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AVOISION: WHEN GOVERNMENT LAWYERS TURN THE SOVEREIGN AGAINST ITSELF

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ABSTRACT

Lawyers sometimes use legally permissible but ethically dubious strategies to avoid the law and at other times they cross the line into illegal law evasion. Between the two is a gray area of conduct highly likely, but not certain, to be illegal known as law "avoision." Lawyering at the outer limits of the law is controversial in the private sector when lawyers represent clients against the government or against other private parties. The better interpretation of the law may stand on the other side, and the lawyer must decide how far to go in an arguably illegal direction on behalf of the client.

The focus of this Article is lawyers who represent the government, and the lasting damage when avoision becomes the modus operandi inside the government. Government lawyers avoiding or evading the law, or both, become a serious threat to their own clients. In a constitutional republic, the law is the foundation upon which the government client rests. The government lawyer represents the law itself. The law, and this means the better interpretation of the law, must take priority when it conflicts with the objectives of a political superior who possesses power only by virtue of the legal order. Law avoision in this context is fundamentally disloyal to the client.

This Article discusses specific examples of law avoision in government including Justice Department memoranda justifying torture, a President's attempt to use the Justice Department to overturn an election, Members of Congress and even Supreme Court Justices using law avoision to circumvent financial disclosure requirements, and states using law avoision to circumvent civil rights and voting rights of racial minorities. Law avoision in all these contexts does grave harm to the government and, if taken to extremes, could involve government lawyers dismantling democracy itself.

To combat law avoision inside the government, this Article proposes a clarification of who the client is so government lawyers recognize that the law is their client and that their professional obligation is to advance the best interpretation of the law, not the interpretation of the law that will enable a political superior to do whatever they want to do. This Article also proposes the establishment

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of a government-wide Office of Professional Responsibility to render formal opinions on, educate and in some instances adjudicate, issues of professional conduct for government lawyers.

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INTRODUCTION

This Article is about a longstanding problem with the ideology of the legal profession which has turned lawyers representing the government into a potential threat to the government itself. The core problem is two widely embraced, but often wrong, theories of professional ethics.

The first theory of lawyering, the theory referenced in the title of this Article, is the view that a lawyer's duty of representation includes guiding clients as close to legal limits as possible, stretching interpretations of facts and law to enable clients to accomplish whatever purpose they desire. Philip Jessup in 1937 recounted a Gilded Age corporate client saying of Wall Street lawyer and later Secretary of State Elihu Root, "I have had many lawyers who have told me what I cannot do. Mr. Root is the only lawyer who tells me how to do what I want to do."[1]

1. PHILIP C. JESSUP, ELIHU ROOT 185 (1938), excerpted and discussed in JOHN T. NOONAN & RICHARD W. PAINTER, PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER 503–09 (1997) (also excerpted and discussed in Second and Third editions of Noonan & Painter). *See* NOONAN & PAINTER, *supra*, at 509, discussing the charge against Root that he would "devise legal forms to accomplish purposes of his clients which are essentially immoral and illegal."

Justifications for advising and assisting clients with potentially illegal conduct invoke not just the duty of zealous representation[2] but sometimes the argument that laws aren't enforced or are unnecessary.[3] Such avoiding or evading the law, for reasons explained below, in this Article is called "law avoision" or simply "avoision."

The second theory is that lawyers' actions are morally and legally distinguishable from their clients' actions and that lawyers almost never are responsible for what their clients do, even if the lawyers' assistance was an integral part of accomplishing the clients' objectives. In this Article, this abnegation of personal responsibility of the lawyer for client conduct is called the "abnegation theory" of legal ethics or simply "abnegation." As explained below, this theory often makes sense when lawyers represent private clients in litigation and other circumstances where it would be unfair to blame the lawyer for the acts of the client, but abnegation of responsibility makes much less sense when the lawyer is retained to help a client achieve a legally dubious objective that but for the lawyer the client probably would not have achieved. As also explained below, abnegation of lawyer responsibility for enabling legally impermissible conduct is particularly problematic in the case of a government lawyer.

Avoision and abnegation together send a green light to lawyers who assist their clients with doing whatever their clients want to do, while using whatever means necessary. Those acts might be arguably illegal, or they could be clearly illegal coupled with a low likelihood of getting caught. The fact that lawyers very rarely are criminally charged for assisting with clients' illegal acts reinforces the ideology of avoision and abnegation in the legal profession.

There are some exceptions; not all lawyers get a free pass. A decade ago, a lawyer representing infamous "Pharma Bro" Martin Shkreli went to prison for assisting Shkreli in defrauding investors, the lawyer even being convicted of some counts for which Shkreli escaped conviction, although both men went to prison.[4] Fifty years ago, White

2. *See, e.g.*, D.C. RULES OF PRO. CONDUCT r. 1.3(a) (D.C. BAR 2018) ("A lawyer shall represent a client zealously and diligently within the bounds of the law.").

3. *See* JESSUP, *supra* note 1, at 208. Jessup discusses Root's representation of the State Trust Company in arranging a large loan to an office boy as a figurehead, to furtively lend large amounts to a consortium involving the bank's own directors, in violation of New York laws banning such loans. *Id.* at 187–90. Jessup points out that "[t]he law [limiting the size of bank loans to any one borrower] was so much of a dead letter that the President of the State Trust Company did not know of its existence" until controversy arose, and that another law the bank president "considered entirely ridiculous, forbade loans to any director." *Id.* at 189.

4. Brendan Pierson, *Ex-Lawyer of Pharma Executive Shkreli Gets 18 Months Prison for Fraud Scheme*, REUTERS, https://www.reuters.com/article/us-usa-crime-shkreli-greebel/ex-lawyer-of-pharma-executive-shkreli-gets-

House Counsel John Dean went to prison and lost his bar license in the Watergate cover up.[5] Years later, Dean likened what happened in the Nixon White House to cover ups by lawyers of corporate malfeasance.[6]

Much has been written about the harm that this approach to professional ethics does in business representations, and potentially devasting consequences for investors, the economy, and the legal profession.[7] Abnegation—denial of lawyer responsibility for client conduct—allows lawyers to walk away from the chaos their avoision has created. The focus of this Article is lawyers who represent the government, and the lasting damage when avoision becomes the modus operandi inside the government. It is here that lawyers avoiding or evading the law, or both, become a serious threat to their own client, and to the law itself.

I. AVOISION

There are laws, and there are people who try to get around the law. Occasionally, people try to get around a bad law, for example a racial segregation law.[8] But most laws are there for a good reason, yet people try to get around them anyway.

This Article is about lawyers who help people get around the law.

Let us start with the purely private legal representation of a client who must comply with laws imposed by the government. Some private clients seek the most profitable balance between minimizing the cost of law compliance on the one hand and minimizing penalties for noncompliance on the other. Some clients compete to minimize the costs of law compliance. Those who spend more money complying with regulations or paying taxes fear they may lose out to those who spend less. For some—by no means all—clients this creates

18-months-prison-for-fraud-scheme-idUSKBN1L22AM [https://perma.cc/GY43-AP6S] (Aug. 17, 2018, 6:50 PM).

5. David Smith, *'I'm Living in the Bubble': The Man Who Helped Bring Nixon Down, 50 Years On*, THE GUARDIAN (June 5, 2022, 2:00 AM), https://www.theguardian.com/us-news/2022/jun/05/watergate-50th-anniversary-john-dean-interview [https://perma.cc/C2V5-VZJM].

6. John Dean, *How Lawyers Can Minimize Professional Mistakes During a Scandal like That at Penn State: Part Two in a Two-Part Series of Columns*, VERDICT (Aug. 10, 2012), https://verdict.justia.com/2012/08/10/how-lawyers-can-minimize-professional-mistakes-during-a-scandal-like-that-at-penn-state [https://perma.cc/J32F-S8U6] (quoting Richard W. Painter, *Irrationality and Cognitive Bias at a Closing in Arthur Solmssen's* The Comfort Letter, 69 FORDHAM L. REV. 1111, 1130–31 (2000)).

7. *See generally* Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507–84 (1994).

8. *See* discussion of Plessy v. Ferguson, 163 U.S. 537 (1896), *infra* text accompanying notes 121–34.

an incentive to do everything possible to minimize the cost of complying with the law.

Taxation is one area where this ideology is prevalent. Legal regimes with high marginal tax rates coupled with abundant tax loopholes invite wealthy individuals and businesses to operate at the limits of the law. The United States and the United Kingdom in the 1970's fit this description quite well.[9]

In 1979, three economists affiliated with the Institute of Economic affairs, a British free-market think tank, published a collection of essays titled *Tax Avoision: The Economic, Legal and Moral Inter-Relationship Between Avoidance and Evasion*[10] They coined the phrase "avoision," a blend of law avoidance and evasion, for operating at the margins of the law. Avoidance is the legally permitted circumvention of the law, such as moving from one jurisdiction to another to pay lower taxes. Evasion is illegal maneuvering around the law, such as lying to tax authorities about one's place of residence to pay lower taxes. Avoision falls somewhere in between—for example, structuring a transaction to appear one way (lower tax) when its economic reality is another way (higher tax). Avoision might or might not be legal and, even if legal initially, later can cross the line into illegal evasion, such as when a taxpayer lies to the tax authority about the essential facts of a dubious transaction.[11]

Seldon et al.'s argument envisions avoision as a valid way for citizens to confront the authority of the government. The authors characterize the government's actions, such as setting tax rates too high and imposing unfair retroactive taxes on completed transactions, as oppressive. Their book explains:

> The distinction between legal 'avoidance' of tax and illegal 'evasion' has been blurred in recent years by governments that have retrospectively converted avoidance into evasion, in order to punish legal behaviour to which they object. This practice emphasizes that tax law has nothing necessarily to do with morals, for moral standards could not apply retrospectively.[12]

9. *See, e.g.*, Gerard M. Brannon, *Tax Loopholes as Original Sin: Lessons from Tax History*, 31 VILL. L. REV. 1763, 1763–66 (1986); Peter Scott, *A Fiscal Constitutional Crisis: Tax Avoidance and Evasion in Inter-War Britain*, 137 ENG. HIST. REV. 170, 196–97 (2022). Marginal tax rates have decreased since the 1980's, but loopholes remain.

10. ARTHUR SELDON ET AL., TAX AVOISION: THE ECONOMIC, LEGAL AND MORAL INTER-RELATIONSHIPS BETWEEN AVOIDANCE AND EVASION (1979).

11. *See* 18 U.S.C. § 1001 (2023) (criminal statute prohibiting false statements to federal officers including the I.R.S.).

12. D.R. Myddelton, *Tax Avoision—Its Costs and Benefits*, *in* TAX AVOISION, *supra* note 10, at 44.

If lawmakers allow "the government itself to override the law, it is hypocrisy to object when citizens evade taxes," the essay concludes.[13] The answer to this problem is "tax avoision," a term the authors define as "tax minimisation with elements of both avoidance and evasion practised by the taxpayer who has difficulty in equating the legal with the moral and the illegal with the immoral."[14]

In other words, private actors are presumably justified in doing whatever they can to get around the law, exploiting as much as possible the sometimes-ambiguous distinction between law avoidance, which is legal, and law evasion, which is illegal. The approach is to avoid and evade the law because the law is itself wrong. This is not just a strategy for business success; it is a normative judgment of right and wrong—a nihilistic form of ethics avoision. This term "avoision" later became so popular in the United States that it was featured on *The Simpsons*,[15] analyzed in academic publications,[16] and used to describe the ethics of a U.S. president who had a history of difficulties with the law.[17]

There is a long history of law avoision in the legal profession. After the collapse of the South Sea Company in 1720, Great Britain's Parliament passed the Bubble Act prohibiting publicly traded limited-liability-company shares without consent of Parliament, after which London solicitors made a robust business of helping clients devise strategies to get around the Bubble Act.[18] In the Gilded Age in the United States, David Dudley Field, Elihu Root, and other leading Wall Street lawyers provided similar assistance to leaders of industry and finance.[19] Today, legions of lawyers explore loopholes in highly

13. *Id.* at 45.

14. Arthur Seldon, *Avoision: The Moral Blurring of a Legal Distinction Without an Economic Difference*, *in* TAX AVOISION, *supra* note 10, at 4.

15. Fox Broad. Co., *I Don't Say Evasion, I Say Avoision (The Simpsons)*, YOUTUBE (Jan. 30, 2016), https://www.youtube.com/watch?v=wpEaFmK3lrY [https://perma.cc/R22S-BLFJ].

16. *See* LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW 4–9 (1996) (discussing law avoision in various contexts beyond tax avoision).

17. *See, e.g.*, Richard W. Painter, *How Trump's Philosophy of Law 'Avoision' is Remaking the Political Right*, NEWSWEEK (Aug. 5, 2020, 2:53 PM), https://www.newsweek.com/how-trumps-philosophy-law-avoision-remaking-political-right-opinion-1523113 [https://perma.cc/BJ3N-6Q2G]. The role of lawyers in facilitating President Trump's law avoision, particularly after the 2020 election, is discussed further in Part IV of this Article.

18. *See* Painter, *supra* note 7, at 521–23.

19. *See generally* Jessup, *supra* note 1.

complex legislation such as the Dodd-Frank Act of 2010.[20] The concept of law avoision has proliferated in the private sector when lawyers and clients operate at the outer limits of the law.

Two law-avoision strategies will get special attention in this Article. First is the *lawyer as manipulator* who devises clever ways to interpret or circumvent the law to undermine the law's intent and perhaps even the letter of the law. This is perhaps the most common avoision strategy in the private sector, and, as discussed later in this Article, is deployed by government lawyers as well. Second, is the *willfully ignorant lawyer* who pretends not to know facts that, if known, would clearly violate the law. This Article sometimes refers to such willful ignorance as the "Sergeant Schultz defense" after the famous T.V. character on Hogan's Heroes—a German POW camp guard whose response to any rule infraction was "I see nothing, I know nothing."[21] Sergeant Schultz is a common fixture not just in corporations and other private organizations, but also in government when public officials for whatever reason ignore facts suggesting illegality.

A rationale for such avoision strategies is zealous representation of the client[22] against an adversary, whether in a contract negotiation, an opposing party in litigation, or against the government. As in Arthur Seldon et al.'s *Tax Avoision*, lawyers and their clients envision themselves on the opposite side of a government that is using its power to control its citizenry through taxation and regulation.[23] The government is the opponent, if not the enemy, and no advantage should be ceded to it any more than would be ceded to any other party opposing the interests of the client.

There are ethical problems with this approach to the private practice of law. These include devastating consequences when lawyers circumvent laws protecting vital interests, such as the stability of the financial system, public health, and the environment. Corporate lawyers all too easily absolve themselves of responsibility for helping clients circumvent the law,[24] and Congress in the Sarbanes-Oxley Act required lawyers for public companies at least to tell boards of

20. For an example of one of the dozens of examples of loopholes in the Dodd-Frank Act, see David I. Walker, *The SEC's Compensation Clawback Loophole*, 118 NW. U.L. REV. 45 (2022).

21. Des Hammond, *The Very Best of Sergeant Schultz*, YOUTUBE (Mar. 20, 2017) (content from CBS production *Hogan's Heroes*), https://www.youtube.com/watch?v=OsXrpxo4uC0 [https://perma.cc/4X4P-SKCW].

22. *See, e.g.*, D.C. RULES OF PRO. CONDUCT r. 1.3(a) (D.C. BAR 2018) ("A lawyer shall represent a client zealously and diligently within the bounds of the law.").

23. *See* SELDON ET AL., *supra* note 10.

24. *See* Painter, *supra* note 7, at 559–60.

directors when they were breaking the law.[25] But in the private bar it is often, perhaps too often, assumed to be fair, indeed honorable (and very profitable) for lawyers to advise clients on "minimal compliance"—doing that which is necessary to avoid penalties but no more. This attitude is pervasive in private practice and difficult to eradicate.

An even greater danger arises when lawyers bring this avoision ideology with them out of the private sector into the government. How does avoision—a strategy designed to go against the government—work for a lawyer representing the government itself? As discussed in Part III, private-sector lawyers and government lawyers are aligned differently. Their ethical responsibilities are different too.

II. ABNEGATION

Are lawyers morally responsible for what they help their clients do? Can lawyers sometimes be legally responsible for what they help their clients do?

A prevailing principle in the legal profession is to distinguish between the intentions and acts of lawyers and their clients and thus to deny or abnegate lawyer responsibility for client conduct. This principle will be referred to here as the "abnegation" theory of lawyering. The theory is that the lawyer is morally and legally responsible only for the lawyer's conduct, not the conduct of the client. ABA Model Rules of Professional Conduct, Rule 1.2(b) thus provides that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[26]

Only if the lawyer knowingly counsels the client to commit a crime or fraud or knowingly assists in a crime or fraud by the client is the lawyer responsible for the client's actions. ABA Rule 1.2(d) provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or

25. *See* Jason Halper, Erica Hogan & Adam Magid, *'Minimum Standards' for Lawyers Practicing Before the SEC*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 21, 2022), https://corpgov.law.harvard.edu/2022/06/21/minimum-standards-for-lawyers-practicing-before-the-sec/ [https://perma.cc/4U7B-83EA] (discussing legislative history of the 2002 Sarbanes-Oxley Act § 307 requiring up-the-ladder reporting of law violations and breaches of fiduciary duty and recent SEC proposals to tighten up these requirements).

26. MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR. ASS'N 2020).

> assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[27]

The actions of the lawyer and the client are presumed to be separate, and the actions of the lawyer, furthermore, are viewed in the most favorable light because of the lawyer's duty to zealously represent the client.[28]

This does not mean that lawyers can always get away with aiding and abetting crimes in representing clients, and indeed the express language of ABA Rule 1.2(d) appears to preclude that. The lawyer can claim that the lawyer did not know about the crime or fraud, but ABA Rule 1.1 (competence)[29] and ABA Rule 1.3 (diligence)[30] might suggest the lawyer should have known. Yet successful prosecutions of lawyers, disciplinary proceedings against lawyers, and even civil suits against lawyers in connection with their clients' bad acts, are few and far between. Lawyers accused of assisting a client in a crime or fraud will argue, and usually successfully, that they were only doing their job. This abnegation argument usually works. Going back to Philip Jessup's vigorous defense of Elihu Root's avoision strategies in representing corporate clients,[31] many legal ethicists embrace the abnegation theory as a general principle, solidifying a presumption in favor of the righteous ethics of a lawyer who is representing a client who is doing wrong.[32]

Abnegation theory is reinforced by the fact that criminal charges against lawyers for conspiring with their clients to violate the law are extremely rare. This is true not only in business representations (e.g. lawyer assistance with financial crimes) but also lawyers representing governments. Lawyers who authorized torture of detainees in the "War on Terror" after the terrorist attacks of September 11, 2001, were never prosecuted, or even subject to disciplinary proceedings by the bar.[33]

There are exceptions. As already mentioned John Dean, Nixon's White House Counsel, went to jail for helping obstruct justice in the Watergate investigation.[34]

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27. *Id.* r. 1.2(d).

28. *See* D.C. RULES OF PRO. CONDUCT r. 1.3(a) (D.C. BAR 2018) ("A lawyer shall represent a client zealously and diligently within the bounds of the law.").

29. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR. ASS'N 2020).

30. *Id.* r. 1.3.

31. *See* Jessup, *supra* note 1, at 187–90.

32. For a recent discussion of this problem, see generally W. BRADLEY WENDEL, CANCELING LAWYERS: CASE STUDIES OF ACCOUNTABILITY, TOLERATION, AND REGRET (2024).

33. See infra text accompanying notes 81–88.

34. Smith, *supra* note 5.

But lawyers held legally accountable for client conduct are the exception, particularly in government. Public officials from time to time are criminally charged, and some go to jail, but their lawyers almost always go free. After all, these lawyers were only doing their job, which was to zealously represent their clients, and only in the rarest of circumstances is lawyers' conduct so egregious that the abnegation theory no longer is presumed to apply. In sum, most lawyers in both the private and public sector believe they will escape accountability for their clients' actions, and they are right because they probably will.

III. THE GOVERNMENT LAWYER

The focus of this Article is lawyers who represent the government. What happens when government lawyers use strategies to avoid and evade the law that are frequently, perhaps too frequently, used in private practice? Can a legal system tolerate government lawyers who help make the law and enforce the law, while they work their way around the law at the same time?

This Part inquires first into the nature of the government lawyer's client, a sovereign entity which embodies the law itself, contrasts that government engagement with the very different ethical framework in which lawyers represent private clients against the sovereign, and finally discusses what happens when lawyers representing the government use law avoision to turn the sovereign against itself.

A. The Law as Sovereign

Government lawyers are aligned differently from private sector lawyers because *their client is the government*. Government itself is a creature of the law. In the United States, the Constitution sets forth the process for choosing the three branches of government. The Constitution defines the process for Congress passing laws, the president enforcing laws, adjudication by federal courts, and the process for entering and ratifying treaties that bind the United States to international law. As the Supremacy Clause says, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[35] States have a similar constitutional framework.

35. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

An oath of office is required of most federal[36] and state[37] government officials, including government lawyers. This oath identifies who the client is—the Constitution and the law itself. That is, to whom the duty of client loyalty is owed. As Margaret Tarkington, a leading authority on government lawyers' ethics, observes:

> [L]awyers in fact have a duty to our Constitutional system of government that is memorialized by the oath. This duty should be added to the [ethics] rules proper, and should be enforceable against lawyers, particularly those who advise or assist government officials or entities in the use of government power.[38]

Whether or not rules of professional conduct for lawyers expressly acknowledge the duty of a government lawyer to adhere to the law itself, that duty is inescapable. The problem identified by Professor Tarkington, and addressed also in this Article, is that this duty too often is not enforced.[39]

Government officers and their lawyers thus cannot just interpret the law and enforce the law. They must interpret and enforce the law in a manner that is faithful to the law. The law is the foundation upon which the government client stands, and the lawyer's client is the law.

Laws constraining government actors include laws prohibiting public corruption and self-dealing, and other abuses of government power. Some rules are specific to certain government offices, for

36. *See, e.g.*, *id.* art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.").

37. *See*, *e.g.*, MINN. CONST. art. V, § 6 ("Each officer created by this article before entering upon his duties shall take an oath or affirmation to support the constitution of the United States and of this state and to discharge faithfully the duties of his office to the best of his judgment and ability.").

38. Margaret Tarkington, Lawyers and the Abuse of Government Power 34 (Feb. 19, 2024) (unpublished manuscript), https://dx.doi.org/10.2139/ssrn.4628233 [https://perma.cc/2WH9-MYBS].

39. Professor Tarkington proposes amendments to state-bar professional-conduct rules that would expressly acknowledge this professional obligation of government lawyers. *Id.* at 140 ("[A]dding a specific rule will clarify that when a lawyer advises a government official as to the use of government power or position that the lawyer owes an enforceable duty to the public to uphold the integrity of both the constitutional system of government and the office being advised."). This Article in Part V, *infra*, focuses on a complementary approach: the federal government and each state should establish a government-wide office of professional responsibility that would interpret the duty of client loyalty in specific instances, advise government lawyers, and investigate alleged breaches by government lawyers.

example the requirement that prosecutors give exculpatory evidence to the defense in a criminal case.[40] There are special ethics rules for members of the armed services,[41] and generally applicable rules such as criminal statutes prohibiting torture of detainees.[42] Other rules—sometimes referred to as government "ethics" rules—apply to all or most government officials, for example financial conflict of interest rules,[43] rules that prohibit certain gifts to public officials[44] and bribery,[45] rules regulating the "revolving door" from the private sector in and out of government,[46] and rules prohibiting abuse of official position to influence an election.[47] These rules not only regulate the conduct of government officials, but, for government lawyers, define the client—the law itself. The sovereign is the client. But in a country where the sovereign embodies the law, it is fair to say that the law itself is also the client.

When government officials circumvent their own rules, practice law avoision, and lawyers help them do so, the legitimacy of government is lost. The sovereign, the government client, has been betrayed.

B. Sovereign vs. Subjects and Lawyers in Between

Principles of the legal profession are generally framed by the historic role of private lawyers interposed between the sovereign and subjects. Long before the rise of representative democracy, lawyers stood up to sovereign power, often for clients who had little say in who their sovereign was or what the law required. Advising subjects on how to comply with the law without giving up too much to the sovereign (the role of the solicitor), zealously representing those who are accused of breaking the law in a criminal case or sued in a civil case (the role

40. *See* Brady v. Maryland, 373 U.S. 83 (1963) (due process requires that the prosecution turn over to the defense all evidence that might exonerate the defendant or mitigate the seriousness of the offense); MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020) (special responsibilities of prosecutors, duty to produce exculpatory evidence).

41. *See 5* C.F.R. § 2635.103 (2024).

42. 18 U.S.C. §§ 2340–2340A.

43. *See*, *e.g.*, 18 U.S.C. § 208 (prohibiting financial conflicts of interest).

44. *See 5* C.F.R. §§ 2635.201–.206 (Gift from Outside Sources); Standards of Ethical Conduct for Employees of the Executive Branch; Amendment to the Standards Governing Solicitation and Acceptance of Gifts from Outside Sources, 81 Fed. Reg. 81648 (Nov. 18, 2016).

45. *See* 18 U.S.C. § 201 (prohibiting bribery).

46. *See, e.g.*, 18 U.S.C. § 207 (post-government employment restrictions); 5 C.F.R. § 2635.502 (impartiality rule prohibiting favoritism toward, among others, former employers of a government officials).

47. *See 5* U.S.C § 7323 (these provisions are commonly referred to as the Hatch Act).

of the barrister) were—and still are—among the principal tasks of the private bar.

Lord Brougham, when he defended Queen Caroline in her 1820 trial before the House of Lords for adultery,[48] summed up the role of the lawyer as an advocate in a proceeding:

> [A]n advocate, by the sacred duty of his connection with his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other; nay, separating even the duties of a patriot from those of an advocate, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client.[49]

Brougham had a point. The law he sought to avoid for his client said adultery was grounds for divorce. Brougham argued that adultery had not been proven in Caroline's case. Although Brougham did not mention it, it was common knowledge that her husband King George IV had many affairs of his own, none of which were brought before the House of Lords.[50] George and Caroline furthermore had reached an agreement that while married their "intercourse" would be limited to formal social events and otherwise they would each do

48. Queen Caroline, the wife of George IV, had been put on trial for adultery in the House of Lords in 1820, her conviction being thought necessary for George to obtain a divorce. Terry Jenkins, *The Queen Caroline Affair, 1820*, HIST. PARL., https://www.historyofparliamentonline.org/periods/hanoverians/queen-caroline-affair-1820 [https://perma.cc/8UBQ-EDLC] (last visited Nov. 12, 2024).

49. Henry Brougham, 1st Baron Brougham and Vaux, served as Attorney-General to Queen Caroline. On October 3, 1820, he delivered a defense in the House of Lords against the Bill of Pains and Penalties brought against her. *Defence of Her Majesty*, H.L. DEB. (Oct. 3, 1820), https://api.parliament.uk/historic-hansard/lords/1820/oct/03/defence-of-her-majesty [https://perma.cc/5HU9-5DY2].

50. *See, e.g.*, LESLIE CARROLL, ROYAL AFFAIRS: A LUSTY ROMP THROUGH THE EXTRAMARITAL ADVENTURES THAT ROCKED THE BRITISH MONARCHY 282–91 (2008) ("Mrs. Robinson would become the first in a long line of George's mistresses.").

whatever they liked.[51] Queen Caroline earned the sympathy of many, including author Jane Austen.[52]

The "confusion" to which Brougham referred was the political turmoil in Britain at a time when public anger over economic conditions (including the Corn Laws and the high price of bread[53]) merged with public sympathy for Queen Caroline after her bad treatment by the Royal Family. This was twelve years before the 1832 Reform Act,[54] and a tiny fraction of the population could vote for Members of Parliament. The King still had considerable power as sovereign. The King's government sought to apply the law with apparent unfairness. The prosecution was conducted by Robert Gifford, 1st Baron Gifford, Attorney General for England and Wales, and John Singleton Copley, Solicitor General for England and Wales. As the government's lawyers, King George IV, the sovereign was their client. Lord Brougham eventually won the case against them—more on political grounds than legal grounds—when the Bill brought against Caroline was abandoned in the Lords because it very likely would have been defeated in the Commons.[55]

Brougham's job was standing up to abuse of power by the sovereign, a critically important role for a lawyer representing a

51. "Our inclinations are not in our power; nor should either of us be held answerable to the other, because nature has not made us suitable to each other. Tranquil and comfortable society is, however, in our power; let our intercourse, therefore, be restricted to that." *Letter from the Prince of Wales to the Princess of Wales* (Apr. 30, 1796), *in* 24 HANSARD, H.C. DEB. (Mar. 4, 1813), https://hansard.parliament.uk/Commons/1813-03-04/debates/0bbe8b3d-d598-45ef-a268-aa22617fe588/LetterFromThePrinceOfWalesToThePrincessOfWales [https://perma.cc/W4LT-YB7R].

52. *See, e.g.*, Letter from Jane Austen to Martha Lloyd, (Feb. 16, 1813), *in* JANE AUSTEN'S LETTERS, 216–17, (Deirdre Le Faye ed., 2011). "I suppose all the World is sitting in Judgement upon the Princess of Wales's letter. Poor Woman. I shall support her as long as I can because she is a Woman and because I hate her Husband. . . . [B]ut if I must give up the Princess, I am resolved at least always to think that she would have been respectable, if the Prince had behaved only tolerably by her at first." Desmond Shawe-Taylor, *The Prince Regent: Jane Austen's Royal Fan*, PERSUASIONS ON-LINE (Winter 2021), https://jasna.org/publications-2/persuasions-online/vol-42-no-1/shawe-taylor/ [https://perma.cc/3SES-J4HW].

53. *See* An Act to Amend the Laws Now in Force for Regulating the Importation of Corn 1815, 55 Geo. 3 c. 26 (UK) (restricting imports of corn to protect agriculture, which enriched the landed nobility while keeping bread prices high).

54. Representation of the People Act 1832, 2 & 3 Will. 4. c. 45 (UK) (broadening property qualifications for the franchise in the counties to include small landowners, farmers, and shopkeepers and in the boroughs to include householders who paid a yearly rental of at least £10 or more as well as some lodgers).

55. *See generally* Eberhard P. Deutsch, *The Trial of Queen Caroline*, 57 A.B.A. J. 1201 (1971).

private client. Lord Brougham articulated a vision of lawyering still vital to preservation of the rule of law today. Whether defending death row inmates or plaintiffs suing for police violence, lawyers zealously representing clients *against the government* have a vital role in the preservation of liberty.

Brougham, however, has been quoted too many times in other contexts. Tax lawyers, corporate finance lawyers, and others, most of whom represent very wealthy people or businesses, often imagine themselves the heirs apparent of Brougham as they do battle on behalf of clients who pay millions in fees. "Not so fast" say many legal ethics experts, particularly when such "zeal" for the client is transferred from litigation to regulatory compliance.[56] But as discussed in Part I, such private lawyering, including avoision lawyering at the outer limits of the law, is not the focus of this Article.

C. Avoision from Within: The Sovereign Against Itself

What about the government lawyer? The government lawyer's loyalty is to the sovereign. The sovereign in the United States is not a king, but a government chosen by the citizens under the Constitution. The U.S. government sometimes is as unpopular as King George IV was in 1820,[57] but that does not change the fact that the government requires the loyalty of its lawyers. And because in the United States the law is sovereign,[58] that means government lawyers must be loyal to the law itself.

But sometimes lawyers inside government circumvent the government's laws to further their own careers or the personal interests of political superiors. Here, law avoision is used against the law by public officials sworn to uphold the law. And in this context, it seems that Lord Brougham's model of zealous advocacy for the client would require the government lawyer to stand on the side of the law.

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56. *See* David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2068 (2010) ("For almost two centuries, [Lord Brougham's] words have stood as the embodiment of the ideal of zealous advocacy that lawyers owe to their clients. But of late, there have also been many who have questioned whether such an extreme standard of partisanship-ignoring the 'alarm,' 'torment,' and 'destruction' of others-is the proper standard for lawyers to take in all circumstances. Specifically, I and others have argued that whatever the value of Brougham's conception in the context in which he made his famous claim . . . this understanding has much less to recommend it when we consider how corporate lawyers ought to conceive of their duties, particularly in the area of regulatory compliance.").

57. *See* Philip Bump, *Biden Continues to Lead Among Those Who Dislike Both Him and Trump*, WASH. POST (Feb. 1, 2024), https://www.washingtonpost.com/politics/2024/02/01/biden-trump-polling-dislike-both/ [https://perma.cc/97W2-ERS4].

58. U.S. CONST. art. VI, cl. 2.

There is a serious conflict of interest when lawyers represent the government and at the same time avoid, evade or avoision their way around the law. Consider an example discussed in more detail later in this Article: a government lawyer who advises political superiors on how to circumvent criminal statutes and international treaties prohibiting U.S. military and intelligence officials from inflicting torture on detainees.[59] If the Supremacy Clause means what it says, then both federal statutes and treaties prohibiting torture are the "supreme law of the land."[60] It is difficult to escape the conclusion that the government lawyer who advises his political superiors on how to circumvent this law has fundamentally betrayed his client, the U.S. government.

Indeed, government lawyers usually push back on law-avoision strategies of private actors and their lawyers. Internal Revenue Service lawyers detect and punish tax avoision and refer egregious cases for criminal prosecution by lawyers in the U.S. Attorney's office. Bank regulators push back against law avoision in the financial sector, patrolling the outer boundaries of permitted conduct. In advising the government on rulemaking and enforcement, government lawyers are juxtaposed to private-sector lawyers, some of whom guide clients to the outer limits of the law and perhaps beyond. The role of the government lawyer by contrast is to protect the government itself, which means to protect the law, to close loopholes and fight avoision, not to help other government actors or anyone else to get around the law.

In sum, law avoision seems antithetical to the lawyer's duty of client loyalty. ABA Rule 1.7 is clear that a lawyer shall not participate in a representation of a client if "there is a significant risk that the representation of one or more clients will be materially limited by" the lawyer's responsibilities to any other person or the personal interests of the lawyer.[61] Political superiors in federal agencies have the power to shape policy within the bounds of the law, but they cannot exceed it. A lawyer who cannot distinguish between a legally impermissible agenda of a political superior and the interests of the government itself in defending the rule of law, or who is unwilling to side with the law, should stand down from the representation.

Of course, our sovereign is not Thomas Hobbes's monolithic *Leviathan*[62] with absolute power under a mythical social contract in which subjects submit because the alternative state of nature is

59. *See* 18 U.S.C. §§ 2340–2340A (prohibiting torture). *See also* discussion *infra* Part IV (discussing avoision strategies of DOJ lawyers circumventing the torture statute).

60. U.S. CONST. art. VI, cl. 2

61. *See* MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2020) (concurrent conflicts).

62. THOMAS HOBBES, LEVIATHAN (The Floating Press 2009) (1651).

believed to be even worse. Our sovereign is not monolithic because we have a representative democracy, and lawyers' representation of government is complicated by the fact that sovereign power is exercised through different branches of government. By constitutional design there is tension between them, as there is tension within each branch between differing political and jurisprudential viewpoints. Two branches—the executive and the legislative—are often at odds with each other. Lawyers representing presidents advocate for ways to expand presidential power, and lawyers representing Congress, particularly if not politically aligned with the president, advocate for constraining presidential power and expanding congressional oversight. Alliances of political superiors in each branch of government shape legal representation. Individual states, and their lawyers, at times may be at odds with the federal government. To the extent there is a divided sovereign, government lawyers will represent the sovereign entity differently according to the part of it in which they work.

Division within the sovereign thus is part of the law. There are situations where branches of government or subdivisions of a sovereign entity will differ as to the application of the law, and that includes good-faith arguments for change or modification of existing law.[63] Blind deference to judicial precedent, even Supreme Court precedent, is not always required or desired. The Eisenhower Justice Department, for example, intervened with an amicus brief[64] opposing the State of Kansas and asking the Supreme Court to overturn its 1896 segregation ruling in *Plessy v. Ferguson*,[65] which the Court did in *Brown v. Board of Education*[66] in 1954. Conflict in *Brown* between the President and segregationist states did not undermine the law but improved it.

But such legitimate differences about the law within the sovereign entity should not be overstated nor used as an excuse to flout existing law when there is no good-faith argument for changing it. Justice Department lawyers, arguing for reversal of state racial-segregation laws in the 1950s, are not properly compared with Justice Department lawyers after the 9/11 attacks advising the Defense Department and Central Intelligence Agency that they could flout criminal laws and

63. *See* MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

64. Brief for the United States as Amicus Curiae, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

65. 163 U.S. 537 (1896) (holding that segregation laws did not violate the Fourteenth Amendment if the facilities for each race were equal).

66. 357 U.S. at 692 (1954).

treaty obligations prohibiting torture.[67] There are some cases in between where a legal argument is a stretch but still reasonable. No definitive all-encompassing theory can articulate in all cases the boundaries of permissible government lawyering. But that does not mean government lawyers can take whatever legal position they want whenever they want or say whatever their political superiors tell them to say.

Even in divided government there is still a single sovereign, and, once again, as stated in the Supremacy Clause of the Constitution, the laws and treaties of the United States are the supreme law of the land. To the extent the states are separate sovereigns within this constitutional framework, every government lawyer—federal and state—owes allegiance to the law. There is a constitutional process, federal and state, for changing the law through legislation, sometimes through executive order, or adjudication in the courts. Lawyers for governmental entities are duty-bound to adhere to that process and to the law that results therefrom.

The avoision problem inside the government is principally a problem of client loyalty. Lawyers who represent the government yet advise public servants on working their way around the law risk breaching their duty of loyalty to the client. The client is the government, not a particular officeholder who happens to be a political superior to the lawyer. Even the president is not above the law.[68] Avoision—working around the law to accommodate the objectives of a political superior without a good-faith argument for changing existing law—is disloyal to the client. The client is the very sovereign that embodies the law itself.

IV. SOME EXAMPLES

This Part surveys some examples in which government lawyers find ways around the law to serve their political superiors or to serve themselves. Loyalty to the sovereign client—including loyalty to the law itself—is at risk in these scenarios. Public officials all too often engage in law avoision in all three branches of the federal government, and the same is true for the states.

67. *See* Claire O. Finkelstein & Michael Lewis, *Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?*, 158 U. PA. L. REV. PENNUMBRA 195, 203–04 (2010).

68. Trump v. Vance, 140 S. Ct. 2412, 2431 (2020), ("Two hundred years ago, a great jurist of our Court [Chief Justice John Marshal] established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding."); *Id.* at 2432 (Kavanaugh, J., concurring) ("In our system of government, as this Court has often stated, no one is above the law.").

A. Avoision in the Executive Branch

The Take Care Clause of the Constitution requires the president to "take Care that the Laws be faithfully executed."[69] Lawyers in executive-branch agencies ensure that the laws are faithfully executed. Their clients are federal agencies run by superior federal officers who also are sworn to uphold the law.

The government client embodies the law itself, in addition to the *lawful* policy objectives of the president and the president's appointed officers. There is a difference between a good-faith interpretation of the law, including the law defining the scope of presidential power, and bad-faith law avoision. In some cases, reasonable persons could disagree about the difference between the two, and this Article does not attempt to define a generally applicable theory of when an interpretation of the law is made in good faith and when it is not. But there are also cases where executive-branch lawyers should know they are far over the line in helping the president or persons working under color of presidential power to work their way around the law.

The most common premise for law avoision in the federal government is an expansive, and distorted, iteration of the "unitary executive theory" of presidential power. This theory, properly construed, holds that the president, as head of the executive branch, has the Constitutional right and power to shape policy and to remove superior federal officers at will, although there is considerable debate over the circumstances in which Congress can constrain the president's removal power.[70] The broader—and more dangerous—iteration of the unitary executive theory is that the president's Article II powers preempt most or even all federal statutes and that, as Richard Nixon famously said, "when the president does it, that means that it is not illegal."[71]

President Nixon was a prototypical example of executive-branch law avoision. When Department of Justice special counsel Archibald Cox subpoenaed incriminating White House tape recordings in the Watergate investigation, Nixon ordered Cox to be fired in the infamous October 1973 Saturday night massacre. Nixon believed his

69. U.S. CONST. art. II, § 3.

70. *See generally* Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023) (defending the view that the "executive power" encompassed authority to remove executive officials at pleasure); *Cf.* Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404 (2023) (response arguing that Bamzai and Prakash do not address powerful counterarguments that the Constitution does not preclude Congress from limiting presidential removal power).

71. David Frost & Richard Nixon, *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES (May 20, 1977), https://www.nytimes.com/1977/05/20/archives/excerpts-from-interview-with-nixon-about-domestic-effects-of.html [https://perma.cc/TM5C-YWE3].

power to remove federal officers under Article II of the Constitution took precedence over prohibitions on obstruction of justice.[72] Attorney General Eliot Richardson refused to fire Cox and resigned as did Deputy Attorney General William Ruckelshaus, but Solicitor General Robert Bork complied and fired Cox.[73] Nixon, with Bork's assistance, was "avoisioning" his way around the Watergate investigation and probably also violating legal prohibitions on obstruction of justice. The plan would have worked but for the fact that Congress threatened to impeach Nixon unless the Justice Department appointed a new special prosecutor.[74] The Supreme Court in *United States v. Nixon* later required Nixon to turn over the White House tapes.[75] The special counsel's office then prepared a draft indictment of Nixon, dated February 1, 1974 charging Nixon with obstruction of justice for a different act—orchestrating a cash payoff of E. Howard Hunt, Jr., a witness in the Watergate investigation[76] (the Justice Department waited over forty years until 2018 to release to the public this draft indictment of Nixon[77]). The draft indictment never was submitted to the grand jury, however, because other lawyers in the Justice Department, who were Nixon's own political appointees, found yet another law-avoision strategy: a 1973 Office of Legal

72. *See* 18 U.S.C. § 1503 (criminalizing obstruction of justice).

73. *See* Nader v. Bork, 366 F. Supp. 104, 105–06, 110 (D.D.C. 1973); s*ee also* Warren Weaver, Jr., *Cox's Ouster Ruled Illegal, No Reinstatement Ordered*, N.Y. TIMES (Nov. 15, 1973), https://www.nytimes.com/1973/11/15/archives/coxs-ouster-ruled-illegal-no-reinstatement-ordered-dismissal-of-cox.html [https://perma.cc/4VLX-ETNF] ("Judge Gerhaerd A. Gesell of Federal District Court said that Robert H. Bork, the Acting Attorney General, who dismissed Mr. Cox upon orders from President Nixon, had violated a Justice Department regulation prohibiting such a move 'except for extraordinary improprieties.' No one accused Mr. Cox of such acts.").

74. Jules Witcover, *Pressure for Impeachment Mounting*, WASH. POST (Oct. 21, 1973, 2:44 PM), https://www.washingtonpost.com/politics/pressure-for-impeachment-mounting/2012/06/04/gJQAd9f6IV_story.html [https://perma.cc/727A-LU6Z]. Republicans in both the House and Senate made public statements condemning President Nixon's actions. *Id.*

75. United States. v. Nixon, 418 U.S. 683, 714 (1974).

76. See National Archives draft grand jury presentment, dated February 1, 1974, in a case in the United States District Court for the District of Columbia captioned United States of America v. Nixon, charging Nixon with violation of 18 U.S.C. §§ 201(d), 371, 1503 and 1510 (bribery, conspiracy, obstruction of justice, and obstruction of a criminal investigation). *See* Draft Grand Jury Presentment, United States v. Nixon (Feb. 1, 1974), https://www.archives.gov/files/research/investigations/watergate/roadmap/docid-70105876.pdf [https://perma.cc/J8TY-JL8H].

77. Eli Watkins & Ellie Kaufman, *National Archives Releases Draft Indictment of Richard Nixon amid Mueller Probe*, CNN, https://www.cnn.com/2018/10/31/politics/richard-nixon-watergate-national-archives-mueller/index.html [https://perma.cc/8L3F-GJFW] (Oct. 31, 2018, 8:44 PM).

Counsel (OLC) memorandum saying a sitting president cannot be indicted.[78] Nixon resigned in August 1974, but was not prosecuted after leaving office because he took advantage of a legally permissible law-avoidance method, the presidential pardon, which he obtained from his successor Gerald Ford.[79]

As the Nixon Administration demonstrated, Department of Justice lawyers may be enlisted to support a presidential avoision strategy. The OLC is headed up by lawyers who are political appointees of the president and provide legal opinions to the White House and to heads of federal agencies. OLC all too often performs a role analogous to what Philip Jessup said of late nineteenth-century lawyer Elihu Root, the future Secretary of State who told his private clients not what they could not do, but how to do what they wanted to do.[80]

Consider, for example, a series of OLC memos after the September 11, 2001 terrorist attacks telling the Central Intelligence Agency and the Department of Defense that they could torture detainees if they did so under color of presidential authority.[81] The avoison strategy in these memos was multifold, embracing arguments that the "enhanced interrogation" methods contemplated (e.g. water-boarding) did not inflict sufficient lasting physical or psychological harm to amount to torture, that the Constitution requires that the president's Article II powers take precedence over both criminal laws prohibiting torture and U.S. treaty obligations such as the Convention Against Torture, and that torturers could invoke a self-defense or "necessity" defense if criminally charged.[82] These OLC memos were later rescinded and widely condemned, including by some Bush

78. *See* Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Off. of Legal Couns., Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973), https://www.justice.gov/d9/pages/attachments/2022/09/02/la_19730924_amenability_of_the_president_vice_president_and_other_civil_officers_to_federal_criminal_prosecution_while_in_office_0.pdf [https://perma.cc/75YV-FNCS].

79. *See* Claire O. Finkelstein & Richard W. Painter, *Presidential Accountability and the Rule of Law: Can the President Claim Immunity if He Shoots Someone on Fifth Avenue?*, 24 U. PA. J. CONST. L. 93, 135, 169–75 (2022) (discussing how the President Ford pardon of former-President Nixon denied the courts an opportunity to rule on former-President Nixon's case).

80. *See supra* text accompanying note 3.

81. *See, e.g.*, Memorandum from John C. Yoo, Off. of Legal Couns., to Alberto R. Gonzales, Couns. to the President 5–6 (Aug. 1, 2002), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf [https://perma.cc/LB5Y-3DVK].

82. *Id.*

Administration lawyers.[83] Some ethics experts opined that the OLC lawyers who authored them should be prosecuted.[84]

When the law is violated, OLC reinforces presidential immunity from prosecution at nearly every turn. In 1973,[85] 2000,[86] and again in 2019,[87] DOJ's OLC opined in three separate memos that federal prosecutors should not, and probably could not, indict a sitting president. No provision in the Constitution says a sitting president cannot be indicted, but DOJ reached this conclusion based mostly on conjecture that a criminal prosecution could unduly interfere with performance of a president's Article II duties. The DOJ lawyers who wrote these memos on all three occasions were political appointees of the President, and on all three occasions the President (Nixon, Clinton, and Trump) had been threatened with prosecution for crimes being investigated by an independent prosecutor. Of course, nobody wants to prosecute their boss, but these OLC memos suggest avoision at the Justice Department more than a defensible position of constitutional law.[88]

In sum, DOJ under the control of several presidents has become an avoision machine. DOJ construes Article II of the Constitution to escape accountability for the president or anyone who works for the president.

But this problem for government lawyers extends well beyond DOJ. Because government lawyers at the top of federal agencies are often political appointees, many come from the private sector and may bring the private-sector approach to lawyering into government with them. They report to political superiors who have their own motives and agendas not necessarily congruent with the interests of the government. These political superiors also may want government lawyers to bend the law. Lawyers who lose sight of who their client really is—the government and the law itself—will succumb and do just that.

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83. *See e.g.*, RICHARD W. PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE 129–32 (2009) (discussing illegality of the DOJ torture memos).

84. *See generally* Finkelstein & Lewis, *supra* note 67, at 195.

85. Memorandum from Robert G. Dixon, *supra* note 78.

86. A Sitting President's Amenability to Indictment & Crim. Prosecution, 24 Op. O.L.C. 222 (2000).

87. Memorandum from Steven A. Engel, Assistant Att'y Gen., Off. of Legal Couns., & Edward C. O'Callaghan, Principal Assoc. Deputy Att'y Gen., Dep't of Just., to Att'y Gen., Dep't of Just. (Mar. 24, 2019), https://www.politico.com/f/?id=00000182-d156-d8f9-ad9e-fd7726100000 [https://perma.cc/A4HV-32KB].

88. *See generally* Finkelstein & Painter, *supra* note 79 (strongly criticizing these memos).

Private lawyers representing former President Trump in 2024 argued before the District of Columbia Circuit that the President after leaving office is immune from criminal prosecution for his official acts as President. If the President ordered Navy Seals to assassinate a political rival, they said, the only remedy would be impeachment and conviction in Congress. The reason: A President's Article II power takes precedence over criminal laws prohibiting murder.[89] Perhaps ten years ago, such a legal argument might have been considered absurd. Not anymore. Then-former President Trump's lawyers again made this argument before the Supreme Court of the United States, and in June 2024, the Court released its opinion in *Trump v. United States*[90] where six Justices agreed.

The Court invited yet more law avoision in the executive branch when it ruled in *Trump v. United States* that a President's conduct within the exercise of core constitutional duties is absolutely immune from criminal prosecution and that conduct carrying out other official duties is presumptively immune.[91] Presidents and political appointees working for Presidents now will strain to characterize everything they do as official-capacity conduct, and as much of that conduct as possible as being within the core constitutional powers of the presidency where absolute immunity attaches (the Court did not rule on whether persons other than the President can claim immunity for carrying out presidential orders). Private-sector lawyers won this

89. Judge Florence Pan posed the question to President Trump's lawyer, Mr. D. John Sauer, in oral argument:

Judge Pan:	"[Y]our position is that he can't be prosecuted for that unless he's impeached?"
Mr. Sauer:	"Yup, as long as it's an official act . . . ."
Judge Pan:	"Could a president order SEAL Team Six to assassinate a political rival? That's an official act[: an] order to SEAL Team Six."
Mr. Sauer:	"He would have to be, and would, speedily be impeached and convicted before the criminal prosecution—."
Judge Pan:	"But if he weren't, there would be no criminal prosecution, no criminal liability for that? . . . I asked you a yes or no question, could a president who ordered SEAL Team Six to assassinate a political rival, who was not impeached, would he be subject to criminal prosecution?"
Mr. Sauer:	"If he were impeached and convicted first?"
Judge Pan:	"So your answer is no."

Transcript of Oral Argument, United States v. Trump, 91 F.4th 1173 (D.C. Cir. 2024) (No. 23-3228).

90. 144 S. Ct. 2312 (2024).

91. *Id.* at 2331.

ruling for Trump at the Supreme Court, but government lawyers in the White House, the Justice Department, and other agencies will be asked by future presidents and political appointees to shoehorn everything into the category of the official. With enough law avoision—memorialized in written opinions of agency general counsels and the DOJ's OLC—the distinction between the official and the political will be blurred and perhaps eviscerated.

Trying to win an election, for example, is presumably political activity, not official. But there is always an argument, however dubious, that protecting the "security" of the election is an official function of the president. Even if federal officials acting on orders of the president engage in criminal acts—for example intimidating voters and depriving them of their civil rights[92] to protect the "security" of an election—the President and his underlings might still argue that the presumption of immunity applies. They will say they were doing everything, including whatever acts are alleged to be the crimes, while conducting "official business." They may have requested in advance a legal opinion from an agency lawyer telling them just that. After the election, perhaps even the military seizing ballot boxes to look for "fraud,"[93] also might be labeled as official conduct. Government lawyers will be pressured to create a paper trail of legal opinions and executive orders characterizing, or rather mischaracterizing, just about everything the President wants done as official so in any subsequent criminal proceedings the immunity defense will be available.[94]

B. Avoision in Congress

Congress has its own law-avoision legal machine. Members of Congress make laws while at the same time using avoision techniques to get around the law. Members of Congress have three groups of lawyers at their disposal: government lawyers on Congressional staffs, campaign lawyers, and private lawyers advising on their personal affairs.

92. 18 U.S.C § 241 (imposing criminal penalties on persons who conspire to deprive others of civil rights, including the right to vote.).

93. *See* 18 U.S.C. § 593 (imposing criminal penalties on any member of the armed forces who interferes with an election or "imposes or attempts to impose any regulations for conducting any general or special election in a State, different from those prescribed by law").

94. It is not clear from the Court's opinion in *Trump v. United States* how far this immunity extends beyond the President, but high-ranking former officials in the Trump Administration sought to avail themselves of the Court's opinion to argue that January 6 related criminal charges against them should be dismissed. *See, e.g.*, Notice of Removal of Criminal Prosecution Pursuant to 28 U.S.C. §§ 1442, 1455 and Request for Leave to File Notice Based on Good Cause at 8, Arizona v. Meadows, No. 24-02063, 2024 WL 4198384 (D. Ariz. Sept. 16, 2024).

Consider for example financial conflicts of interest and congressional stock trading. Congress passed a criminal conflicts of interest statute providing that it is a crime for executive-branch employees to participate in government matters that affect their personal financial interest, including companies they own stock in.[95] But elected officials, including the President, Vice President, and Members of Congress are exempt from this law, meaning they can trade stocks and regulate the same companies at the same time.

Insider trading based on misappropriated nonpublic information is illegal for Members of Congress, among others,[96] but it is very hard to prove an insider-trading case against a Member of Congress. The Speech and Debate Clause of the Constitution[97] bars the Securities and Exchange Commission and prosecutors from asking questions about what Members say to each other in Congress, information which is likely to be the core factual basis for an insider trading case. Reform advocates have repeatedly called on Congress to close this loophole by passing a law prohibiting Members from trading individual stocks,[98] but thus far Congress hasn't done so.

Yet another loophole in insider trading law, also discussed by the Author and Professor Nagy, is that Members of Congress can tip off campaign donors and other friends, including hedge fund managers,

95. 18 U.S.C. § 208 (providing for criminal penalties for "whoever, being an officer or employee of the executive branch of the United States Government, . . . participates personally and substantially as a Government officer or employee, [in a] particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest").

96. *See* United States v. O'Hagan, 521 U.S. 642, 647 (1997) (holding that misappropriation of nonpublic information in breach of a duty of trust and confidence is criminal insider trading under the federal securities laws). In 2012, Congress expressly stated that this prohibition on insider trading applied to Members of Congress when it enacted the Stop Trading on Congressional Knowledge (STOCK) Act of 2012, Pub. L. No. 112-105, §§ 3–19, 126 Stat. 291, 291–305.

97. U.S CONST. art. I, § 6, cl. 1 ("The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

98. *See, e.g.*, Donna M. Nagy & Richard W. Painter, *It's Time for Senators, House Members to Divest Stocks in Individual Publicly Traded Companies*, BLOOMBERG L. (Jan. 6, 2021, 4:00 AM), https://news.bloomberglaw.com/white-collar-and-criminal-law/its-time-for-senators-house-members-to-divest-stocks-in-individual-publicly-traded-companies [https://perma.cc/2S4D-NTA2].

about nonpublic information, which can then be used for trading in securities markets. Unless an express quid pro quo in which something is given to the Member in return for the information can be proven, prosecution for insider trading is extremely difficult.[99] Such insider-trading avoision for friends of Members is apparently among the privileges of Congressional office.

And it doesn't stop there. Financial disclosure requirements under the Ethics in Government Act of 1978[100] are intended to ensure that the public knows when Members of Congress are buying and selling securities. The Stop Trading on Congressional Knowledge (STOCK) Act tightens these requirements to require prompt reporting shortly after a trade.[101] But Members of Congress buy and sell industry sector funds to get around these reporting requirements, taking advantage of a loophole in the STOCK Act that allows trades in funds to be reported later than trades in individual stocks.[102] It does not matter that Members' conflicts of interest are even greater with sector funds than with individual stocks because most of what Congress does affects entire industries, not just one publicly traded company.

These are some examples of Members of Congress using avoision to get around the law. Laws pertaining to elections and corporate money in politics—another area full of loopholes—are discussed briefly under a separate subheading below. The common theme is that a legislative branch that makes the law works against the law when it applies to itself.

C. Avoision in the Judiciary

What happens when lawyers can't kick the avoision habit even when they become judges? The Author explores in another article the

99. Donna M. Nagy & Richard W. Painter, *Plugging Leaks and Lowering Levees in the Federal Government: Practical Solutions for Securities Trading Based on Political Intelligence*, 2014 U. ILL. L. REV. 1521, 1526 (2014); *see generally* Donna M. Nagy & Richard W. Painter, *Selective Disclosure by Federal Officials and the Case for an FGD (Fairer Government Disclosure) Regime*, 2012 WIS. L. REV. 1285, 1285–365 (2012).

100. Pub. L. No. 95-521, 92 Stat. 1824 (1978).

101. *See* Stop Trading on Congressional Knowledge (STOCK) Act of 2012, Pub. L. No. 112-105, §§ 6(a), 19(a), 126 Stat. 291, 293–94, 304 (repealed 2022) (requiring executive-branch officers and Members of Congress to file a report "[n]ot later than 30 days after receiving notification of any transaction required to be reported under section 102(a)(5)(B)").

102. Nicholas Megaw & Caitlin Gilbert, *US Congress: How Investment Funds Became the New Insider Trading Risk*, FIN. TIMES (May 23, 2023), https://www.ft.com/content/e3ed73d1-c97c-41c6-9993-6c1023da418c [https://perma.cc/7DF6-S3XM].

ethics scandal at the Supreme Court and what can be done about it.[103] The focus here is different: the avoision problem in government lawyering and the fact that it has even reached into our nation's highest court.

Consider the financial disclosure rules legally binding on the Justices under the Ethics in Government Act.[104] At least two Justices—Justices Alito[105] and Thomas[106] have found a disclosure loophole, a law-avoision opportunity, using the "personal hospitality" exception to the gift rules for federal judges both to accept and to avoid disclosing free travel on private planes of billionaires.[107]

Even more problematic is the Court's refusal to abide by statutory recusal requirements.[108] Justice Thomas failed to recuse in *Trump v. Thompson*,[109] President Trump's motion to quash the House January 6 Committee's subpoena of White House documents, and also failed to recuse in another case involving a House subpoena for information

103. *See generally* Richard W. Painter, *SCOTUS House: Can a Supreme Court Ethics Lawyer and Inspector General Help Get This Fraternity Under Control?*, 37 GEO. J. LEGAL ETHICS 347 (2024).

104. *See* 5 U.S.C. §§ 1301(10), 13103(f)(11) (requiring financial disclosures from all three branches of government, including Justices of the Supreme Court).

105. Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/XA47-R5XC].

106. *See* Letter from Noah Bookbinder, President & Chief Exec. Officer, Citizens for Resp. & Ethics in Wash., Virginia Carter, Chief Ethics Couns., Citizens for Resp. & Ethics in Wash., Norman L. Eisen, & Richard Painter, to John Roberts, Chief Just., U.S. Sup. Ct., & Merrick Garland, Att'y Gen., U.S. Dep't of Just. (Apr. 14, 2023), https://www.citizensforethics.org/wp-content/uploads/2023/04/Justice-Clarence-Thomas-DOJ-Complaint-April-14-2023-1.pdf [https://perma.cc/7ENL-RPR8].

107. *See* Samuel A. Alito, Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, 6:24 PM), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda [https://perma.cc/36EC-DDN8] (arguing that Justice Alito's fishing trip to Alaska on a billionaire's private jet did not have to be disclosed).

108. *See* 28 U.S.C. § 455 (requiring a judge or justice to recuse in a case in which their impartiality might reasonably be questioned).

109. Trump v. Thompson, 142 S. Ct. 680, 680 (2022) (Thomas, J., dissenting) (denying former President Trump's application for stay of mandate and injunction pending review of subpoena of White House documents by the House January 6 Committee over Justice Thomas's lone dissent).

about fake electors in Arizona.[110] Justice Thomas's spouse, Virginia Thomas, had supported President Trump's effort to overturn the 2020 election, including in Arizona.[111] She attended the January 6 *Stop the Steal* rally[112] and in text messages Ms. Thomas told White House Chief of Staff Mark Meadows that Trump was the victim of election fraud.[113] Justice Thomas was required to recuse from these cases "in which his impartiality might reasonably be questioned."[114] His wife's own texts with Meadows could have been among the documents responsive to the House subpoena of White House documents. Yet, in *Trump v. Thompson*,[115] Justice Thomas was the only Justice to vote in favor of staying the subpoena.[116] As Professor Amanda Frost has pointed out, this was a clear violation of the recusal law, and the other eight Justices all knew about it.[117] Yet they did nothing to prevent it.

Ironically, some of the justices who engage in ethics avoision are aligned with the jurisprudential theory that "natural law" is grounded in moral concepts of right and wrong.[118] By contrast, recall that one of

110. Ward v. Thompson, 143 S. Ct. 439, 439 (2022) (mem.) (Thomas & Alito, JJ., dissenting) (denying application to block January 6 Committee subpoena of records of Arizona's GOP Chair).

111. Emma Brown, *Ginni Thomas Pressed 29 Ariz. Lawmakers to Help Overturn Trump's Defeat, Emails Show*, WASH. POST (June 10, 2022, 11:50 AM), https://www.washingtonpost.com/investigations/2022/06/10/ginni-thomas-election-arizona-lawmakers/ [https://perma.cc/2XLK-4PR2].

112. Kevin Daley, *Exclusive: Ginni Thomas Wants to Set the Record Straight on January 6*, WASH. FREE BEACON (Mar. 14, 2022), https://freebeacon.com/courts/exclusive-ginni-thomas-sets-the-record-straight-on-january-6/ [https://perma.cc/D26T-J5Z7].

113. Bob Woodward & Robert Costa, *Virginia Thomas Urged White House Chief of Staff to Pursue Unrelenting Efforts to Overturn the 2020 Election, Texts Show*, WASH. POST (Mar. 24, 2022), https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/ [https://perma.cc/6G6S-7YNL].

114. 28 U.S.C. § 455(a).

115. 142 S. Ct. 680 (2022).

116. *Id.* at 680.

117. Amanda Frost, *Why the Other Eight Justices Must Censure Clarence Thomas*, SLATE (Dec. 5, 2022, 12:30 PM), https://slate.com/news-and-politics/2022/12/clarence-thomas-conflict-of-interest-consequences.html [https://perma.cc/UX6C-JNG4].

118. *See* Michael W. McConnell, *Trashing Natural Law*, N.Y. TIMES (Aug. 16, 1991), https://www.nytimes.com/1991/08/16/opinion/trashing-natural-law.html [https://perma.cc/D2TW-N86B] ("The first casualty in the battle over Judge Clarence Thomas's nomination to the Supreme Court has been the venerable concept of 'natural law' -- the idea that human rights are based on universal moral principles not limited by the letter of the law. Judge Thomas frequently refers to natural law in his academic writings. His detractors decry this as 'weird' and dangerous."); *see also* John

the arguments justifying law avoision discussed in Part I of this Article is the very different claim that law has no moral foundation,[119] and that law avoision is a way for citizens to stand up to oppressive government power.[120] But Justices of the Supreme Court are often the last word in interpreting the law. For them to engage in law avoision undermines the moral legitimacy of the Court and of the law itself.

D. Avoision in the States

Plessy v. Ferguson[121] was a highwater mark of a near-century-long avoision game many states played *vis-à-vis* the federal government after the Civil War to evade the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.[122] The tragedy of post-Reconstruction legal history will not be retold here, except a few isolated examples to illustrate how pervasive this prolonged flouting of the law was and how lawyers enabled it.

Plessy, in 1896, upheld a Louisiana law requiring segregated railroad cars for non-Whites, premised on the legal theory that "separate but equal" was enough to satisfy the equal protection clause of the Fourteenth Amendment.[123] In many instances, segregated facilities in railroads, public schools, and elsewhere were not equal in quality to those for Whites, but *Plessy*'s legal test was an invitation to avoision because a factual showing of inferiority of a particular facility would be difficult for plaintiffs to prove. More important, this "separate but equal" theory was wrong on its face because separate facilities never were equal. The entire point of segregation was to designate one race as inferior to the other.[124]

S. Baker, Jr., *Natural Law and Justice Thomas*, 12 REGENT UNIV. L. REV. 471, 474 & n.11 (2000).

119. *See supra* notes 10–14 and accompanying text.

120. *Id.*

121. 163 U.S. 537 (1896).

122. *Id.* at 550–51 (upholding Louisiana's Separate Car Act, which required separate railway cars for Blacks and Whites).

123. *Id.* "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

124. This was the conclusion eventually reached by the Court decades later in 1954 when reversing *Plessy* in Brown v. Board of Education, 347 U.S. 483, 494–95 (1954).

The majority in *Plessy* mischaracterized facts about the system of racial segregation in their opinion[125] (only one Justice dissented[126]), in some instances simply repeating misstatements of fact made to the Court by Louisiana's lawyers,[127] with the objective of enabling Louisiana to evade the Fourteenth Amendment.

Counsel for Louisiana also misrepresented the law to the Court. Alexander Porter Morse, a lawyer born in Saint Martinville, Louisiana who had been an officer in the Confederate Army,[128] argued the case for Louisiana. Morse's brief tread dangerously close to violating the requirement that lawyers honestly plead the law to a tribunal (today's standard is embodied in ABA Rule 3.3 (candor toward the tribunal) and FED. R. CIV. P. 11). Morse cited common-law cases holding that *private* carriers *may* segregate their facilities to support his argument that under the Fourteenth Amendment states could segregate *public* facilities by statute and *require* private carriers to segregate their facilities. The Justices accepted this argument, string citing these common-law cases involving private carriers to justify upholding the Louisiana statute, ignoring the fact that the Fourteenth Amendment expressly prohibits unequal treatment by the states,[129] not private companies. Counsel for Louisiana thus lied about the law in the briefs, and the Supreme Court repeated this lie by citing the same irrelevant cases to support its opinion.[130]

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125. The Court, without citing any factual evidence supporting this point, said the badge of inferiority from segregation was all in the mind of African Americans subject to it: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Plessy*, 163 U.S. at 551. The Court then strayed into a fanciful hypothetical with no basis in fact: "The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption." *Id.*

126. *See id.* at 552–64 (Harlan, J., dissenting).

127. *See* David S. Bogen, *Why the Supreme Court Lied in* Plessy, 52 VILL. L. REV. 411, 445 (2007) (discussing the dishonest briefing and oral arguments in *Plessy*).

128. *See Alexander Porter Morse*, FIND A GRAVE, https://www.findagrave.com/memorial/6130969/alexander-porter-morse [https://perma.cc/8AZ8-8DHU] (last visited Nov. 7, 2024).

129. U.S. CONST. amend. XIV, § 1.

130. *See* Bogen, *supra* note 127, at 445 (first citing *Ex parte* Plessy, 11 So. 948, 950 (La. 1892), *aff'd sub nom.* Plessy v. Ferguson, 163 U.S. 537 (1896); and then citing 13 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF

Lawyers' lies have consequences. Judges' lies have consequences. State-mandated racial segregation was upheld by the federal courts for fifty-eight years (1896–1954) in part because of a legal lie.

Plessy fits into a much bigger pattern of civil rights law avoision facilitated by lawyers, acting as legislators, prosecutors, city attorneys, state attorneys general, and judges. The Thirteenth Amendment prohibiting slavery was evaded with "Black Codes" and other measures forming the legal basis for Jim Crow. Some post-Civil-War state laws went so far as to provide that freed slaves could, by court order, be found unable to care for themselves and "apprenticed" to their former masters.[131] The Fifteenth Amendment right to vote was a de facto nullity in much of the United States until passage of the Voting Rights Act of 1965.[132] States used literacy tests and other avoision strategies before the Act banned any such "test or device" having the purpose of denying minorities the right to vote.[133] Some states today, with the help of clever lawyers, are finding new avoision strategies to circumvent the Voting Rights Act and the Fifteenth Amendment with "facially neutral" voter registration and voting laws that could once again disproportionately keep minorities from the polls.[134]

THE UNITED STATES 148–49 (Gerhard Casper & Philip B. Kurland eds., 1975) (citing these same common law cases involving private carriers)).

131. *See, e.g.*, 1865 Miss. Laws 82, 86–87 (empowering the sheriff and county court to apprentice to a suitable person "all freedmen, free negroes and mulattoes, under the age of eighteen" who are deemed to be orphans or whose parents are deemed unable to care for them, and "[p]rovided, that the former owner of said minors shall have the preference, when in the opinion of the court, he or she shall be a suitable person for that purpose").

132. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

133. *Id.* § 3(b) (empowering the Attorney General to enforce the guarantees of the Fifteenth Amendment when "a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color").

134. *See* Gary J. Simson, *Election Laws Disproportionately Disadvantaging Racial Minorities, and the Futility of Trying to Solve Today's Problems with Yesterday's Never Very Good Tools*, 70 EMORY L.J. 1143, 1160 (2021); GÉRARD P. CACHON & DAWSON KAAUA, DEMOCRACY ON THE LINE: POLLING PLACE CLOSURES IN GEORGIA AND THE WAIT TIME TO VOTE 13 (2023).

Law avoision by the states goes beyond civil rights into other areas as far reaching as immigration[135] and environmental regulation.[136] Sometimes there is a legitimate dispute over the interpretation of federal or state law, or whether federal law preempts state law, in which case lawyers representing the states are simply doing their jobs even if federal courts eventually rule against them.[137] On the other hand, public officials in some states do not have a good-faith legal argument and simply do not want to follow federal law. They may ask lawyers to mischaracterize law or facts to accomplish that objective.[138]

135. Some states are in a tug of war with the federal government over control of immigration policy, although different states contest federal policy depending on whether there is a Democratic or Republican President. For an example of law avoision during the Biden Administration, see Dep't Homeland Sec. v. Texas, 144 S. Ct. 715 (2024) [hereinafter *Dep't Homeland Sec. v. Texas, Filing*] (reversing order by the U.S. Court of Appeals for the Fifth Circuit in Texas v. U.S. Dep't Homeland Sec., 88 F.4th 1127 (5th Cir. 2023), barring federal Border Patrol agents from cutting or moving razor wire installed by Texas along a portion of the U.S.-Mexico border). The Trump Administration has sparred with different states over "sanctuary cities" and other ways to get around the President's interpretation of immigration law. Finally, the argument that some persons born in the United States are not natural-born citizens because their parents did not have proper documentation is a way for the President and states that support that theory to get around the Fourteenth Amendment's Birthright Citizenship Clause.

136. *In re* Denial of Contested Case Hearing Requests, 993 N.W.2d 627, 650–51 (Minn. 2023); *see also* Summer Ballentine, *Minnesota Supreme Court Rules Against Disputed Mine, Says State Pollution Officials Hid EPA Warnings*, AP NEWS, https://apnews.com/article/mine-pollution-environment-lake-superior-minnesota-st-louis-river-copper-574484284712660d9d7739544ec2a379 [https://perma.cc/CH8U-3W62] (Aug. 2, 2023, 5:36 PM) ("The Minnesota Supreme Court on Wednesday ruled that the state's Pollution Control Agency improperly granted permits to a fiercely contested copper-nickel mine and concealed environmental concerns about the project, which critics say threatens to pollute Lake Superior and hurt tribal lands . . . Justices found that state regulators not only ignored concerns from the federal Environmental Protection Agency about the northeastern Minnesota mine, but attempted to conceal EPA warnings from the public.").

137. *Dep't Homeland Sec. v. Texas, Filing*, *supra* note 135, arguably fits into this category, although it should be pointed out that the razor wire Texas installed at the border has prevented federal agents from rescuing some refugees who subsequently drowned. *See* Colbi Edmonds, *3 Migrants, Including 2 Children, Drown Near Texas Border*, N.Y. TIMES (Jan. 14, 2024), https://www.nytimes.com/2024/01/14/us/migrants-drown-texas-dispute.html [https://perma.cc/J46L-EU3S] ("According to Customs and Border Protection, federal agents were 'physically barred' by state officials from responding to the situation. Texas officials said that was 'wholly inaccurate.'").

138. *See* In re *Denial of Contested Case Hearing Requests*, 993 N.W.2d at 655–60 (discussing misrepresentation by Minnesota's Pollution Control Agency to facilitate granting of mining permit).

Such is law avoision, or even law evasion. Avoision may be premised on the assumption that state officials won't get caught or won't be challenged by the federal government. In other instances, law avoision can be used as a delay tactic until political changes in Washington D.C. bring about change in federal law. When lawyers for the states advance bad faith legal arguments to attack the law, they are not zealously representing their client. They are betraying a client that is part of a broader federal union that embodies the law itself.[139]

E. Election Avoision

When avoision strategies are turned on the democratic process itself—election avoision—this approach to lawyering becomes even more dangerous.

Election law involves government lawyers and another group of lawyers: the private sector lawyers who represent candidates for public office. Some of those candidates are also incumbent office-holders with a sworn duty to uphold the law. The government is not directly a client for these lawyers; the candidate is. But an incumbent client's own fiduciary duties to the government should preclude law avoision. Political lawyers who embrace law avoision may be leading their clients down the path of breach of fiduciary duty to the government, if not breach of the law itself.

Let's start with the money. Congress in 1907 passed the Tillman Act,[140] which prohibits donations from corporate treasuries to political campaigns. Ever since then, lawyers have exploited loopholes to get around the law.[141] One avoision strategy is independent-electioneering communications funded by organizations separate from campaigns, such as Super PACs. Congress tried to close that loophole, but the Supreme Court in *Citizens United v. Federal Election Commission*[142] struck down a key provision of that law, ruling that unlimited spending from corporate treasuries on electioneering communications is constitutionally protected speech.[143] While there are restrictions on direct contributions to campaigns and political parties,[144] spending on electioneering communications and on Super

139. *See supra* text accompanying note 35 (discussing the Supremacy Clause of the Constitution).

140. ch. 420, 34 Stat. 864 (1907).

141. *See* MELVIN I. UROFSKY, THE CAMPAIGN FINANCE CASES 10 (2020).

142. 558 U.S. 310 (2010).

143. *Id.* at 318–19.

144. *See* Buckley v. Valeo, 424 U.S. 1, 23 (1976) (holding that dollar limitations on contributions by individuals to campaigns do not violate the First Amendment, but limitations on spending by political campaigns do violate the First Amendment); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 223–24 (2003) (upholding limits on soft money contributions

PACs is unlimited. The Court has not struck down the Tillman Act prohibition on direct corporate contributions to campaigns, but corporate-funded Super PACs are First Amendment protected avoidance strategies.[145] The only reason these are not law-avoision strategies is that the *Citizens United* case clarified their legality; so long as a Super PAC or other organization stays within defined legal boundaries, for example, they do not coordinate activities with a campaign.[146] As Justices Sandra Day O'Connor and John Paul Stevens wrote in *McConnell v. Federal Election Commission*, "[money, water, will always find an outlet."[147]

This is not an Article on election law, or campaign finance law, but money in politics is an area where avoision opportunities are abundant. For example, restrictions on coordination of Super PAC activities with candidates and campaigns themselves are covered by detailed regulations[148] that candidates and their lawyers may seek to circumvent.[149]

The 2024 election cycle has brought yet another form of avoision to the fore: AI "deepfaking," or video and audio electioneering communications depicting candidates doing things they didn't do.

As the public interest group Public Citizen explains:

> Extraordinary advances in artificial intelligence now provide political operatives with the means to produce campaign ads and other communications with computer-generated fake images, audio or video of candidates that appear real-life, fraudulently misrepresenting that what candidates say or do. Generative artificial intelligence and deepfake technology–a type of artificial intelligence used to create convincing images, audio and video hoaxes–is evolving very rapidly.

used to register voters and increase attendance at the polls); McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 192–93 (2014) (striking down aggregate limits on donor contributions to multiple candidates).

145. *See* Lieu v. FEC, No. 19-5072, 2019 U.S. App. LEXIS 29880, at *2 (D.C. Cir. Oct. 3, 2019) (dismissing suit brought against the Federal Election Commission by Rep. Ted Lieu, Rep. Walter Jones, Sen. Jeff Merkley, State Sen. John Howe, Zephyr Teachout, and Michael Wager asking the Circuit Court to overturn its decision in SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1003 (2010) (interpreting the *Citizens United* holding to allow unlimited spending on Super PACs)).

146. *See, e.g.*, 11 C.F.R. § 109.21(b)(3) (2024) (providing that electioneering communications coordinated with a campaign must be reported as an in-kind contribution to the campaign).

147. 540 U.S. 93, 224 (2003).

148. *See* 11 C.F.R. § 109.21.

149. Legislation has been introduced to close some of these loopholes. *See* Stop Super PAC–Candidate Coordination Act, H.R. 1172, 117th Cong. (2021).

> Every day, it seems, new and increasingly convincing deepfake audio and video clips are disseminated, including, for example, an audio fake of President Biden, a video fake of the actor Morgan Freeman and an audio fake of the actress Emma Watson reading *Mein Kampf*.[150]

Even if creating such deepfake videos can be made illegal, the law will be almost impossible to enforce if candidates avoid creating these videos themselves, the videos are created by someone else and then they are quickly distributed on social media by the candidates and their supporters shortly before an election.[151]

But an even more dangerous type of avoision takes place if the candidate who loses an election decides to change the result. That danger is particularly acute if the candidate is an incumbent office-holder intent on using the powers of that office to stay in office. For example, the current President of the United States.

This Article will not retell details of President Donald Trump's effort to overturn the 2020 election, much of which involved lawyers working for him personally or for his campaign. Eight of these lawyers were indicted in Fulton County, Georgia for racketeering, and only one of them, Acting Deputy Attorney General Jeffrey Clark, was a government lawyer.[152] These lawyers allegedly engaged in law avoision to such an extent that, if successful, they would have subverted the entire process of electing a president in Georgia, and other states as well. Then came yet more avoision at the federal level, including a scheme to convince Vice President Mike Pence to violate his oath of office and declare Donald Trump the winner on January 6, 2021.[153]

The Justice Department plot was particularly dangerous. Trump allegedly plotted with Jeffrey Clark, then Acting Assistant Attorney General, to pressure state officials to invalidate the election. Trump also allegedly planned to fire Acting Attorney General Jeffrey Rosen if

150. Letter from Pub. Citizen to Lisa J. Stevenson, Office of Gen. Couns., Fed. Election Comm'n (July 13, 2023), https://www.citizen.org/article/second-submission-petition-for-rulemaking-to-clarify-that-the-law-against-fraudulent-misrepresentation-applies-to-deceptive-ai-campaign-communications/ [https://perma.cc/VJ54-4NDM].

151. This problem is discussed more extensively in Richard W. Painter, *Deepfake 2024: Will* Citizens United *and Artificial Intelligence Together Destroy Representative Democracy?*, 14 J. NAT'L SEC. L. & POL'Y 121, 127–28 (2023).

152. Alison Durkee, *Giuliani Disbarred in D.C.: Here Are All the Other Ex-Trump Lawyers Now Facing Legal Consequences*, FORBES (Sept. 27, 2024, 9:23 AM), https://www.forbes.com/sites/alisondurkee/2024/09/26/kenneth-chesebro-charged-in-wisconsin-here-are-all-the-former-trump-lawyers-now-facing-legal-consequences/ [https://perma.cc/6FGU-HAL9].

153. Indictment at 13–14, 24, Georgia v. Trump, No. 23SC188947 (Fulton Cnty. Super. Ct. Aug. 14, 2023).

he refused to participate.[154] Clark drafted a DOJ letter to leaders of the Georgia legislature saying that DOJ had "identified significant concerns that may have impacted the outcome of the election in multiple states, including the State of Georgia," and that there had been election "irregularities sworn to by a variety of witnesses."[155] The draft DOJ letter then claimed that the Georgia General Assembly had the constitutional power to override the popular vote in a special session.[156] To get the Georgia General Assembly to participate in the fake electors scheme by certifying the Trump slate of electors, the draft letter stated:

> The Department believes that in Georgia and several other States, both a slate of electors supporting Joseph R. Biden, Jr., and a separate slate of electors supporting Donald J. Trump, gathered on that day at the proper location to cast their ballots, and that both sets of those ballots have been transmitted to Washington, D.C., to be opened by Vice President Pence.
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> The purpose of the special session the Department recommends would be for the General Assembly to (1) evaluate the irregularities in the 2020 election, including violations of Georgia election law judged against that body of law as it has been enacted by your State's Legislature, (2) determine whether those violations show which candidate for President won the most legal votes in the November 3 election, and (3) whether the election failed to make a proper and valid choice between the candidates, such that the General Assembly could take whatever action is necessary to

154. Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES, https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html [https://perma.cc/H3DP-R7BF] (Oct. 13, 2022).

155. *See* Letter from Jeffrey A. Rosen, Acting Att'y Gen., Richard Donoghue, Acting Deputy Att'y Gen. & Jeffrey Bossert Clark, Acting Assistant Att'y Gen., Civ. Div., to Brian P. Kemp, Governor, GA., David Ralston, Speaker of the House, GA., & Butch Miller, President *Pro Tempore* of the Senate, GA. 1 (Dec. 28, 2020), https://www.documentcloud.org/documents/21087991-jeffrey-clark-draft-letter/#document/p1 [https://perma.cc/R5SP-RR74].

156. "In light of these developments, the Department recommends that the Georgia General Assembly should convene in special session so that its legislators are in a position to take additional testimony, receive new evidence, and deliberate on the matter consistent with its duties under the U.S. Constitution." *Id.* at 2.

> ensure that one of the slates of Electors cast on December 14 will be accepted by Congress on January 6.[157]

The avoision strategy was simple: use unsupported allegations of election fraud to justify the Georgia legislature sending two slates of electors to the Electoral College, giving Vice President Pence the opportunity to count the votes of the electors supporting President Trump when Congress convened on January 6, 2021.

The U.S. House January 6 Committee hearings revealed Trump's pressure on the Justice Department to approve this plan.[158] In the end, the letter was never signed and sent. Had this plot succeeded, a DOJ sworn to uphold the law would have destroyed the rule of law and perhaps democracy itself.

Such is election avoision.[159] The rules governing elections are among the most important rules that incumbent officeholders must observe when they run for re-election. Holders of public office don't get to stay in office simply because they find a way to use their power to stay in office and lawyers who will help them do it.

The role of the government lawyer presumably is to protect the government itself rather than help government actors get around the law. Trump's plan to use the Justice Department to help him overturn the election was a breach of duty by DOJ lawyers who participated in it. Their client was not Trump but the United States. Their client was the law.

F. Democracy Avoision

This Article now turns to avoision of the entire constitutional system. Emergency powers is where unique danger lies.

An expansive emergency-powers legal doctrine offends separation of powers and federalism. But that does not prevent presidents, on the advice of lawyers, declaring an "emergency" for the sake of expanding presidential power. When Congress refused to appropriate money that Donald Trump requested for a border wall, for example,

157. *Id.* at 2–3.

158. *Hearing on the January 6th Investigation: Hearing Before the Select Comm. to Investigate the January 6th Attack on the U.S. Cap.*, 117th Cong. 7–9 (2022) (statements of Jeffrey Rosen, Former Acting Att'y Gen.; Richard Donoghue, Principal Associate Deputy Att'y Gen.; Steven Engel, Assistant Att'y Gen.) (describing President Trump's efforts to coerce the Justice Department to declare the 2020 election invalid).

159. A Newsweek op-ed published in summer 2020 listed the many law-avoision strategies that Donald Trump had used before and after becoming president and predicted Trump's central goal in 2020: election avoision. *See* Richard W. Painter, *How Trump's Philosophy of Law "Avoision" Is Remaking the Political Right*, NEWSWEEK (Aug. 5, 2020, 2:53 PM), https://www.newsweek.com/how-trumps-philosophy-law-avoision-remaking-political-right-opinion-1523113 [https://perma.cc/T9ZQ-NNVU]. That of course is what happened after he lost the election.

the Justice Department told Trump he could lawfully divert funds Congress had appropriated for national defense to build the wall.[160] Trump invoked the National Emergencies Act (NEA) and issued a proclamation declaring a "national emergency" at the "southern border."[161] The Justice Department—siding with presidential law avoision[162]—insisted the NEA grants the President absolute discretion in determining whether an emergency exists and then to abrogate congressional appropriations powers to meet the "emergency."[163] With the support of the Justice Department, the federal government even invoked eminent domain to seize private property from landowners in the Rio Grande Valley for border-wall construction.[164]

Even more dangerous is emergency use of the military for law enforcement. The Posse Comitatus Act[165] prohibits the president from using federal troops inside the United States for law-enforcement purposes without consent of Congress. The Insurrection Act[166] is one of these exceptions and allows the president to use federal troops to suppress an insurrection. When presidents don't want to invoke the Insurrection Act, lawyers can sometimes find other loopholes that allow deployment of federal troops for domestic law enforcement. For example, in the summer of 2020, Justice Department lawyers told the Trump Administration that it could use National Guard units under command of the president instead of state governors for law enforcement under a provision in federal law that allowed federal "training" of the troops.[167] And, as the Author and Claire Finkelstein speculated, what would have happened, if on January 6, 2021,

160. Briefs for Defendants-Appellants at 41–48, Sierra Club v. Trump, 929 F.3d 670 (9th Cir. 2019) (No. 19-16102).

161. Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 20, 2019).

162. *See supra* notes 66–86 (discussing the Justice Department's role in executive-branch law avoision).

163. Fred Barbash, *Courts Have No Say in Trump's Border-Wall Decree, Justice Department Argues*, WASH. POST (Apr. 5, 2019, 5:50 PM), https://www.washingtonpost.com/world/national-security/courts-have-no-say-in-trumps-border-wall-decree-justice-department-argues/2019/04/05/d83f80a0-579d-11e9-9136-f8e636f1f6df_story.html [https://perma.cc/K498-SUGQ].

164. *Eminent Domain Along the Southern Border: Government Seizures of Private Property*, NAT'L IMMIGR. F. (July 26, 2019), https://immigrationforum.org/article/eminent-domain-along-the-southern-border-government-seizures-of-private-property/ [https://perma.cc/B7EM-4Q2W].

165. Posse Comitatus Act, 18 U.S.C. § 1385.

166. The Insurrection Act, 10 U.S.C. §§ 251–254.

167. Steve Vladeck, *Why Were Out-of-State National Guard Units in Washington, D.C.? The Justice Department's Troubling Explanation*, LAWFARE (June 9, 2020, 10:47 PM), https://www.lawfaremedia.org/article/why-were-out-state-national-guard-units-washington-dc-justice-departments-troubling-explanation [https://perma.cc/T3N2-TM3Q]; 32 U.S.C. § 502(f).

President Trump had decided to federalize the national guard not to stop the insurrection but to aid the rioters, halt the certification of the vote and keep himself in power?[168] Fortunately, the President did not take law avoision that far.

When a President does invoke the Insurrection Act the possibilities are limitless—and dangerous. Constitutional attorneys Bob Bauer and Jack Goldsmith summarized the potentially broad reach of the act, and the danger of its abuse, in a December 2023 op-ed in the *New York Times*:

> The president can, for example, deploy military force where states call [upon] federal assistance in quelling an "insurrection" or as the president "considers necessary" to enforce federal law against "obstructions," "combinations" or "assemblages" or [alternatively] to quell any "domestic violence" or "conspiracy" that impedes the enforcement of constitutional rights or even "the course of justice" under federal law.[169]

White House lawyers and Justice Department lawyers could use their avoision skills to concoct an "insurrection" by piecing together isolated incidents of social disorder around the country and then devise a legal justification for whatever measures the President chooses to deal with it. Lawyers who believe the President, rather than the law itself, is their client may have few reservations about finding a justification for this or other abuses on presidential power.

History tells us how such emergency powers can be abused, with catastrophic consequences. And lawyers steeped in avoision techniques were there to lend a helping hand.

In the Weimar Republic, constitutional law scholar Carl Schmitt argued that the sovereign was defined not by law but by politics. More specifically he argued that the executive branch, which was embodied in the President and the Chancellor of Germany (two separate offices although the President appointed the Chancellor), could rewrite the constitution to override checks and balances from the legislature, judges, or individual German states. The executive, Schmitt argued, was chosen by all the people of Germany and embodied the will of the people who existed prior to any constitutional document (the Weimar Constitution had only come into existence after World War I). For this reason, Schmitt argued that a sovereign who expresses the will of the

168. Claire O. Finkelstein & Richard W. Painter, *"You're Fired": Criminal Use of Presidential Removal Power*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 307, 370 (2023).

169. Bob Bauer & Jack Goldsmith, *Trump Is Not the Only Reason to Fix This Uniquely Dangerous Law*, N.Y. TIMES (Dec. 27, 2023), https://www.nytimes.com/2023/12/27/opinion/insurrection-act-congress-trump.html [https://perma.cc/QEY3-7C6Y].

people may set aside the legal and constitutional order.[170] In sum, the sovereign under Schmitt's theory was not the law, but the will of the people, which was embodied in the executive.[171]

So how did this theory work in practice?

Schmitt was not just a political philosopher; he was also a lawyer for the German government in the early 1930's. Schmitt advocated for an expansive interpretation of Article 48 of the Weimar Constitution,[172] a provision allowing the President of Germany to suspend civil liberties and use military force inside states that did not fulfill their obligations to the national government. By the early 1930's, Schmitt and proponents of executive power were winning much of this debate.

Then came a seminal 1932 case, *Reich v. Prussia*. The case was decided the year before Adolf Hitler came to power. On July 20, 1932, Field Marshall von Hindenburg, the Reich President, was concerned that a socialist-party-dominated government in the State of Prussia had lost control of street demonstrations by communists and other extremists. Hindenburg claimed authority under Article 48 to issue a decree "concerning the restoration of public safety and order in

170. CARL SCHMITT, THE CONCEPT OF THE POLITICAL (George Schwab trans., Univ. Chi. Press 2007) (1932). More broadly speaking, the jurisprudential question Schmitt posed was about the relationship between law and politics—a distinction that for the government lawyer is essential to the identity of the client. If law is so firmly rooted in politics that law is inseparable from politics, as Schmitt argued, then the lawyer should simply follow the directions of the political superior who by virtue of his office defines the law. *See id.* at 20–22.

171. *See generally* CARL SCHMITT, POLITICAL THEOLOGY 6 (George Schwab trans., Mass. Inst. Tech. 1985) (1922). In this book, Schmitt articulates the doctrine of "Sovereignty" with the opening line "Sovereign is he who decides on the exception." *Id.* at 5.

172. Article 48 provided: "§1 If a state fails to carry out the duties imposed upon it by the national constitution or national laws, the President of the Reich may compel performance with the aid of armed force. §2 If public safety and order be seriously disturbed or threatened within the German Reich, the President of the Reich may take the necessary measures to restore public safety and order; if necessary, with the aid of armed force. For this purpose he may temporarily suspend in whole or in part the fundamental rights enumerated in Articles 114, 115, 117, 118, 123, 124 and 153. §3 The President of the Reich must immediately communicate to the Reichstag all measures taken by virtue of Paragraph 1 or Paragraph 2 of this Article. On demand of the Reichstag these measures must be abrogated. §4 If there be danger in delay, the state ministry may, for its own territory, take such temporary measures as are indicated in Paragraph 2. On demand by the President of the Reich or by the Reichstag such measures shall be abrogated. Detailed regulations shall be prescribed by a national law."

DIE VERFASSUNG DES DEUTSCHEN REICHS [CONSTITUTION] Aug. 11, 1919, art. 48 (Ger.).

the . . . Land of Prussia."[173] He declared the Chancellor of Germany, Franz von Papen, to be the commissioner of Prussia, in effect supplanting the elected government there, and instructed von Papen to take over governing Prussia with the support of General von Schleicher, the Minister of Defense.[174] Prussia objected, and the case came before the Supreme Court in Leipzig which had to rule on the legitimacy of this 'Preussenschlag' of July 1932. Schmitt represented the President and Chancellor. Opposing counsel was Herman Heller (1891–1933), a legal theorist of Jewish heritage.[175]

Article 48 allowed the Reichstag to nullify the President's declaration of emergency under Article 48.[176] To avoid having to deal with the Reichstag, Schmitt argued that the President could exercise that same emergency power for up to sixty days after dissolving the Reichstag, unchecked because the Reichstag was not in session. The consent of the cabinet still was required for the President to exercise emergency authority under the statutes implementing Article 48, and the cabinet, while appointed by the President, served with the consent of the Reichstag. But if the Reichstag was not in session, the cabinet could not be removed either. Schmitt had found a loophole in the constitutional structure and helped President von Hindenburg exploit it to advance Schmitt's own vision of executive power.[177]

The Supreme Court of Germany largely let him get away with it. Historian David Dyzenhaus writes:

> The middle ground the court sought was to maintain the Prussian government in its place as far as its external relations with federal institutions were concerned, while giving control of the internal affairs of Prussia to Papen until such time as order was restored. That the court preserved Prussia's place in the federal structure was a blow to Papen and Schmitt. But the gift of its internal machinery of government to Papen was a significant victory, which is why Michael Stolleis, Germany's leading legal historian, calls the decision a 'milestone in the constitutional history of the downfall of the

173. David Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons?*, 91 AM. POL. SCI. REV. 121, 121 (1997).

174. *Id.*

175. "The case had been framed by a debate starting in 1929 between Schmitt and Hans Kelsen (1881-1973), also of Jewish origin and the leading legal philosopher of the previous century, about which institution should be the 'guardian of the constitution'." David Dyzenhaus, *Lawyer for the Strongman*, AEON (Jun. 12, 2020), https://aeon.co/essays/carl-schmitts-legal-theory-legitimises-the-rule-of-the-strongman [https://perma.cc/XU5Q-KLL6].

176. Die Verfassung des Deutschen Reichs [Constitution] Aug. 11, 1919, art. 48, § 4 (Ger.).

177. Dyzenhaus, *supra* note 175.

> Republic'. That the court gave the stamp of legality to an executive seizure of power in 1932 by the aristocratic Right in Germany laid the foundation for Hitler's more dramatic seizure of power the following year and for the claim that the Enabling Act of 1933, by which a thoroughly intimidated Reichstag handed him supreme and unlimited legislative power, was perfectly legal.[178]

We know where this iteration of executive power ended. Schmitt joined the Nazi Party in 1933.[179]

This tragedy for Schmitt had its roots in his flawed concept of the sovereign who was his client when he represented the federal government of Germany in *Reich v. Prussia*. He had rejected the law as sovereign and substituted in its place the executive as sovereign because he believed the executive embodied an abstract "will of the people." When an eighty-five-year-old President Hindenburg appointed Adolf Hitler as chancellor in January 1933, it was all over. The Weimar Constitution for all practical purposes was dead by the middle of that same year.[180]

This Article is not about emergency powers in the United States, nor the loopholes in our laws that might allow an American president to manufacture an excuse to use military force for domestic law enforcement, to crush political opponents, or to redo an election he lost.[181] This Article is about lawyers—avoision lawyers—who help powerful government officials get around the law. But a lawyer who can use the legal levers of the Justice Department to justify torture, as happened in 2003, or who can devise a scheme for the Justice Department to stop the counting of the electoral votes for president, as almost happened in late 2020 and early 2021, can also devise a scheme like Carl Schmitt's to find a constitutional basis for use of emergency powers so extreme that it brings an end to democracy itself.

178. *Id.*

179. *See* THE OXFORD HANDBOOK OF CARL SCHMITT 8–9 (Jens Meierhenrich & Oliver Simons, eds., 2016).

180. *See Strongman*, *supra* note 175.

181. *See* Claire O. Finkelstein & Richard Painter, *Invoking Martial Law to Reverse the 2020 Election Could be Criminal Sedition*, JUST SEC. (Dec. 22, 2020), https://www.justsecurity.org/73986/invoking-martial-law-to-reverse-the-2020-election-could-be-criminal-sedition/ [https://perma.cc/U63N-7V7X] (discussing President Trump's White House meeting with Michael Flynn and others discussing a proposal to send the military into some states to redo the 2020 election).

V. ANSWERING AVOISION WITH A GOVERNMENTWIDE OFFICE OF PROFESSIONAL RESPONSIBILITY

This Article underscores the urgency of shifting the ideology of the legal profession away from avoision, at least for government lawyers. Avoision is a philosophy that sees government as the enemy and legal representation as a cat-and-mouse game between private citizens and the government. Public servants, however, are not private citizens. They work for the government. Avoision puts government at war with itself.

Government lawyers who engage in avoision thus breach their fundamental duty of loyalty to their client. They undermine the law while purporting to represent the law.

This Part explores an answer to avoision. That answer comes in two parts. The first is changing substantive law to close loopholes that allow for abuse of power, strengthening checks and balances and other oversight mechanisms, and enhancing law enforcement so avoision inside government is easier to detect and correct. This is a broad topic covering subjects as diverse as holding the executive branch accountable for criminal acts,[182] ethics reform in Congress,[183] and the ethics of the Supreme Court.[184]

The second part of the answer to avoision is strengthening oversight of government lawyers to assure accountability when avoision schemes cross the line into illegality. This is the principal focus of this Article. Whatever changes are made to substantive law and to the checks and balances in government, government lawyers are the gatekeepers. Government lawyers who exploit loopholes in the law to get around the law will undermine whatever substantive law reforms are put in place, unless their avoision techniques too are curtailed. We must change how government lawyers practice law.

First and foremost, government lawyers need a clear understanding of who their client is. They should not go down the path of Carl Schmitt and embrace raw political power as their client. The fact that Presidents and Members of Congress are elected by the people does not give them license to do anything they want on the pretext that they are fulfilling the will of the voters. The sovereign is not the President or even Congress. The Supreme Court is not the sovereign even though the Court interprets the law. The sovereign is the Country, its Constitution, and the laws thereunder. The sovereign is the law itself.

182. *See, e.g.*, Finkelstein & Painter, *supra* note 79.

183. *See, e.g.*, Part IV (discussing "Avoision in Congress" and possible reforms, including banning conflicts of interest from congressional stock trading).

184. *See* Painter, *supra* note 103 (discussing advantages of installing an inspector general at the Supreme Court).

For the government lawyer, the principle of client loyalty means loyalty to the law. Zealous representation of the client means zealous adherence to the law and defense of the law against all persons, inside and outside the government, who would distort the law to their will.

There should be a government-wide Office of Professional Responsibility (OPR) to oversee the work of government lawyers and make sure they remain loyal to their client. Such a lawyer-focused OPR would be different from the existing "office of professional responsibility" in some federal agencies that is responsible for the professionalism of all agency employees.[185]

The OPR would be analogous to the U.S. Office of Government Ethics (OGE) that is charged with overseeing ethics compliance by all executive-branch employees. Executive-branch lawyers are subject to statutes and OGE ethics rules governing all federal employees,[186] but they also have the special obligations that lawyers owe to their clients, including the duty to loyally represent the United States and its laws. Congress has specifically provided that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."[187] Articulating how these ethics rules apply in the context of representing the government would be the task of a government-wide OPR.

The government-wide OPR would help mitigate the ideology of avoision and other misconduct among government lawyers. The OPR would emphasize to all government lawyers their duty to distinguish between the interests of a political superior who might want to bend the law, and the interests of the government in defending the rule of law. The OPR could insist that lawyers who are not willing to represent the government loyally and diligently in a particular matter do not participate in that matter. Government lawyers could even be

185. *See, e.g.*, *Office of Professional Responsibility*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/about/leadership-organization/professional-responsibility [https://perma.cc/JL2G-3T79] (Mar. 29, 2024) (describing an office "responsible for ensuring compliance with Agency-wide programs and policies relating to corruption, investigating criminal and serious misconduct or mismanagement allegations, and executing CBP's internal security and integrity awareness programs").

186. *See, e.g.*, 5 U.S.C. app. § 102 (contents of financial disclosure reports); 18 U.S.C. § 207(a)(1) (post government employment restrictions); 18 U.S.C. § 208(a) (financial conflicts of interest for executive branch employees); 5 C.F.R. § 2635.502(a)–(b) (2024) (impartiality rule prohibiting favoritism toward, among others, former employers of a government officials). Interpretation and application of these and other ethics rules for federal employees is within the purview of OGE.

187. 28 U.S.C. § 530B(a) (for federal government lawyers engaged in their duties in the District of Columbia, this would mean they must comply with the District of Columbia Rules of Professional Conduct).

required to take an oath that they would uphold the law despite directives from a political superior that are contrary to the law.

The Justice Department currently has an Office of Professional Responsibility (DOJ OPR)[188] that addresses lawyer conduct, but most federal agencies do not have a similar office. The DOJ OPR also is not fully effective because senior DOJ officials can overrule its determinations on matters of professional ethics. This is exactly what happened in the case of the OLC torture-memo lawyers who, despite the recommendations of the DOJ OPR,[189] were not referred by the DOJ for professional discipline.[190] An effective OPR overseeing the DOJ, or any other agency should be an independent entity having the power and responsibility to make determinations on matters of professional ethics binding on all government lawyers. Senior officials within an agency should not have the power to overturn OPR determinations of professional responsibility.

Because the DOJ model of having a separate OPR existing solely within one agency is too malleable to influence by political superiors in the agency, and the likelihood of its determinations being overruled, it is probably better to use the OGE model and have a single OPR for the executive branch. Legal-ethics lawyers in each agency could be assigned to coordinate with the OPR. It should be emphasized that the focus of a federal OPR would only be the professional responsibility of lawyers representing the government, not the ethics of other federal officers who often are not lawyers. OGE, agency inspectors general, and, in appropriate cases, the Public Integrity Section in the Criminal Division of the Justice Department, should continue to oversee the propriety and legality of agency operations overall. The OPR would focus on government lawyers.

188. *See Office of Professional Responsibility*, U.S. DEP'T JUST., https://www.justice.gov/opr [https://perma.cc/M8HR-CCKG] (last visited Feb. 20, 2024).

189. *See* U.S. DEP'T JUSTICE, OFF. PRO. RESP., INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 236, 251–52 (2009) (finding that OLC lawyers John Yoo and Jay Bybee engaged in professional misconduct because they had failed to provide "thorough, objective, and candid" analysis in the memoranda concerning interrogation of suspected terrorists). OPR indicated an intent to refer the matter to the bar disciplinary authorities in the states where Yoo and Bybee were licensed.

190. *See* DAVID MARGOLIS, U.S. DEP'T JUSTICE, MEMORANDUM OF DECISION REGARDING THE OBJECTIONS TO THE FINDINGS OF PROFESSIONAL MISCONDUCT IN THE OFFICE OF PROFESSIONAL RESPONSIBILITY'S REPORT OF INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 68 (2010) (overruling OPR's determination and finding that the torture memos showed "poor judgment" instead of a violation of rules of professional conduct).

The effectiveness of this proposal of course turns on the President not having and abusing the power to fire the head of the OPR or other government watchdogs, such as agency inspectors general, the head of the Office of Special Counsel, and the Director of OGE. Such abuse of presidential removal power is beyond the scope of this Article, but it is a matter of serious concern.

Congress could do the same and have an OPR to monitor the conduct of lawyers who advise Members and committees. Both Houses of Congress already have ethics committees to oversee the Members themselves (reform of Congressional ethics is badly needed but beyond the scope of the remedies proposed in this Article). The focus of an OPR would be on lawyers representing Congress. Improvement in the professionalism of congressional lawyers might have a spillover effect and improve the ethics of Members. The Supreme Court also should have an ethics lawyer, and perhaps an inspector general (this also is a topic beyond the scope of this Article).[191]

States should have an OPR to oversee the work of lawyers employed by state and local governments. Individual ethics lawyers employed by each governmental subdivision or agency could coordinate with a statewide OPR to provide legal-ethics guidance tailored to the work done in each subdivision or agency of the state government. Although state-bar disciplinary authorities and courts would be the adjudicator of whether rules of professional conduct were adhered to, an OPR for state-government lawyers could provide useful interpretive guidance.

A government-wide OPR should follow the model of state-bar advisory opinions and issue advisory opinions for government lawyers on specific ethics issues that arise regularly. While the ABA Model Rules of Professional Conduct are a useful baseline, the function of OPR would be to interpret and apply lawyers' ethics rules in the context of government law practice. Only a few of the ABA Model Rules are specific to government practice,[192] and generally applicable ethics rules, for example Rule 1.13 (Organization as Client) should be interpreted from the perspective of the government as client. A government OPR can provide such helpful context.

In situations where government lawyers are found to have breached their professional obligations, OPR should issue a report, as would a state-bar disciplinary authority. In some cases, a private reprimand would be appropriate if there is a finding of wrongdoing, but in more serious cases the findings of a government OPR should be public. Public disclosure of specific cases of government-lawyer

191. *See* Painter, *supra* note 103, at 47–48 (proposing an ethics lawyer and an inspector general for the Supreme Court).

192. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2023) (illustrating special responsibilities of the prosecutor).

misconduct serves two purposes. First, other government lawyers learn from these cases and hopefully avoid similar misconduct themselves. Second, public disclosure of government-lawyer misconduct is a deterrent. The most senior lawyers in federal agencies often are political appointees who move in and out of private-sector employment. If they know that distorting or ignoring the law to suit the will of a political superior in a government agency could lead to a public reprimand, they might think twice before allowing themselves to be used in this manner. In appropriate circumstances, the OPR should make referrals to state bars for lawyer discipline. In rare circumstances, the OPR should make criminal referrals. Criminal accountability is an important remedy when government lawyers clearly cross the line into criminal conduct.

An important function of a federal OPR also would be to push back on the abnegation theory by which government lawyers disavow responsibility for client conduct. There is no statutory or other legal principle embracing this theory to shield a government lawyer from responsibility for participating in or advising government actions. The lawyer is also an officer in the agency and cannot so easily divorce his own actions from those of the agency. Lawyers will be responsible for agency malfeasance in some instances more than others, but the inquiry in each case needs to focus on the facts of that case, not an abstract theory about lawyers' conduct being severable from the conduct of their clients. A federal OPR would conduct such a fact-based inquiry and make its recommendations accordingly.

Yet another professional norm that a federal OPR should reinforce is a lawyer's duty to communicate within a client organization. The requirement that lawyers report wrongdoing "up-the-ladder" of a public company is incorporated in Securities and Exchange Commission rules under Section 307 of the Sarbanes-Oxley Act of 2002,[193] and similar up-the-ladder reporting is required under ABA Rule 1.13 for lawyers representing any type of organization.[194] Reporting up by lawyers in a government agency weakens the "Sergeant Schultz" defense[195] for officials at the top. High-ranking government officials will find it a lot harder to plead ignorance of wrongdoing if lawyers for the organization are required to tell them about evidence of wrongdoing beforehand.

193. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6305–06 (Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205).

194. MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR. ASS'N 2020).

195. *See supra* text accompanying note 21 (discussing the Sergeant Schultz defense).

CONCLUSION

A central problem with avoision inside the government is conceptual: the failure of government lawyers to recognize that they are sworn to uphold the law. The client is the sovereign, and the sovereign is defined by the law.[196] The government lawyer may think the client instead is a political superior, or a political agenda reflected in the will of the voters. This is wrong. If the client is perceived to be one of these, the lawyer feels justified in using avoision strategies to fight against the sovereign, against the rule of law. The lawyer is attacking the lawyer's client and is helping others to attack the client. The lawyer who is successful at avoision could even destroy the client by destroying the rule of law itself.

196. U.S. CONST. art. VI, cl. 2 (providing that the Constitution, the laws of the United States and all treaties made "shall be the supreme law of the land").