including institutions such as Congress and the courts.<sup>15</sup> They will also likely consider past practice within the executive branch. Although past practice may not be binding or dispositive, it can serve as a useful guide to what is possible and the real-world consequences of past actions.<sup>16</sup> As the U.S. Supreme Court has repeatedly indicated, accumulated wisdom is often useful, particularly because the Constitution provides a somewhat muddled template and ambiguous statutes can cause unwanted effects.<sup>17</sup> Moreover, past practice may reflect unwritten norms, like judicial independence, which have tempered efforts to “pack the Court” or strip the federal courts of their jurisdiction.<sup>18</sup>

Insular lawyering upends these virtues. Instead of reasoned elaboration, insular lawyering resorts to opacity.<sup>19</sup> Insular lawyering rejects established institutions and tries to ignore, circumvent, or undermine other stakeholders. Unwritten norms similarly receive short shrift.

The Terrorist Surveillance Program (TSP) established by President George W. Bush in the aftermath of the 9/11 attacks provides an example of insular lawyering.<sup>20</sup> At various points, that program apparently entailed the bulk collection of internet metadata and communications between U.S. persons—American citizens, lawful permanent residents, and others physically present

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15. See Arthur H. Garrison, *The Role of the OLC in Providing Legal Advice to the Commander-in-Chief After September 11th: The Choices Made by the Bush Administration Office of Legal Counsel*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 648, 662 (2012) (noting that questions of law posed to administration lawyers implicate interests beyond policy and politics).

16. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); see also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (relying on historical examples to establish the president's exclusive power to recognize foreign governments); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (emphasizing a longstanding history of presidents making recess appointments); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–24 (2012) (discussing the importance of historical practice to interpretations of separation of powers).

17. See, e.g., *Noel Canning*, 134 S. Ct. at 2559 (“[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions . . .” (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929))).

18. See, e.g., Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 317–18 (2017) (noting bipartisan acceptance of this norm).

19. Cf. David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 278, 282–83, 287 (2010) (analyzing secrecy's risks and benefits).

20. See Legal Authorities Supporting the Activities of the National Security Agency Described by the President, 30 Op. O.L.C. 1 (2006) [hereinafter 2006 NSA Memo], <https://www.justice.gov/olc/file/477041/download> [<https://perma.cc/Q4EJ-35HX>]; Julian Sanchez, *Reading Jack Goldsmith's STELLARWIND Memo (Part I)*, JUST SECURITY (Sept. 10, 2014), <https://www.justsecurity.org/14789/reading-jack-goldsmiths-stellarwind-memo/> [<https://perma.cc/7KCT-G6EA>].

in the United States—and foreign parties.<sup>21</sup> Under FISA,<sup>22</sup> which provided a comprehensive, finely calibrated scheme for monitoring communications by foreign agents within the United States, the TSP was of questionable legality.<sup>23</sup> FISA required the government to obtain a warrant before wiretapping such communications.<sup>24</sup> Thus, Congress’s enactment of this comprehensive scheme likely precluded warrantless wiretaps involving U.S. persons.<sup>25</sup> Congress *could* have authorized such wiretaps,<sup>26</sup> but its failure to do so suggests that Congress sought to prohibit this activity.<sup>27</sup> Moreover, the president defied Congress’s mandate and insisted on authority to engage in warrantless wiretaps, leaving him in territory where the courts are least likely to exercise deference.<sup>28</sup>

A 2006 white paper, authored and published by the DOJ, circumvented the legal requirements for wiretaps under FISA and instead argued that the Authorization for the Use of Military Force (AUMF) enacted by Congress shortly after 9/11 changed the calculus.<sup>29</sup> According to the DOJ, the AUMF authorized the president to order actions that were “necessary and appropriate” to deter future attacks from those responsible for 9/11.<sup>30</sup> The DOJ asserted that collection of the communications at issue was necessary and appropriate.<sup>31</sup> It then asserted that the AUMF modified FISA’s comprehensive scheme.<sup>32</sup> Indeed, the agency claimed that reading FISA as

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21. Professor Jack Goldsmith, when he served at the OLC, authored a memorandum in 2004 for the George W. Bush administration that the Obama administration subsequently released under a Freedom of Information Act request. *See* Sanchez, *supra* note 20. Goldsmith’s memorandum, while heavily redacted in its public form, appears to suggest that indiscriminate collection of metadata would violate FISA. *See id.*

22. 50 U.S.C. §§ 1801–1885c (2012).

23. *See* United States v. Abu-Jihaad, 630 F.3d 102, 117–19 (2d Cir. 2010).

24. *See id.* at 121, 130 (noting that the Fourth Amendment imposes a warrant requirement for surveillance of communications of foreign agents located within the United States).

25. *See* Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 316–24 (2010). *But see* John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 566–68 (2007) (arguing that President Bush’s authority under Article II of the Constitution supported the lawfulness of the TSP and that FISA had to be read in light of the president’s Article II power); Memorandum from Jack L. Goldsmith, III, Assistant Att’y Gen., U.S. Dep’t of Justice, to the Att’y Gen. 21–24 (May 6, 2004), [https://www.justice.gov/sites/default/files/pages/attachments/2014/09/19/may\\_6\\_2004\\_goldsmith\\_opinion.pdf](https://www.justice.gov/sites/default/files/pages/attachments/2014/09/19/may_6_2004_goldsmith_opinion.pdf) [<https://perma.cc/R5EA-M6XE>] (arguing for the legality of a narrower version of STELLARWIND that President Bush authorized in 2004).

26. *See* United States v. Mohamud, 843 F.3d 420, 441–44 (9th Cir. 2016) (holding that section 702 of FISA, which authorizes warrantless surveillance of one-end foreign communications, is consistent with the Fourth Amendment).

27. *Cf.* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretative Canon Use in the Roberts Court’s First Decade*, 117 MICH. L. REV. 71, 117–18 (2018) (explaining the statutory interpretation canon, “*expressio/inclusio unius est exclusio alterius*,” which holds that Congress’s express authorization for one action is an express prohibition of any other action).

28. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

29. 2006 NSA Memo, *supra* note 20, at 35.

30. *Id.* at 25–26.

31. *Id.*

32. *Id.*

*prohibiting* the TSP would render FISA an unconstitutional infringement on the president's Article II authority.<sup>33</sup>

The DOJ white paper unduly expanded interpretations of both the AUMF and the president's Article II authority. The AUMF may permit exclusively foreign intelligence, surveillance, and reconnaissance operations, which are incident to war.<sup>34</sup> However, reading the AUMF as authorizing surveillance of constitutionally protected U.S. persons is a stretch. Similarly, the president's Article II powers do not extend that far. If the executive possessed such power under Article II, any action by Congress would survive solely as a matter of presidential grace. The framers surely did not intend to place Congress in such a precarious position.

The DOJ white paper's skewed reading is an apt example of insular lawyering. A reasonable observer would assume that Congress had authority under its war, law enforcement, and commerce powers to set up a comprehensive structure governing surveillance of U.S. persons. Admittedly, the president would have residual power over collection of purely foreign communications.<sup>35</sup> Congress, however, would have the last word on communications in which U.S. persons participated.<sup>36</sup> The DOJ's approach went far beyond this reasonable reading and cited a hidden source of presidential authority.<sup>37</sup> The interpretation that the DOJ favored defied commonsense understandings of statutory and constitutional structure. Moreover, until two enterprising *New York Times* reporters disclosed the TSP's existence in late 2005, both the existence of the TSP and the legal justifications for it were completely unknown.<sup>38</sup> This process of secret law is typical of insular lawyering.<sup>39</sup>

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33. *Id.*; see also Memorandum from Jack L. Goldsmith, *supra* note 25, at 21–24.

34. See generally ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION (2006), <https://fas.org/sgp/crs/intel/m010506.pdf> [<https://perma.cc/KD82-3KEN>]. For more information, see also Matthew C. Waxman, *The Power to Wage War Successfully*, 117 COLUM. L. REV. 613, 642 (2017).

35. See, e.g., *United States v. Truong*, 629 F.2d 908, 913 (4th Cir. 1980) (“[T]he Executive Branch need not always obtain a warrant for foreign intelligence surveillance.”).

36. See Swaine, *supra* note 25, at 316–17. Goldsmith's 2004 memorandum appeared to concede that FISA did preclude certain elements of the pre-2004 TSP, such as the indiscriminate collection of internet metadata. See Sanchez, *supra* note 20; see also GOLDSMITH, *supra* note 14, at 182 (explaining that Goldsmith and former FBI Director James Comey convened at the hospital bedside of then–Attorney General John Ashcroft to head off efforts of other Bush administration officials to secure Ashcroft's approval of the original TSP). A comprehensive assessment of the post-2004 TSP is beyond the scope of this Article, but the pre-2004 TSP's legal underpinnings frame the role of insular lawyering.

37. See 2006 NSA Memo, *supra* note 20, at 1 (“The NSA activities are supported by the President's well-recognized inherent constitutional authority . . .”).

38. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html> [<https://perma.cc/C9P6-U6VG>].

39. Another example from the Bush administration concerns the legal rationale for interrogation of certain “high-value” post-9/11 detainees. See Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 1–2 (Aug. 1, 2002); see also DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 162, 176–80, 200–02 (2007); Kathleen



## II. THE TRUMP ADMINISTRATION AND INSULAR LAWYERING

Exhibit A in the Trump administration's catalogue of insular lawyering also concerns FISA. In early 2018, White House Counsel Donald McGahn sent a letter conveying the White House's decision to declassify and release certain documents addressing a specific FISA warrant request.<sup>40</sup> The DOJ submitted the request to the Foreign Intelligence Surveillance Court (FISC) while investigating Carter Page. Page, who had links to Russia, had served as a foreign policy aide to then-candidate Trump.<sup>41</sup> McGahn's letter is a disturbing example of insular lawyering. However, to appreciate the risks undertaken by McGahn requires an understanding of the difference between his letter and insular lawyering in prior administrations.

Notably, McGahn's letter, unlike the DOJ white paper published during the Bush administration, does not involve a new program that may conflict with FISA.<sup>42</sup> Instead of being programmatic in focus, McGahn's letter is remarkably particular. Indeed, unlike most other presidential actions facilitated by insular lawyering, McGahn, at least on the surface, did not seek to augment executive power.<sup>43</sup> The material that McGahn authorized for

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Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 462 (2005); Margulies, *Reforming Lawyers*, *supra* note 1, at 835–40 (warning against overreacting to episodes of insular lawyering by enacting rigid rules that unduly impair a lawyer's ability to provide legal advice to the executive branch); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1726–29 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN PUBLIC* (2010)) (asserting that authors of memoranda on coercive interrogations suffered significant adverse consequences, although those consequences were less formal than some critics of the underlying policies might have wished); Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1975–76 (2008); Stephen I. Vladeck, *Justice Jackson, the Memory of Internment, and the Rule of Law after the Bush Administration*, in *WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION* 183, 201–07 (Austin Sarat & Nasser Hussain eds., 2010) (discussing the appropriate blending of formal and informal sanctions for past government overreaching); Wendel, *supra* note 1, at 207–08; W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 80–85 (2005) (arguing that the 2002 OLC opinions violated settled public understandings of interrogation).

40. *See generally* Letter from Donald F. McGahn II, Counsel to the President, to Devin Nunes, Chairman, House Permanent Select Comm. on Intelligence (Feb. 2, 2018) [hereinafter McGahn Letter].

41. Verified Application at 4, *In re Page* (FISA Ct. Oct. 2016).

42. *See* 2006 NSA Memo, *supra* note 20, at 17–34 (providing rationales for why the NSA TSP activities were consistent with FISA).

43. This list would include not only DOJ memoranda on the TSP and the post-9/11 interrogation program but also earlier advice that straddled the line between appropriately aggressive counsel and insular lawyering. *See* Bauer, *supra* note 5, at 180–229 (analyzing examples, such as President Roosevelt's destroyer deal with Britain during World War II and the U.S. blockade during the Cuban Missile Crisis); *see also* Gabriella Blum, *The Role of the Client: The President's Role in Government Lawyering*, 32 B.C. INT'L & COMP. L. REV. 275, 281 (2009) (arguing that, although senior officials typically seek legal advice approving proposed actions, when action is sound for policy reasons but legally questionable, lawyers should not provide an unduly expansive legal interpretation; instead, senior officials should assume responsibility for taking correct action over lawyers' disagreement); *cf.* OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 123–27 (2006) (discussing the view expressed by Jefferson regarding the

release—a report by the Republican majority of the House Permanent Select Committee on Intelligence (HPSCI) on the Carter Page FISA request<sup>44</sup>—actually *criticized* the DOJ FISA request as an abuse of power by the executive branch.<sup>45</sup> The White House clearly had legal authority<sup>46</sup> to release the HPSCI majority report, which was drafted by the staff of the HPSCI chair, Devin Nunes.<sup>47</sup>

Moreover, on the surface, McGahn’s letter and Nunes’s memo were neither secret nor opaque. While the white paper was top secret and very closely held within the Bush administration, McGahn’s *intended* audience was the public. If secrecy is a sine qua non of insular lawyering, McGahn’s letter does not qualify.

Although McGahn’s letter was public, in its own way it reflected the disregard of unwritten norms and established institutions that is characteristic of insular lawyering. In addition, McGahn’s letter and Nunes’s memo did aim to augment presidential power. By seeking to discredit the investigation of the Trump campaign’s collusion with Russia in the 2016 election, Nunes’s memo sought to augment the power and political standing of one particular occupant of the White House: President Donald J. Trump.<sup>48</sup> The McGahn letter’s misleading rationale for approving the release of Nunes’s memo reinforced the memo’s goals.<sup>49</sup>

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questionable legality of the Louisiana Purchase that the president should act, explain the reasons for the action, and seek public ratification or at least acquiescence); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1099–109 (2003).

44. See Memorandum from HPSCI Majority Staff to HPSCI Majority Members on the Foreign Intelligence Surveillance Act Abuses at the Department of Justice and the Federal Bureau of Investigation 1 (Jan. 18, 2018) [hereinafter Nunes Memo].

45. See *id.*

46. See *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988) (noting the president’s broad authority over sensitive national security information).

47. Many members of the HPSCI majority who signed the report lacked access to the underlying FISA materials that the report described. Memorandum from HPSCI Minority to All Members of the House of Representatives on Correcting the Record—the Russia Investigations 2 & 8 nn.1–2 (Jan. 29, 2018) [hereinafter Schiff Memo].

48. Some Republican House members who signed on to Nunes’s memo, such as Representative Trey Gowdy of South Carolina, had a narrower goal of casting doubt on the Carter Page FISA request *without* undermining the Mueller inquiry. See Trey Gowdy (@TGowdySC), TWITTER (Feb. 2, 2018, 10:34 AM), <https://twitter.com/TGowdySC/status/959495152770469888> [<https://perma.cc/3EFD-WD7U>].

49. It is not clear that Nunes achieved this goal. Nunes’s memo was so blatantly deceptive that it may have influenced only members of the public who were already convinced by President Trump’s repeated claims that the Russia investigation is a “witch hunt.” See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 12, 2019, 6:20 AM), <http://twitter.com/realDonaldTrump/status/1084092774633353217> [<https://perma.cc/Q5GM-ZYMF>] (“Part of the Witch Hunt.”); see also Olivia Paschal, *Trump’s Tweets and the Creation of ‘Illusory Truth,’* ATLANTIC (Aug. 3, 2018), <https://www.theatlantic.com/politics/archive/2018/08/how-trumps-witch-hunt-tweets-create-an-illusory-truth/566693/> [<https://perma.cc/UTQ9-K62N>] (reporting that the president referred to the Mueller probe as a “witch hunt” over eighty-four times in 2018 alone). On the other hand, the public is often credulous, so one cannot discount the impact of Nunes’s memo on public perceptions of the Russia investigation.

*A. The Carter Page FISA Request*

To understand insular lawyering, it is important to understand the Carter Page investigation. In a March 2016 interview with the *Washington Post*, then-candidate Donald Trump identified Page as one of his foreign policy advisors.<sup>50</sup> For years prior to being singled out as an advisor to Trump, Page was active in matters involving energy interests in Russia and apparently expressed strong views favoring Russian strongman Vladimir Putin.<sup>51</sup> In October 2016, as Obama administration intelligence and national security officials publicly expressed concern that Russia was meddling in the U.S. presidential election, the DOJ's National Security Division requested a FISA warrant to collect Page's communications and asserted that probable cause existed to believe that Page was an agent of the Russian government and that the communications would yield foreign intelligence information.<sup>52</sup> The FISC granted the warrant request.<sup>53</sup>

*B. The Nunes Memo's Misleading Claims*

Nunes's memo made a loaded accusation about the DOJ's request for a FISA warrant in Page's case. According to Nunes's memo, the National Security Division had *not* shown probable cause.<sup>54</sup> Instead, according to Nunes, it had relied largely, if not exclusively, on a partisan dossier compiled by former British intelligence operative Christopher Steele.<sup>55</sup> While a law firm that represented Hillary Clinton's campaign committee had paid for Steele's work, Nunes asserted that the DOJ had knowingly concealed this fact from the FISC.<sup>56</sup> The provenance of Steele's dossier was clearly a material fact in the assessment of the dossier's reliability.

Nunes's memo was a frontal assault on the DOJ and the FISA process. It asserted that the DOJ had submitted a warrant application to the FISC in which it knowingly relied almost exclusively on a partisan report.<sup>57</sup> Moreover, according to Nunes, the DOJ had knowingly concealed a material

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50. See Rosalind S. Helderan, *Memo Points to FBI's Sustained Interest in Carter Page, Ex-Adviser to Trump*, WASH. POST (Feb. 2, 2018), [https://www.washingtonpost.com/politics/memo-points-to-fbis-ongoing-interest-in-trump-adviser-carter-page/2018/02/02/89bfdee2-077c-11e8-8777-2a059f168dd2\\_story.html](https://www.washingtonpost.com/politics/memo-points-to-fbis-ongoing-interest-in-trump-adviser-carter-page/2018/02/02/89bfdee2-077c-11e8-8777-2a059f168dd2_story.html) [https://perma.cc/AW7A-G4LA]. Another former Trump foreign policy adviser, George Papadopoulos, pled guilty to making false statements to FBI agents about his ties to Russia in violation of 18 U.S.C. § 1001. See Statement of the Offense at 1–3, *United States v. Papadopoulos*, No. 1:17-cr-00182-RDM (D.D.C. Oct. 5, 2017), ECF No. 19.

51. See Natasha Bertrand, 'Carter Page Is a Very Unlikely GOP Hero,' ATLANTIC (Sept. 19, 2018), <https://www.theatlantic.com/politics/archive/2018/09/carter-page-is-a-very-unlikely-gop-hero/570655/> [https://perma.cc/FLF3-PN9F].

52. Verified Application, *supra* note 41, at 32.

53. Primary Order and Warrant at 2, *In re Page* (FISA Ct. Oct. 2016).

54. See Nunes Memo, *supra* note 44, at 1.

55. See *id.* at 2.

56. *Id.* (asserting that neither the DOJ's initial nor follow-up FISA applications "disclose or reference the role of the [Democratic National Committee], Clinton campaign, or any party/campaign in funding Steele's efforts" (emphasis added)).

57. *Id.* at 2.

fact from the tribunal.<sup>58</sup> The release of Nunes's memo threatened the FISA process's efficacy and legitimacy. First, Congress did not intend that the DOJ and the FISC transact FISA business in a fishbowl.<sup>59</sup> Public disclosure of FISA requests is generally not sound practice, since even seemingly harmless segments from a request can compromise intelligence sources and methods.<sup>60</sup> Second, Nunes's memo made explosive and unsupported claims about the courts, law enforcement, and the intelligence community's compliance with law.<sup>61</sup> Recall that Nunes contended that the DOJ request was both baseless and materially misleading.<sup>62</sup> Nunes's memo also intimated that the FISC, composed of Article III district court judges, was either inordinately passive or complicit in the DOJ's misrepresentations.<sup>63</sup>

That is not all. Nunes made these accusations about an ongoing DOJ investigation, which violated the unwritten norm of prosecutorial independence from both legislative and executive pressure.<sup>64</sup> In addition, Nunes's charges against the DOJ and the FISC did not concern a garden-variety investigation. They concerned an investigation of the Russia ties of an individual whom then-candidate Donald Trump had acknowledged as an advisor on foreign affairs.<sup>65</sup> The investigation therefore was relevant to charges that the Trump campaign had colluded with Russian efforts to interfere with the 2016 U.S. presidential election. Indeed, Nunes's memo dovetailed precisely with constant claims by now-President Trump that the Russia investigation, led by Special Counsel Robert Mueller, was itself a partisan "witch hunt."<sup>66</sup>

Despite its attack on established institutions like the DOJ and the FISC, and its breach of unwritten norms, Nunes's memo may have been an appropriate action for a congressional committee *if* the report's claims were correct. However, the memo's claims were profoundly misleading. First, federal law enforcement had been aware of Page's pro-Russian activities

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58. *Id.* at 3.

59. See generally Peter Margulies, *Defining "Foreign Affairs" in Section 702 of the FISA Amendments Act: The Virtues and Deficits of Post-Snowden Dialogue on U.S. Surveillance Policy*, 72 WASH. & LEE L. REV. 1283 (2015) (discussing trade-offs between transparency and efficacy in intelligence collection).

60. *CIA v. Sims*, 471 U.S. 159, 178 (1985). See generally David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005) (analyzing the "mosaic theory" for limiting public disclosure of government information about national security).

61. See David Kris, *The Irony of the Nunes Memo*, LAWFARE (Mar. 1, 2018, 12:52 PM), <https://www.lawfareblog.com/irony-nunes-memo> [<https://perma.cc/W3PY-GFFW>].

62. See *supra* notes 57–58 and accompanying text.

63. See Nunes Memo, *supra* note 44, at 1–2.

64. See Green & Roiphe, *supra* note 2, at 69–74 (discussing the importance of prosecutorial independence).

65. See Verified Application, *supra* note 41, at 4; Michael Crowley, *Trump's Foreign Policy Team Baffles GOP Experts*, POLITICO (Mar. 21, 2016, 7:45 PM), <https://www.politico.com/story/2016/03/donald-trump-foreign-policy-advisers-221058> [<https://perma.cc/559Y-4D4K>] (announcing then-candidate Trump's foreign policy team, including Carter Page and George Papadopoulos).

66. See *supra* note 49 and accompanying text.

since 2013—well before compilation of the Steele dossier.<sup>67</sup> Second, the DOJ's FISA request used only a modest portion of information from Steele and included abundant evidence *beyond* the information in the dossier.<sup>68</sup> Third, the DOJ's FISA request fully disclosed that Steele and his funders had a political stake in his activities.<sup>69</sup>

The DOJ did not refer to Donald Trump, Hillary Clinton, or their respective campaigns by name because of its longtime policy to avoid the unmasking of U.S. citizens in FISA materials.<sup>70</sup> The DOJ request, however, provided copious details about the 2016 election that alerted a reasonably attentive reader to the identities of the candidates, whom the DOJ coyly referred to as “Candidate #1” (Trump)<sup>71</sup> and “Candidate #2” (Clinton).<sup>72</sup> The DOJ referred to Steele as “Source #1” and, in a lengthy footnote, disclosed Steele's work on behalf of a law firm doing opposition research on Trump.<sup>73</sup> The logical inference from the DOJ's explanation of the political connections of Source #1 (Steele) was that the “U.S.-based law firm” seeking to discredit Candidate #1 (Trump) represented the Clinton campaign or an individual or entity closely allied with that organization.

The FISC's judges are not casual consumers of FISA warrant applications; they *read the footnotes*.<sup>74</sup> In sum, the FISA request provided the FISC with ample information on Steele's ties to Trump's political opponents.<sup>75</sup> The Nunes memo's claims that DOJ failed to disclose these facts were blatant misrepresentations squarely contradicted by the record.

### C. McGahn's Letter Reinforced Nunes's Misleading Memo

While McGahn's letter authorizing the release of Nunes's memo is anodyne on its face, its content and context display attributes of insular

67. See Byron Tau, *Trump Says Democrats Must 'Re-Do' Memo They Want to Release*, WALL ST. J. (Feb. 10, 2018, 12:54 PM), <https://www.wsj.com/articles/white-house-denies-democratic-request-to-release-memo-seeks-revisions-1518224387> [https://perma.cc/ZDJ6-LBYQ].

68. See Verified Application, *supra* note 41, at 21 (relying on open-source information, several published news articles, and Page's own interview with the FBI); Schiff Memo, *supra* note 47 (discussing serious flaws in Nunes's memo); see also Charlie Savage, *Five Takeaways From the Release of the Democratic Memo*, N.Y. TIMES (Feb. 24, 2018), <https://www.nytimes.com/2018/02/24/us/politics/takeaways-democratic-memo.html> [https://perma.cc/DR4Q-XFLE] (summarizing Schiff's memo).

69. See Verified Application, *supra* note 41, at 15 n.8.

70. See Kris, *supra* note 61.

71. Verified Application, *supra* note 41, at 4.

72. *Id.* at 18.

73. *Id.* at 15 & n.8, 16 (noting that a “U.S.-based law firm” had hired an “identified U.S. person” who in turn hired Steele to “conduct research regarding Candidate #1's ties to Russia” and had done so with the “likely” purpose of finding information “that could be used to discredit Candidate #1's campaign”).

74. Kris, *supra* note 61.

75. Verified Application, *supra* note 41, at 15 n.8 (“The identified U.S. person hired Source #1 to conduct this research. The identified U.S. person never advised Source #1 as to the motivation behind the research into Candidate #1's ties to Russia. The FBI speculates that the identified U.S. person was likely *looking for information that could be used to discredit Candidate #1's campaign.*” (emphasis added)).

lawyering. First, consider the context. By facilitating the release of Nunes's memo and the HPSCI minority's reply, McGahn became a party to the unprecedented disclosure of FISA requests. Such disclosure can be damaging in ways not immediately apparent. If disclosure reveals intelligence sources and methods, it can allow the United States's adversaries to exploit weaknesses in the nation's defenses.<sup>76</sup> Moreover, the prospect of future disclosure of FISA requests for partisan and personal reasons undermines the FISA process. The secrecy of FISA applications allows law enforcement and counterterrorism officials to be open with the FISC about the basis for their requests. The prospect of future breaches of secrecy will chill those officials' communications with the tribunal, which Congress established to ensure the accuracy and integrity of U.S. investigations of suspected foreign agents. If officials become unduly reticent about seeking warrants due to concerns about eventual public disclosure, that hesitation will erode U.S. security.<sup>77</sup>

Second, because of this adverse impact on the functioning of a process in which all three branches of the federal government have a stake, release of Nunes's memo did not serve the presidency *as an institution*. Rather, release of the memo was a concrete example of a risk that has long-driven constraints on executive branch discretion over surveillance: the concern that particular presidents will exploit that discretion to punish political opponents and stifle challenges to their authority.<sup>78</sup> One of the controversial elements of Nunes's tenure as HPSCI chair was his unusual closeness with the White House—particularly on matters pertaining to the Russia investigation, in which Nunes and the White House shared a partisan interest and the White House also had a personal interest.<sup>79</sup> It seems plausible, if not highly probable, that Nunes drafted the majority HPSCI report with the full knowledge that the White House would authorize its release because of their shared interest in derailing the Russia probe.<sup>80</sup>

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76. The materials released by the government may have been sufficiently redacted to minimize this risk. See David Kris, *What to Make of the Carter Page FISA Applications*, LAWFARE (July 21, 2018, 10:35 PM), <https://www.lawfareblog.com/what-make-carter-page-fisa-applications> [<https://perma.cc/XEP4-SXY8>]. However, the better practice is not to trigger the risk in the first place.

77. See Peter Margulies, *Searching for Federal Judicial Power: Article III and the Foreign Intelligence Surveillance Court*, 85 GEO. WASH. L. REV. 800, 856 (2017) (noting that secrecy is "vital" to detecting and responding to national security threats).

78. *Id.* at 809; cf. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 314 (1972) (noting that "[h]istory abundantly documents the tendency of Government . . . to view with suspicion those who most fervently dispute its policies").

79. See, e.g., Philip Bump, *In One Sentence, Devin Nunes Proved His Critics Right*, WASH. POST (Aug. 9, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/08/09/in-one-sentence-devin-nunes-proved-his-critics-right/> [<https://perma.cc/V4QJ-ZQZA>] (questioning whether Nunes could participate in the Russia investigation impartially).

80. Moreover, it is at least possible that Nunes informed the White House of the contents of the HPSCI report before it became final and even permitted the White House to review the report in draft form. In a colloquy in January 2018, just prior to the release of Nunes's memo, Nunes issued an equivocal denial that the White House had assisted in the report's preparation. See Sharon LaFreniere & Nicholas Fandos, *How Partisan Has House Intelligence Panel Become? It's Building a Wall*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/2018/>

In analyzing McGahn's public explanation of the White House's decision to authorize release of Nunes's memo, it is useful to consider the American Bar Association's Model Rules of Professional Conduct. Rule 1.7(a)(2) states that a conflict of interest may arise when the lawyer's responsibility to provide loyal and competent representation is "materially limited" by a range of possible factors, including the lawyer's "personal interest."<sup>81</sup> If McGahn had a conflict under this rule,<sup>82</sup> it flowed from the conflict of interests and roles afflicting McGahn's client, President Trump. As White House Counsel, McGahn represented the Office of the President.<sup>83</sup> McGahn represented President Trump in his official capacity, not in his individual capacity as a central figure in an ongoing criminal investigation.<sup>84</sup> Presidential reviews of material for public disclosure involve the president's official role, not the personal penal interest of the White House's current occupant.<sup>85</sup> If McGahn, in advising President Trump, fulfilled his duty as White House Counsel in the former respect but endangered President Trump's personal interest in the latter sense, the risk that President Trump would fire McGahn would likely be heightened. The White House Counsel, like any political appointee, assumes the risk of dismissal for policy or political reasons. Arguably, however, the White House Counsel does *not* assume the risk of firing because of the President's *personal* interest in avoiding criminal prosecution. Giving advice while confronting that heightened risk of firing may be a "personal interest of the lawyer" under Rule 1.7(a)(2) that "materially limit[s]" the lawyer's representation of the Office of the President.<sup>86</sup>

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02/08/us/politics/house-intelligence-committee-russia-nunes.html [https://perma.cc/2352-D7VA] (answering "[a]s far as I know, no" to a question about whether the White House had helped with the report).

81. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2016).

82. This Article does *not* argue that McGahn had a conflict of interest that requires professional discipline. Under the analysis advanced here, McGahn complied with the ethics rules. Despite that caveat, analyzing McGahn's approach under the rules illustrates the tensions inherent in lifeboat lawyering. But the discussion of legal ethics proceeds against the backdrop of this important disclaimer.

83. *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir. 1998) (per curiam).

84. *Id.* at 1277–83 (arguing that the role of a government lawyer is different from a lawyer's role representing the president in his personal capacity).

85. Similarly, the president's oath to "preserve, protect, and defend the Constitution of the United States" implies that the president will make decisions for the public good, not for the president's private gain. See Andrew Kent, Ethan J. Leib & Jed Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. (forthcoming 2019) (manuscript at 25), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3260593](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260593) [http://perma.cc/8NZZ-K2G8]; Benjamin Wittes & Quinta Jurecic, *What Happens When We Don't Believe the President's Oath?*, LAWFARE (Mar. 3, 2017, 12:30 PM), <https://www.lawfareblog.com/what-happens-when-we-dont-believe-presidents-oath> [https://perma.cc/NE4Y-HGCW].

86. This view of the lawyer's personal interest may be difficult to square with Rule 1.7(a)(2) as a pragmatic matter because it would preclude *anyone* from serving as White House Counsel in the Trump administration. See MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2016). Perhaps the better interpretation of the rule's language is to treat the lawyer's interest in maintaining his position as a risk endemic to the practice of law. On this view, the lawyer's "personal interest" within the meaning of the rule would have to be more specific and concrete than the mere risk of getting fired, whatever the reason for the

In addition, McGahn might also have had an additional personal interest: his own interest in avoiding criminal prosecution because of complicity in crimes, such as obstruction of justice, linked to the Russia probe. Reports indicate that McGahn had multiple lengthy interviews with Robert Mueller's office about the firing of FBI Director James Comey and related matters.<sup>87</sup> According to reports, McGahn's fear that President Trump was "setting [him] up" to take the fall for obstruction of justice played a role in encouraging those interviews.<sup>88</sup> McGahn's concerns may have led to a desire to discredit Mueller or perhaps placate Mueller's office. While the latter may seem less likely, the rules of legal ethics rightly look to whether conflicting interests *may* distort the lawyer's judgment *before* the lawyer gives advice that may be skewed. A material limitation under Rule 1.7(a)(2) can be cured if the lawyer: (1) "reasonably believes" he or she can provide "competent and diligent representation,"<sup>89</sup> and (2) obtains the client's informed consent in writing.<sup>90</sup> However, McGahn's actions regarding Nunes's memo may not have met either criterion.<sup>91</sup>

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termination. On the other hand, a rule's wide application in particular contexts may simply highlight its importance; wide application is usually not a reason in and of itself to construe a rule differently. In any event, an ethical analysis assuming Rule 1.7(a)(2)'s applicability helps illustrate the awkward position in which senior Trump administration lawyers find themselves on a regular basis.

87. See Maggie Haberman & Michael S. Schmidt, *Trump Lawyers' Sudden Realization: They Don't Know What Don McGahn Told Mueller's Team*, N.Y. TIMES (Aug. 19, 2018), <https://www.nytimes.com/2018/08/19/us/politics/don-mcghahn-trump-mueller.html> [<https://perma.cc/YRL9-SMPL>].

88. *Id.* It is also possible that McGahn was willing to sit down with Mueller because McGahn himself was concerned about the activities of the Trump campaign and President Trump's subsequent decisions, such as the Comey firing, that impacted the Russia investigation. See Bob Bauer, *Don McGahn as White House Counsel: An Early Appraisal*, LAWFARE (Sept. 2, 2018, 10:00 AM), <https://www.lawfareblog.com/don-mcghahn-white-house-counsel-early-appraisal> [<https://perma.cc/EQF8-TTXW>]. However, that motivation—however commendable—would not cure any conflict of interest that McGahn experienced in reviewing Nunes's memo or describing the White House decision to approve its release. Rules governing conflicts of interest are even *more* important when lawyers' motivations become tangled and difficult to parse.

89. See MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(1) (AM. BAR ASS'N 2016).

90. *Id.* r. 1.7(b)(4).

91. The first factor—reasonable belief in the possibility of providing sound representation—may be triggered if McGahn was personally fearful of being fired. See *id.* r. 1.7(a)(2). There are some indications that McGahn was not fearful of this prospect and, indeed, had been looking to leave his job for some time. Julie Hirschfeld Davis et al., *Don McGahn to Leave White House Counsel Job This Fall, Trump Says*, N.Y. TIMES (Aug. 29, 2018), <https://www.nytimes.com/2018/08/29/us/politics/don-mcghahn-white-house-counsel-trump.html> [<https://perma.cc/2K2P-SWC>]. That would address the first factor. However, the second condition would be far more difficult to meet. Because of President Trump's own conflicts between his role as president and his status as an individual involved in an ongoing criminal probe, President Trump may not have been able to provide informed consent within the meaning of the rule. This Article does not raise the conflicts issue to attack McGahn's integrity. McGahn's situation was complicated, and glib analysis obscures more than it enlightens. Moreover, the complexities of McGahn's situation stemmed from the actions and decisions of his client, President Trump, and from the conflicts afflicting President Trump himself. As noted, it is possible that *anyone* who agreed to serve as White House Counsel



Moreover, despite its neutral tone, McGahn's letter, which authorized release of Nunes's memo, compounded Nunes's profoundly deceptive claim that the DOJ FISA request was groundless and materially misleading. Recall that Nunes's memo asserted that the DOJ's FISA requests did not "disclose or reference the role of . . . *any party/campaign*" regarding the Steele dossier.<sup>92</sup> Nunes surely knew that this claim was patently false since the DOJ had included a lengthy discussion of the Steele dossier's provenance in its request.<sup>93</sup> At best, Nunes's claim constituted a disingenuous use of arcane "private language"<sup>94</sup> in which the phrase "*any party/campaign*" actually means any specifically *named* party or campaign.

Practitioners of this private language would insist that their claim was accurate because the DOJ FISA request did not actually *name* the group that had funded Steele's research.<sup>95</sup> However, such private language claims are too artificial to provide a reasonable or accurate reading of the DOJ request. Those claims do not gain accuracy merely because of the DOJ's efforts to comply with longstanding practice by avoiding unmasking a U.S. person. As noted above, the DOJ FISA request, even though it did not identify Donald Trump or Hillary Clinton by name, made absolutely clear that it was referring to those individuals' roles in the 2016 election and the efforts of their allies and acolytes. Under any reading, the claims in Nunes's memo were severely deceptive.

Even without more, the White House's decision to permit the release of Nunes's memo despite this manifest deception was problematic because the release *itself* implied that Nunes's memo was an accurate summation of the DOJ's FISA request. After all, at least in normal times, the White House would not knowingly authorize release of a profoundly deceptive document about a vital national security investigation. McGahn's description of Nunes's memo did not dislodge this sadly mistaken impression. Characterizing the memo, McGahn wrote: "To be clear, the Memorandum reflects the *judgments* of its congressional authors."<sup>96</sup> By referring to

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would experience the ethical complications this Article identifies. *See supra* note 83 and accompanying text. That is one of the distinctive features of this administration.

92. Nunes Memo, *supra* note 44, at 2 (emphasis added).

93. *See* Verified Application, *supra* note 41, at 15 n.8 (describing, in-depth, the origins of the Steele dossier for over a page).

94. Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 471–72 (2005) (noting that construing language always entails defining a particular interpretive community with a shared sense of the language's meaning). Legal ethics scholars have long warned about the risks of lawyers seeking to protect themselves and their clients from legal accountability through unduly strained interpretations of language in their own legal opinions or external legal authority. *See, e.g.*, Milton C. Regan, Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139, 1164–65 (2005); William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 YALE J. ON REG. 1, 12–15 (2005); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1185 (2005) (cautioning against risk to professional values posed by lawyer's unduly literal or willfully idiosyncratic and opaque reading of texts).

95. *See* Verified Application, *supra* note 41, at 15 n.8 (referring to the commissioning group as "an identified U.S. person" and "a U.S.-based law firm").

96. McGahn Letter, *supra* note 40, at 2.

Nunes's judgments, McGahn reprised the private language claiming the DOJ request's failure to name a candidate or campaign meant that it had not "disclose[d] or reference[d]" any campaign.<sup>97</sup>

In common parlance, deceptive claims like those in Nunes's memo are not judgments. The term "judgment" refers to "discerning" and "comparing" with care.<sup>98</sup> A plainly false claim does not meet the standards of balance, discernment, and reasonableness that we associate with the word. McGahn could have used a word like "position" instead of "judgments." This term is more neutral: an individual's position on a topic can always be flawed and describing a view as a position has far less positive connotation than the term "judgment." Yet, McGahn did not opt for this course. The ordinary reader, who may not consult the DOJ FISA request, the HPSCI minority report, or online commentary on these sources, was left to consider Nunes's memo as an account of congressional judgments that the White House thought sufficiently sound to release to the world, despite longstanding traditions of keeping FISA requests secret.

McGahn's use of private language in referring to the Nunes memo's blatant misrepresentations as judgments is not the only specific example of insular lawyering in his letter. In addition, McGahn asserted that a presidential decision to approve release of a document generated by Congress should include "input from the Office of the Director of National Intelligence and the Department of Justice."<sup>99</sup> Here, again, the ordinary understanding is that those agencies *approved* the release of Nunes's memo. McGahn's note that the White House had determined, "[c]onsistent with this review," that release was appropriate reinforced this impression that both government agencies had lent their imprimatur to the release.<sup>100</sup> However, news reports established that the DOJ, including the FBI, had repeatedly warned *against* release of the memo out of concern that it would compromise sources and methods.<sup>101</sup> In this sense, too, McGahn's letter was misleading about the nature of the input received from the DOJ—the agency primarily responsible for making FISA requests. In a letter intended for general public distribution, the president's lawyer should have been far more precise.

### III. LIFEBOAT LAWYERING: BAILING OUT THE SHIP OF STATE

In opposition to the robust critique of McGahn's letter laid out above, a more favorable interpretation is also available. On this view, McGahn's letter models the distinctive representational mode of the Trump

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97. Nunes Memo, *supra* note 44, at 2.

98. See *Judgment*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/judgment> [<https://perma.cc/5NB6-KZ3W>] (last visited Mar. 15, 2019).

99. McGahn Letter, *supra* note 40, at 2.

100. *Id.* (emphasis added).

101. See, e.g., Anne Gearan, *Trump's Attacks on Justice and FBI Echo Election Claims of a 'Rigged System,'* WASH. POST (Feb. 2, 2018), [https://www.washingtonpost.com/politics/trumps-attacks-on-justice-and-fbi-echo-election-claims-of-a-rigged-system/2018/02/02/a22b1e1c-082e-11e8-b48c-b07fea957bd5\\_story.html](https://www.washingtonpost.com/politics/trumps-attacks-on-justice-and-fbi-echo-election-claims-of-a-rigged-system/2018/02/02/a22b1e1c-082e-11e8-b48c-b07fea957bd5_story.html) [<https://perma.cc/X9NQ-SRFG>] (noting that the FBI expressed "grave concerns" about the release of Nunes's memo).

administration: what this Article calls lifeboat lawyering. That turn of the lens requires an explanation of lifeboat lawyering's origins, virtues, and liabilities. Chief among these are the unstable interaction between the lifeboat and insular modes and the challenges in distinguishing between them.

A cottage industry of commentators has grown up around the premise that the Trump administration is like a leaky lifeboat, always at risk of sinking.<sup>102</sup> The captain—President Trump—is mercurial. The administration's senior lawyers, including Donald McGahn and even former Attorney General Jeff Sessions, conceived of their job as, at least in part, saving the president from himself and preserving a baseline respect for institutions and unwritten norms.<sup>103</sup>

Of course, stress and exigent situations are hardly strangers to *any* administration, and mercurial decision-making was a risk that the framers noted over two centuries ago.<sup>104</sup> Senior lawyers, including those advising the president on national security and related issues, have operated regularly in this challenging atmosphere.<sup>105</sup> More generally, President Trump is hardly the first challenging client that the legal profession has encountered. That said, lifeboat lawyering, as the term is used in this Article, connotes

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102. Trump's former senior counselor, Steve Bannon (an individual not known for moderation), apparently believed that President Trump "did not understand the power of the permanent institutions—the FBI, CIA, the Pentagon and the broader military establishment." WOODWARD, *supra* note 4, at 162. Bannon's firm conviction that President Trump did not understand material that is customarily taught in a grade-school civics class speaks volumes about his advisors' attitudes. *Id.* Of course, it is possible that Woodward's claims are inaccurate. However, the sheer volume of similar perspectives suggests that Woodward and others with the same message have some basis for their assertions. *See also* JAMES COMEY, *A HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP* 243–44 (2018) (recounting Comey's practice of writing memos to the file about his solo meetings with President Trump, a practice that Comey asserted was unnecessary for "encounters with any other person," but diligently followed with President Trump because of his pervasive doubts about the latter's "integrity").

103. For example, reports suggest that McGahn repeatedly urged President Trump not to fire Special Counsel Robert Mueller. *See* Editorial, *supra* note 4. Former Attorney General Sessions, while rarely vociferous, sought to maintain the Justice Department's independence. *See* Matt Zapposky & Sari Horwitz, *'We Just Need to Keep Pushing On': Why Trump's Attacks Won't Make Jeff Sessions Quit*, WASH. POST (June 5, 2018), [https://www.washingtonpost.com/world/national-security/we-just-need-to-keep-pushing-on-why-trumps-attacks-wont-make-jeff-sessions-quit/2018/06/05/3b909470-68d7-11e8-9e38-24e693b38637\\_story.html](https://www.washingtonpost.com/world/national-security/we-just-need-to-keep-pushing-on-why-trumps-attacks-wont-make-jeff-sessions-quit/2018/06/05/3b909470-68d7-11e8-9e38-24e693b38637_story.html) [<https://perma.cc/MYN4-VFMT>] (describing Sessions as viewing himself as "the only person standing between the president and the complete destruction of the Justice Department"). The acknowledgment of Sessions's role offered in this footnote does not indicate approval of Sessions's policy moves in areas such as immigration.

104. *See* THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (warning of the influence of "ill humors" among the political branches as the enemy of "deliberate reflection").

105. *See generally, e.g.*, Bauer, *supra* note 5; Goldsmith, *supra* note 5. Indeed, some of the behavior that this Article labels as lifeboat lawyering is arguably ordinary behavior for officials within the vast bureaucracy of the executive branch. *See* Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 164–65 (2018) ("[D]aily activities of executive branch officials [include] asking questions, seeking information . . . and seeking to persuade others . . . of the advantages of particular decisions, or of the risks of others.").

greater use of authority than is contemplated by the ABA's Model Rules or is tailored to a specific client group (e.g., clients of questionable capacity).<sup>106</sup> For example, it appears that former White House Counsel McGahn repeatedly slow-walked requests by President Trump.<sup>107</sup> Some of these actions may fall within the lawyer's authority under the ethics rules. However, other modes of delay or more affirmative obfuscation may present greater ethical challenges.

In addition to the ethical challenges that slow-walking and other lifeboat lawyering tactics may pose, it is important to note that lifeboat lawyering may entail triage of varying potential presidential decisions, each of which may pose legal problems.<sup>108</sup> Doctors regularly conduct triage on prospective patients in emergencies such as epidemics, mass accidents, and armed conflicts.<sup>109</sup> In conducting triage, doctors treat the sickest patients first, with the condition that those treated *can* be saved by treatment.<sup>110</sup> In other words, doctors prioritize and sort patients using criteria that may entail allowing some patients to get worse while the doctors focus their efforts on the patients that require immediate care.

For lifeboat lawyers, triage can have poignant and ethically troubling implications. Lifeboat lawyers will see themselves as essential components of the lifeboat crew. Even if they could leave, they believe they should stay on to help.<sup>111</sup> However, that help can involve difficult tradeoffs in which a lawyer tolerates certain decisions that are illegal or ill-advised in order to stop or slow down other decisions that are even worse. After all, a lawyer cannot stop everything. There are too many potential bad decisions on the horizon

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106. See MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2016). Comment 6 to Rule 1.14 includes the client's "variability of state of mind and ability to appreciate consequences of a decision" as a factor to be used in determining a lawyer's decisional capacity. *Id.* r. 1.14 cmt. 6. This Article's citation to such factors, which may at times reflect President Trump's decisional style, are not intended to suggest that the president himself lacks decisional capacity in a clinical or legal sense. However, the variability of decisions and difficulty in reckoning with consequences do pose special challenges for lawyers advising the president.

107. See WOODWARD, *supra* note 4, at 163 (quoting McGahn as urging President Trump to be patient regarding FBI Director James Comey's firing, saying, "Let's cool this off, let's talk to Rod [Rosenstein, the Deputy Attorney General in charge of the Russia probe after Attorney General Sessions recused himself] and we'll get back to you with a plan.>").

108. Former President Obama may have captured the risk of such triage most effectively. See Edward-Isaac Dove, *Obama Delivers Full-Throated Rebuke of Trump's Presidency*, POLITICO (Sept. 7, 2018, 12:23 PM), <https://www.politico.com/story/2018/09/07/obama-says-trump-has-pushed-america-to-a-pivotal-moment-810650> [https://perma.cc/BJ7G-2UT5] (noting that former President Obama responded to an anonymous op-ed by a senior Trump administration official by stating that such officials are "not doing us a service by actively promoting 90 percent of the crazy stuff that's coming out of this White House, and saying, 'Don't worry, we're preventing the other 10 percent'").

109. See Aruna C. Ramesh & S. Kumar, *Triage, Monitoring, and Treatment of Mass Casualty Events Involving Chemical, Biological, Radiological, or Nuclear Agents*, 2 J. PHARMACY & BIOALLIED SCI. 239, 241 (2010).

110. See *id.*

111. Of course, people on a lifeboat generally cannot leave without risking death. In that minor respect, this Article's lifeboat metaphor breaks down, although it is largely apt for framing the approaches described in the text.

to stop them all. Moreover, the lawyer's client—here, President Trump—may view some decisions as so central that even slow-walking such decisions may lead to the lawyer's dismissal. To avoid this result, the lawyer may allow many illegal and unwise decisions to stand in order to stop a few others.<sup>112</sup>

In some situations, lifeboat lawyering may succeed. For example, as of September 2018, it appeared that President Trump's advisors—presumably including former White House Counsel McGahn—had persuaded the president *not* to immediately release unredacted versions of scores of documents and communications in the Russia probe, such as former FBI Director James Comey's texts.<sup>113</sup> Such an indiscriminate document dump would surely have been a treasure trove for America's adversaries. If McGahn played a role in this postponement pending DOJ review, perhaps McGahn's willingness to "play ball" on releasing Nunes's memo lent him sufficient clout with the president so that he could take that stance. Alternatively, McGahn's willingness to stay a little bit longer may have saved the president from a less prudent White House Counsel. However, we should mute our celebration of this arguable lifeboat lawyering success story.

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112. The scope and content of unwritten rules regarding prosecutorial independence or analogous norms is often subject to debate. For example, the norm of prosecutorial independence is only marginally relevant to McGahn's role in the FBI investigation of then-Supreme Court nominee and D.C. Circuit Judge—now Supreme Court Justice—Brett Kavanaugh. News reports indicate that McGahn helped craft parameters for the FBI investigation triggered by the testimony before the Senate Judiciary Committee of Dr. Christine Blasey Ford, who alleged that Kavanaugh had sexually assaulted her thirty-five years earlier. See Robert Costa, *McGahn's Last Stand: The White House Counsel Has Been Working Feverishly to Get Kavanaugh Confirmed*, WASH. POST (Oct. 4, 2018), [https://www.washingtonpost.com/politics/mcghans-last-stand-the-white-house-counsel-has-been-working-feverishly-to-get-kavanaugh-confirmed/2018/10/03/c443c69e-c727-11e8-b2b5-79270f9cce17\\_story.html](https://www.washingtonpost.com/politics/mcghans-last-stand-the-white-house-counsel-has-been-working-feverishly-to-get-kavanaugh-confirmed/2018/10/03/c443c69e-c727-11e8-b2b5-79270f9cce17_story.html) [https://perma.cc/3XXD-DDNQ]. Those parameters limited the scope of the FBI's probe to a group of issues and witnesses, excluding other lines of inquiry. *Id.* Given the distinctive place of FBI investigations in the judicial nomination and confirmation process, McGahn complied with relevant ethics rules, even assuming that press reports are correct that McGahn helped determine the scope of the FBI inquiry. An FBI investigation of a judicial nominee is not an ordinary criminal investigation, where norms of independence apply most strongly. See Kristina Peterson & Brent Kendall, *Can the FBI Investigate the Kavanaugh Accusations?*, WALL ST. J. (Sept. 20, 2018, 10:00 AM), <https://www.wsj.com/articles/can-the-fbi-investigate-the-kavanaugh-accusations-1537452001> [https://perma.cc/5CVV-UT9N]. Instead, the FBI's probe is ancillary to the nomination process—a courtesy to the executive and Congress, albeit a courtesy that is now well-entrenched. *Id.* In the Kavanaugh matter, the FBI's investigation after Dr. Ford's testimony also appeared to reflect the wishes of a majority of members of the Senate Judiciary Committee, including Senator Jeff Flake of Arizona, whose position had been crucial in delaying a committee vote on Judge Kavanaugh pending the results of FBI inquiries. See Costa, *supra*. To the extent that the FBI conducted its investigation on behalf of the White House and a majority of members of the Senate Judiciary Committee, McGahn's role in setting parameters on the FBI probe did not compromise the independence of a law-enforcement investigation and thus did not violate the unwritten rules posited in this Article. While different parameters regarding the FBI inquiry may have been appropriate for policy reasons, that issue is beyond this Article's scope.

113. See Jennifer Rubin, *Trump Does Another About-Face, Thank Goodness*, WASH. POST (Sept. 21, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/09/21/trump-does-another-about-face-thank-goodness/> [https://perma.cc/QWF3-GBS2].

The triage facet of lifeboat lawyering is fraught with problems. First, lifeboat lawyers may overestimate their value and therefore permit decisions to stand that they should resist even if termination is the result. Similarly, lawyers may underestimate the relative value of a “noisy withdrawal,”<sup>114</sup> which might prompt external stakeholders to rein in their client in a way that internal measures cannot.<sup>115</sup> In addition, the lifeboat lawyer’s decisions are often made in secret, without review by the public or any independent agency. Those decisions therefore lack the transparency that would be useful for assessing whether the lifeboat lawyer is making the *right* choices.

As an example of the problems associated with lifeboat lawyering, consider again McGahn’s letter. In the previous Part, this Article framed the letter as an example of insular lawyering, which reflected disdain for existing institutions and unwritten norms. However, with a relatively minor turn of the lens, one can also perceive McGahn’s letter as an instance of lifeboat lawyering. That fluid character should give us pause.

McGahn’s letter meets lifeboat lawyering’s criteria. In advising his readers “[t]o be clear” that the accompanying Nunes memo “reflects the judgments of its congressional authors,”<sup>116</sup> one can argue that McGahn meticulously separated the White House from the report’s irresponsible claims. As noted above, that separation is the only logical aim of emphasizing the congressional pedigree of the document that the White House approved for release. Moreover, one can read the reference to the “judgments of . . . congressional authors” as sounding in sarcasm.<sup>117</sup> First, the venerable trope of pointedly identifying a position with another individual often carries with it an acerbic subtext. Consider Marc Antony’s relentless catalogue of the positions of Brutus in Antony’s funeral address for Julius Caesar in Shakespeare’s *Julius Caesar*.<sup>118</sup> Antony’s description of Brutus as an honorable man is among Western civilization’s signature uses of sarcasm. Antony’s target was the Roman Senate; one can imagine a modern-day Antony discussing the “judgments of . . . congressional authors”<sup>119</sup> with the same dryly devastating intent and effect.

Moreover, after some initial hiccups, McGahn in due course also wrote a letter approving the release of the *Democratic* HPSCI report, which deconstructed the deceptions in the majority’s screed. McGahn may have thought that the best remedy for the Nunes memo’s misrepresentations was the straightforward account of the Democratic legislators.<sup>120</sup> Of course,

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114. See David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 *FORDHAM L. REV.* 2067, 2129 (2010).

115. See also ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 114–16 (1970) (criticizing the reluctance of senior U.S. officials to resign in protest over the U.S.’s conduct during the Vietnam War).

116. McGahn Letter, *supra* note 40, at 2.

117. *Id.*

118. See WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 2.

119. McGahn Letter, *supra* note 40, at 2.

120. *Cf. Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies . . . the remedy to be

McGahn did not advertise this view. He did not have to. Public officials, pundits, and the media did it for him. A reasonable lawyer in McGahn's position could readily have believed that the Nunes memo's deceptions would not survive contact with the actual facts laid out in the Democrats' response. On this view, the release of FISA documents would not have undermined institutions. Instead, it would demonstrate the soundness of the FISA process in a concrete way that more generic government assurances could not.

Moreover, this lifeboat lawyering account is entirely consistent with McGahn's role as White House Counsel. As the D.C. Circuit explained, the White House Counsel serves the Office of the President, *not* the personal legal interests of the White House's current occupant.<sup>121</sup> If McGahn reasonably believed that the effects of the release of Nunes's memo would match those in the lifeboat lawyering account, his letter would dovetail nicely with the White House Counsel's legal responsibilities.

That said, a moment's reflection should reveal the incongruities in the lifeboat lawyering version of McGahn's FISA letter. While the Brandeisian "more speech" account<sup>122</sup> accurately reflects the response of many readers of Nunes's memo, those sentiments were not unanimous. Perhaps fueled by partisan rancor, many readers from President Trump's base likely bought into the deceptive claims contained in Nunes's memo. The polarized, segmented state of our media discourse surely contributed to this division. Individuals who get their news from Fox News's opinion shows might well have agreed with Nunes's memo and adopted its corrosive view of the FISA process. If encouraging public faith in institutions is a goal of the White House Counsel, this effect clearly undermined that objective.

Moreover, in issuing the letter, McGahn also defied the longtime bipartisan view that a fishbowl was not the appropriate venue for national security investigations. To be sure, the accumulated wisdom of bipartisan public officials can be wrong. However, a senior government lawyer should hesitate before assuming that the lawyer knows better. It is not at all clear that McGahn went through such a process, particularly since what we know of the *actual process* engaged in by the White House prior to release of the FISA materials indicates that senior national security officials vigorously disagreed with approving the report's release.<sup>123</sup>

At best, then, the lifeboat lawyering account of the Carter Page FISA request's release suggests that the lifeboat lawyering role entails significant triage. By definition, we know that McGahn did *not* believe that President Trump's decision to release the FISA materials was reason enough for McGahn to immediately resign his position. McGahn may have thought that the FISA materials' release would have benign effects of the kind described

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applied is more speech, not enforced silence."), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

121. See *In re Lindsey*, 158 F.3d 1263, 1268, 1270 (D.C. Cir. 1998).

122. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

123. See Gearan, *supra* note 101.

above. Perhaps McGahn felt that, by remaining in his job, he could head off other decisions with markedly less benign effects, such as September 2018's thankfully aborted Russia probe document dump.<sup>124</sup> That view brings us back to former President Obama's warning that officials taking a lifeboat stance may facilitate a great many depredations, even as they head off a handful of catastrophes that go unnamed.<sup>125</sup>

That process—if process is even the appropriate term—seems infected with the same mercurial lack of moorings that afflicts the Trump White House generally. In a job in which past practice matters a great deal, oscillating between deference to and disregard for past practice can contribute to the undermining of institutions and norms. Lifeboat lawyers should at least be clear about those long-term risks as they ply their precarious trade.

#### CONCLUSION

The birth of a new brand of executive branch lawyering is bigger news than the latest iteration of the iPhone. The Trump administration's lawyers have constructed a model of lifeboat lawyering to cope with the decisional vagaries of their restless client in the White House. That new creation has relied on triage and improvisation to manage the mercurial turn of presidential decision-making.

While lifeboat lawyering has its uses, we should be wary of its tendency to morph into insular lawyering's disregard for institutions and unwritten norms. McGahn's letter, which approved release of Nunes's memo, shows that practitioners of lifeboat lawyering may need to temper their heroic efforts with tolerance for their principal's unwise or lawless decisions. They may also overestimate their own worth in office and unduly discount the robust effect of a vocal resignation. Under the circumstances, the toolkit for lifeboat lawyering should come with a stern warning: handle with care.

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124. *See supra* notes 113–14 and accompanying text.

125. *Dovere, supra* note 108.