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LAWYERS' DEMOCRATIC DYSFUNCTION

*Leah Litman**

ABSTRACT

As part of the symposium on Jack Balkin and Sandy Levinson's Democracy and Dysfunction, this Article documents another source of the dysfunction that the authors observe—elite lawyers' unwillingness to break ranks with other elite lawyers who participate in the destruction of various norms that are integral to a well-functioning democracy. These network effects eliminate the possibility of "soft" sanctions on norm violators such as withholding future professional advancement. Thus, rather than enforcing norms and deterring norm violations, the networks serve to insulate norm violators from any meaningful accountability.

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I. INTRODUCTION

Something is rotten in the United States.¹ Over the last several years, academics and commentators from across the political spectrum have expressed varying degrees of concern about the health of the U.S. political system.² Sandy Levinson and Jack Balkin's recently released book,

Democracy and Dysfunction, makes clear that the authors also harbor significant

* Assistant Professor of Law, University of Michigan Law School. Thanks to Don Herzog, Sandy Levinson, and David Pozen for helpful comments and conversations, and to Widad Diab (University of California, Irvine School of Law), Jared Looper (University of Michigan Law School), and Thomas Multari (University of California, Irvine School of Law) for helpful research assistance.

1. Cf. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 4.

2. See generally Aziz Huq & Tom Ginsburg, *How We Lost Constitutional Democracy*, in *CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA* 135 (Cass R. Sunstein ed., 2018); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* 78, 105–06 (2018); Richard Primus, *The Republic in Long-Term Perspective*, 177 *U. MICH. L. REV. ONLINE* 1, 22–23 (2018).

misgivings, if not fears, about the state of our constitutional republic.³

Democracy and Dysfunction documents Levinson and Balkin's correspondence over a period of several years, spanning the lead up to and first year of the Donald J. Trump presidency. The exchanges between the two focus primarily on diagnosing our constitutional system's ailments, although some cover possible solutions.⁴ Levinson maintains that much of our political dysfunction is attributable to the Constitution itself.⁵ He explains that the Constitution's systems for apportioning representation in the Senate and choosing presidents are both deeply undemocratic and skew political incentives in nefarious ways.⁶ Balkin, on the other hand, focuses more on subconstitutional defects, such as the difficulty of voting in the United States as well as the structure of mass media.⁷

In this short symposium piece, I suggest there is another contributing force to the kinds of dysfunction that both of the authors observe. My addition is a friendly amendment to Balkin and Levinson's diagnoses because the dynamic I describe could facilitate dysfunction that is attributable to the Constitution itself or to subconstitutional forces. The dynamic relates to a point that Levinson made in one of the authors' exchanges. Levinson wrote: "I supported the filibuster of Justice Gorsuch's nomination to the Supreme Court, even as I knew it would be fruitless, because I saw no reason for the Democrats to be 'good sports' with regard to stealing the seat that might well/should have gone to Merrick Garland."⁸

This passage is illuminating because it conveys Levinson's fear that the Democrats will collaborate with President Trump and be "good sports" when it comes to judicial nominations. Levinson seems to view his own hope that Democrats will not cooperate as evidence of a defect in our constitutional order: "[T]he Constitution makes it so very difficult to achieve a genuine governing

3. SANFORD LEVINSON & JACK M. BALKIN, *DEMOCRACY AND DYSFUNCTION* 2 (2019).

4. Balkin and Levinson suggest many different categorizations for antidemocratic trends, including constitutional rot and constitutional crises. *Id.* at 73–82, 106–13 (distinguishing constitutional rot from constitutional crisis).

5. *See id.* at 2.

6. *Id.* at 12–13, 45–50. This point is in keeping with Levinson's previous work. *See generally* SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (2d ed. 2011); CYNTHIA LEVINSON & SANFORD LEVINSON, *FAULT LINES IN THE CONSTITUTION: THE FRAMERS, THEIR FIGHTS, AND THE FLAWS THAT AFFECT US TODAY* (2017); SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

7. *See* LEVINSON & BALKIN, *supra* note 3, at 29, 51–53.

8. *Id.* at 121.

coalition that can, well, govern.”⁹

I think this passage calls to mind something else—the inability of social and professional networks, and particularly elite lawyers, to hold their members accountable for facilitating the breakdown of norms that are integral to our constitutional system. Although political polarization makes it difficult for legislators to cooperate across the aisle, the network of elite lawyers still finds common ground with one another. This group likes to be “good sports” with one another.¹⁰ Elite circles of the legal profession seem deeply uncomfortable with doing anything that might hold other elite lawyers accountable for their disregard of various norms or principles. And the legal network’s unwillingness to hold its members accountable for breaching these norms partially contributes to the kind of dysfunction that Levinson and Balkin observe.¹¹

Consider some of the norms that the authors maintain are important to a functional system of constitutional governance: norms of political participation (such as allowing political opponents to vote) and norms related to political responsiveness (such as allowing the winners of an election to assume power or ensuring elections remain sufficiently democratic and responsive to the popular will).¹² Levinson and Balkin express concern about antidemocratic measures, such as voter suppression, that undermine these norms.¹³

Various elite lawyers have participated in these antidemocratic measures, and the network of elite lawyers has been unwilling to sanction them for it. That unwillingness eliminates one possible mechanism for upholding and enforcing these norms and others like them. The elite network’s discomfort with holding its members accountable for breaching norms shares some parallels with the parallel and overlapping phenomenon of being uncomfortable with calling someone a racist or with identifying racial discrimination by name.¹⁴ The hesitation to call someone or something racist sometimes stems from a feeling that calling someone a racist is as bad as being racist.¹⁵ It is a strange idea, but it shows up in media

9. *Id.* at 122.

10. I will focus, in this Article in particular, on elite lawyers who identify as progressive being good sports.

11. This claim does not depend on the legal force of the arguments for or against breaking a particular norm or whether a particular action is legal or illegal. It focuses more on whether a lawyer is advocating for a course of conduct that is destructive to the functioning of a political democracy (such as suppressing votes) or is immoral (such as separating families to cause pain).

12. See LEVINSON & BALKIN, *supra* note 3, at 70–73.

13. See, e.g., *id.* at 136–37.

14. John Blake, *The Polite Way to Call Someone a Racist*, CNN (Sept. 29, 2018), <http://cnn.com/2018/09/29/us/polite-racism/index.html> [<https://perma.cc/K5FH-KEKS>].

15. *Id.*

coverage, which often describes racism as racially tinged rather than as racist.¹⁶ It appears in politics, where leaders balk at criticizing other politicians for being racist.¹⁷ And it has shaped legal doctrines as well, including courts' reluctance to say that government decisionmakers have acted on the basis of racism.¹⁸

Both the discomfort with holding elite lawyers accountable for participating in the breakdown of important norms and the discomfort with identifying racists result in a zone of unaccountability.¹⁹ When social or professional networks refuse to hold their members accountable for their actions, the networks lose the ability to function as meaningful safeguards against the breakdown of norms.²⁰ If anything, the existence of these networks makes it more difficult to protect the relevant norms—since the

networks make it difficult to criticize people within the network who violate the norms.²¹

The phenomenon of elite loyalty relates to the problem of political polarization that Balkin and Levinson write about.²² The two phenomena are similar insofar as political polarization makes it harder for the member of one political camp to reject a political ally who participated in the destruction of a norm.²³ But the two phenomena are different because political polarization does

16. Julia Craven, *Media Euphemisms for 'Racist' Are Stupidly Tinged*, HUFFINGTON POST (Jan. 12, 2018), https://www.huffpost.com/entry/media-trump-shithole-racist_n_5a58f0dee4b04f3c55a23a07?guccounter=1 [<https://perma.cc/T9YD-7HC6>]; Marina Fang, *Journalists Should Call Something Racist When It's Racist, Associated Press Says*, HUFFINGTON POST (Mar. 29, 2019), https://www.huffpost.com/entry/journalism-racist-racism-reports_n_5c9e6245e4b0bc0daca861d7 [<https://perma.cc/3ZLA-R699>].

17. Paul Kane & Ed O'Keefe, *Republicans Vote to Rebuke Elizabeth Warren, Saying She Impugned Sessions's Character*, WASH. POST (Feb. 8, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/02/07/republicans-vote-to-rebuke-elizabeth-warren-for-impugning-sessionss-character/>; Jessica A. Levinson, *Snow White Was Flawed, and Other Truths About Rep. Ilhan Omar*, HILL (Aug. 19, 2019), <https://thehill.com/opinion/white-house/457938-snow-white-was-flawed-and-other-truths-about-rep-ilhan-omar> [<https://perma.cc/H5FX-DCDD>].

18. See *infra* text accompanying notes 98–108.

19. See *infra* text following note 29 for definition.

20. See Fang, *supra* note 16.

21. See Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 959 (2018).

22. See *id.* at 958–59.

23. Political polarization makes the idea of giving the opposing political side a win—and

not explain why individuals who identify with the opposite political party are unwilling to criticize a person who facilitated the breakdown of a norm.²⁴ That behavior, instead, might plausibly be attributable to the network effects of belonging to a particularly small subset of the lawyerly community.²⁵ Being a member of the small group of elite lawyers leads to familiarity with other members of the group, which makes it harder to view those fellow members as a destructive force in the world. Familiarity and insularity raise the stakes of uncomfortable dynamics within the group, and being a member of a network facilitates codependence on other network members and even an expectation of reciprocated loyalty. Together, these incentives create professional and personal pressures to stick by other members of the elite network of lawyers, including lawyers who have facilitated the destruction of important constitutional norms and thereby undermined a healthy, democratic constitutional order.²⁶

Part II of this Article lays the groundwork for the idea that lawyers who participate in the destruction of important constitutional norms or principles will never face meaningful accountability from other lawyers. Part II discusses the case study of former officials in the George W. Bush Administration who participated in the now-discredited enhanced interrogation (i.e., torture) program. Part III shows something similar is already happening with the Trump Administration officials who participated in the forced separation of families.²⁷ There are already ongoing efforts to rehabilitate those officials, and in some cases, the lawyers involved in the program have already been promoted to other jobs.²⁸ These case studies suggest that the community of elite lawyers is either unwilling or unable to discipline members for participating in the breakdown of our constitutional order.²⁹ (For purposes of this Article, *discipline* or *sanction* means only withholding certain future government appointments and promotions from the lawyers—not imposing criminal sanctions or removing them from their current jobs or pursuing actions such as disbarment. Discipline or sanction might involve some degree of social shunning to the extent

abandoning someone on one's own political team—less appealing than it would be in a world without political polarization. See generally Jay J. Van Bavel & Andrea Pereira, *The Partisan Brain: An Identity-Based Model of Political Belief*, 22 TRENDS COGNITIVE SCI. 213 (2018).

24. Cf. *id.* at 214–15.

25. See Thomas Baumgartner, Lorenz Götte, Rahel Gügler & Ernst Fehr, *The Mentalizing Network Orchestrates the Impact of Parochial Altruism on Social Norm Enforcement*, 33 HUM. BRAIN MAPPING 6, 1453 (2011) (outlining the phenomenon of *parochial altruism*, which the authors define as “a preference for altruistic behavior towards ingroup members”).

26. See *id.* at 1467; see also Pozen & Fishkin, *supra* note 21, at 923.

27. See *infra* Part III.

28. See *infra* Part III.

29. See *infra* Parts II, III.

that withholding public support counts as social shunning. But here, the terms refer only to withholding certain governmental appointments that amount to promotions.) Part IV concludes with some reflections about how this ethos of unaccountability appears in constitutional jurisprudence and why it is destructive to our constitutional order.

The important point is not whether the specific decisions the lawyers made or the policies they defended are lawful or were lawful. Some perfectly lawful policies might nonetheless be morally abhorrent and destructive to a functional system of governance. Restricting the franchise and suppressing voter turnout might be legal (at least in some instances), but it is nonetheless antidemocratic. The President asking a foreign government to investigate a political opponent in order to politically and personally benefit the President (particularly when the country needs U.S. foreign aid or military assistance) may or may not violate federal election laws,³⁰ but it is nonetheless deeply antithetical to a functioning system of government. Asking only whether something is illegal minimizes the potential stakes and obscures equally significant—if not more significant—issues.

II. ENHANCED INTERROGATIONS

In response to the terrorist attacks on September 11, 2001, the Bush Administration launched several morally and legally dubious programs.³¹ Among them were the Administration's use of so-called enhanced interrogation techniques on detainees who were held at Abu Ghraib prison or at various black sites outside of the United States.³² At the time, human rights experts argued that the enhanced interrogation techniques met accepted definitions of torture under international

30. See Letter from Whistleblower to Sen. Richard Burr, Chairman, Select Comm. on Intelligence, and Rep. Adam Schiff, Chairman, Permanent Select Comm. on Intelligence (Aug. 12, 2019), https://intelligence.house.gov/uploadedfiles/20190812_-_whistleblower_complaint_unclass.pdf [<https://perma.cc/263C-PNZP>] [hereinafter Letter from Whistleblower]; see also Memorandum of Telephone Conversation Between President Trump, U.S., and President Zelenskyy, Ukr. (July 25, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf> [<https://perma.cc/69YS-TGYP>].

31. Amna Akbar & Rupal Oza, "Muslim Fundamentalism" and Human Rights in an Age of Terror and Empire, in GENDER, NATIONAL SECURITY AND COUNTER TERRORISM: HUMAN RIGHTS PERSPECTIVE 152 (Margaret L. Satterthwaite & Jayne C. Huckerby eds., 2013); Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834, 842–44 (2015); Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 383 (2016); Shirin Sinnar, Note, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN. L. REV. 1419, 1420–21 (2003).

32. S. Rep. No. 113-288, at 97, 133–34, 175 n.1054 (2014).

law; they also criticized the programs on moral grounds.³³ Scores of lawyers were involved in these programs: They developed the legal justifications and defenses for enhanced interrogation, including bolstering the questionable idea that torture generates reliable information.³⁴

Around the time that the programs were discovered, and especially after the justifications for the programs were discredited with the benefit of hindsight, there were calls to sanction the officials involved. Websites argued that the lawyers involved in the program should be prosecuted or disbarred.³⁵ Op-eds in major newspapers maintained that they “corrupted the law . . . g[a]ve cover to existing and plainly illegal policies,” and “authorized unspeakable acts.”³⁶ Other op-eds called for the lawyers to be prosecuted,³⁷ disbarred,³⁸ or shunned by “Congress,

33. Curtis Bradley, *The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy*, 4 DUKE J. CONST. L. & PUB. POL'Y 57, 71–72 (2009); Michael P. Scharf, *International Law and the Torture Memos*, 42 CASE W. RES. J. INT'L L. 321, 345, 447 (2009); *Those Who Authorize and Use CIA “Enhanced” Interrogation Tactics Risk Criminal Prosecution*, PHYSICIANS HUM. RTS. (Aug. 2, 2007), <https://phr.org/news/those-who-authorize-and-use-cia-enhanced-interrogation-tactics-risk-criminal-prosecution/> [<https://perma.cc/PBP6-QDTF>].

34. See *infra* text accompanying notes 47–56 (describing Justice Neil Gorsuch's role in legitimating and legalizing the Bush Administration's torture regime).

35. See Kenneth J. Theisen & Stephanie Tang, *The Truth About Torture: Why John Yoo Should Be Fired, Disbarred, and Prosecuted*, WORLD CAN'T WAIT!, <http://www.worldcantwait.net/index.php/97-organizers/kenneth-theisen/5767-the-truth-about-torture-why-john-yoo-should-be-fired-disbarred-and-prosecuted> [<https://perma.cc/9T6J-6QQ2>].

36. *There Were Orders to Follow*, N.Y. TIMES (Apr. 4, 2008), <https://www.nytimes.com/2008/04/04/opinion/04fri1.html?scp=9&sq=%22John+C.+Yoo%22&st=nyt>.

37. Will Bunch, *Pa. Must Disbar War Criminal John Yoo—NOW!*, PHILA. INQUIRER (May 7, 2009), https://www.philly.com/philly/blogs/attytood/Pennsylvania_and_Yoo_NOT_perfect_together.html; N.Y. Times Editorial Bd., *Prosecute Torturers and Their Bosses*, N.Y. TIMES (Dec. 21, 2014), <https://www.nytimes.com/2014/12/22/opinion/prosecute-torturers-and-their-bosses.html>; Steve Sheppard, *How the Torture Lawyers Broke the Law, and Why They Must Be Punished*, FINDLAW (Mar. 1, 2010), <https://supreme.findlaw.com/legal-commentary/how-the-torture-lawyers-broke-the-law-and-why-they-must-be-punished.html> [<https://perma.cc/2BHK-GM8N>]; Jon Wiener, *Prosecute John Yoo, Says Law School Dean Erwin Chemerinsky*, NATION (Dec. 12, 2014), <https://www.thenation.com/article/prosecute-john-yoo-says-law-school-dean-erwin-chemerinsky/> [<https://perma.cc/B6H5-BH5C>].

38. Sam Stein, *Lawrence Wilkerson: Disbar the Bush Lawyers and Get a Special Prosecutor for the Rest*, HUFFINGTON POST (May 28, 2009), https://www.huffpost.com/entry/lawrence-wilkerson-disbar_n_191755 [<https://perma.cc/Q4CP-XXNG>].

university administrators, and bar associations” going forward.³⁹

But none of that ever happened. Instead, officials who held various roles in the torture program went on to obtain more powerful and more insulated positions in government, often with the support of elite Democratic lawyers. Consider the case of Judge Jay Bybee. Bybee was an Assistant Attorney General who authored a memo arguing that enhanced interrogation techniques did not amount to torture unless the officer using enhanced interrogation specifically intended to cause physical pain that is the “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”⁴⁰ The memo also maintained that Congress could not criminalize torture because the President’s powers as Commander in Chief gave the President the constitutional authority to torture people in some circumstances.⁴¹

There were calls to punish Bybee for his role in authorizing the extreme and cruel treatment of detainees.⁴² But a year after he authored the memo, Bybee was nominated to be a judge on the U.S. Court of Appeals for the Ninth Circuit, and

39. Paul Campos, *How to Torture the Bush Six*, DAILY BEAST (July 14, 2017), <https://www.thedailybeast.com/how-to-torture-the-bush-six> [<https://perma.cc/QB7Z-3GU9>].

40. Memorandum from the Office of the Attorney Gen. to Alberto R. Gonzales, Counsel to the President 1 (Aug. 1, 2002) [hereinafter Memorandum from the Office of the Attorney Gen.], <https://www.justice.gov/olc/file/886061/download> [<https://perma.cc/8YKE-YMNN>]; *On the Nomination PN4: Jay S. Bybee, of Nevada, to be United States Circuit Judge for the Ninth Circuit*, GOVTRACK (Mar. 13, 2003) [hereinafter *On the Nomination PN4*], <http://www.govtrack.us/congress/votes/108-2003/s54> [<https://perma.cc/82AE-347W>].

41. Memorandum from the Office of the Attorney Gen., *supra* note 40, at 31–39.

42. Martin Garbus, *Disbar the Judge and the Lawyers*, HUFFINGTON POST (Dec. 29, 2014), https://www.huffpost.com/entry/disbar-alberto-gonzales-torture-memos_b_6391986?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAAE1FgDszBjN36j6MzaIWoj-RGUqsDW9xoewSwWcrWcCA sTQ8DIBaJ2MkJO0VRXgG7xA5XTayzirOQtu1rp9EbMAxYswchwGJ-hknsaoW02 OZJDZjZ24levr23BrQ7XxBqhIdyBT6iT6WLouBaIA_va0IMrtT6Qec0S1wzfmritzP [<https://perma.cc/4F2X-9FRB>]; Hilzoy, *Disbar Them*, WASH. MONTHLY (May 6, 2009), <https://washingtonmonthly.com/2009/05/06/disbar-them/> [https://perma.cc/N88R-PG_NW]. Others called for him to be impeached. Bruce Ackerman, *Impeach Jay Bybee*, SLATE (Apr. 17, 2009), <https://slate.com/news-and-politics/2009/04/the-case-for-impeaching-jay-bybee.html> [<https://perma.cc/6FQ5-F6YS>]; Scott Horton, *Impeach Jay Bybee*, HARPER’S MAG. (Apr. 20, 2009), <https://harpers.org/blog/2009/04/impeach-jay-bybee/> [<https://perma.cc/BQP7-Q2PQ>]; John Nichols, *Begin by Impeaching the Torture Judge*, NATION (Apr. 19, 2009), <https://www.thenation.com/article/begin-impeaching-torture-judge/> [<https://perma.cc/SMW2-M42N>]; *The Torturers’ Manifesto*, N.Y. TIMES (Apr. 18, 2009), <https://www.nytimes.com/2009/04/19/opinion/19sun1.html?mtrref=undefined&gwh=CBB00CFD6179CDD5991BA821CF23D44D&gwt=pay>.

the Senate confirmed him by a 74–19 vote.⁴³ The “yea” votes included 26 Democratic senators, such as Senator Harry Reid (from Bybee’s home state of Nevada) and Senator Patrick Leahy, who was in charge of judicial nominations for the Democrats.⁴⁴ The Senate received several letters in support of Bybee’s nomination from self-identified Democrats; the letters often leveraged the authors’ progressive credentials in support of Bybee’s nomination.⁴⁵ The letter writers also stressed the authors’ membership in elite networks, such as academia.⁴⁶ Bybee received letters of support from Stuart Green, a self-identified “liberal Democrat and active member of the ACLU,”⁴⁷ and Democratic state senator Terry Care.⁴⁸ The law firm Latham & Watkins later provided Bybee free legal services to support his defense on ethics charges.⁴⁹

Bybee is not the only federal judge involved in the Administration’s response to September 11. Justice Neil Gorsuch handled all terror litigation for the office of the Assistant Attorney General in the Bush Administration.⁵⁰ In the course of that litigation, the office argued that the enhanced interrogation program was unchallengeable in court.⁵¹ During the

43. *On the Nomination PN4*, *supra* note 40.

44. Henry Weinstein, *Conservative Confirmed as 9th Circuit Judge*, L.A. TIMES (Mar. 14, 2003), <https://www.latimes.com/archives/la-xpm-2003-mar-14-me-bybee14-story.html>.

45. *See, e.g., Confirmation Hearings on Federal Appointments: Hearings Before the Comm. on the Judiciary U.S. Senate*, 108th Cong. 2–3 (2003) (statement from Orrin G. Hatch, Senator).

46. *See, e.g., Weinstein, supra* note 44.

47. *Confirmation Hearings on Federal Appointments: Hearings Before the Comm. on the Judiciary U.S. Senate, supra* note 45, at 2–3.

48. *Id.* at 195; *Sen. Terry Care*, NEV. APPEAL (Jan. 9, 2007), <https://www.nevadaappeal.com/news/sen-terry-care/> [<https://perma.cc/78X9-6CKX>] (explaining Nevada state Senator Terry Care).

49. Ian Millhiser, *Corporate Law Firms Give Torture Judge Jay Bybee Over \$3 Million in Free Legal Services*, THINKPROGRESS (Oct. 24, 2011), <https://thinkprogress.org/corporate-law-firms-give-torture-judge-jay-bybee-over-3-million-in-free-legal-services-ba1374e94eb0/> [<https://perma.cc/86HW-QXPP>]. Bybee was implicated in a 2009 report by the Office of Professional Responsibility, which could have resulted in his disbarment. Nick Baumann, *OPR: Torture Lawyers Guilty of “Professional Misconduct”*, MOTHER JONES (Feb. 19, 2010), <https://www.motherjones.com/crime-justice/2010/02/opr-torture-lawyers-guilty-professional-misconduct/> [<https://perma.cc/X24E-L5FD>]. However, the Department of Justice refused to adopt the conclusions of the report in 2010. *Id.*

50. Charlie Savage, *Neil Gorsuch Helped Defend Disputed Bush-Era Terror Policies*, N.Y. TIMES (Mar. 15, 2017), https://www.nytimes.com/2017/03/15/us/politics/neil-gorsuch-torture-guantanamo-bay.html?ref=politics&_r=0 [hereinafter Savage, *Gorsuch*].

51. They argued, “[C]ourts should not undertake ‘the task of balancing individual rights

course of his tenure in the Executive Branch, Gorsuch added a notation that torture works on a memo about the Administration's enhanced interrogation techniques⁵² and put a big *X* next to a note about whether the Administration should apply the Geneva protections against torture to persons who were detained in connection with the war on terror.⁵³ (The Administration would later unsuccessfully argue that the Geneva conventions should not apply to those detainees.)⁵⁴ And after visiting Guantanamo Bay, Gorsuch wrote a letter saying he was "extraordinarily impressed" with the facilities and that the generals have "developed standards and imposed a degree of professionalism that the nation can be proud of."⁵⁵

When Gorsuch was nominated to the Supreme Court, Neal Katyal, who argued and won one of the detainee-treatment cases, wrote an op-ed in the *New York Times*, urging the Senate to confirm Gorsuch.⁵⁶ Katyal subsequently introduced Gorsuch in his confirmation hearing.⁵⁷ Gorsuch's former law clerks

against national-security concerns' unless the political branches . . . have determined that 'judicial oversight is appropriate.'" Defendant's and the United States' Motion to Dismiss, *Ali v. Rumsfeld*, 479 F. Supp. 2d 85 (D.D.C. 2007) (No. 05-1378 (TFH)), 2006 WL 1032554, at *9. See Brief for Defendant-Appellants, *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006) (No. 05-4896-CV), 2005 WL 6237672, at *34-36 ("At a fundamental level, the district court's opinion reflects an unwarranted reluctance to give weight to reasoned judgments of the Executive Branch regarding the risks associated with the disclosures about secret intelligence gathering activities. . . . To dismiss the carefully considered judgments presented by the government in this case as mere 'speculation,' and to replace those judgments with the court's own conclusion that disclosure would not be harmful, is to make the judiciary rather than the Executive Branch the arbiter of this country's intelligence gathering needs. That is a role the judiciary is institutionally unsuited to play.").

52. Robert Barnes & Ed O'Keefe, *Senate Democrats Focus on Gorsuch's Defense of Bush-Era Terrorism Policies*, WASH. POST (Mar. 15, 2017), https://www.washingtonpost.com/national/senate-democrats-focus-on-gorsuchs-defense-of-bush-era-terrorism-policies/2017/03/15/3fced3de-0998-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.052123953456/.

53. See Jennifer Daskal, *Questions for Judge Gorsuch*, JUST SECURITY (Mar. 16, 2017), <https://www.justsecurity.org/38876/questions-judge-gorsuch/> [https://perma.cc/BMS5-L8MY].

54. *Id.*

55. Letter from Neil M. Gorsuch to General Jay W. Hood (Nov. 17, 2005), <https://www.documentcloud.org/documents/3522197-Gorsuch-DOJ-War-on-Terror-Documents.html#document/p1> [https://perma.cc/4MJW-3LBW].

56. Neal Katyal, *Why Liberals Should Back Neil Gorsuch*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/opinion/why-liberals-should-back-neil-gorsuch.html?_r=0.

57. Neal Katyal, Professor of Law, Georgetown Univ., Introduction of Judge Neil

wrote to the Senate on his behalf; the letter stressed that the clerks' "political views span the spectrum, and among [them], you will find differing views on how the Senate handled the nomination of Judge Merrick Garland."⁵⁸

It is important to caveat this case study by making clear what I am *not* saying: The lawyers involved in the torture programs were not bad lawyers, and their participation in the torture programs did not mean that they were incapable of principled decision-making. As a judge, Judge Jay Bybee has (correctly) ruled against the Trump Administration in a challenge to President Trump's executive order that purports to prohibit migrants from asserting asylum claims if they do not enter the country through ports of entry.⁵⁹ And Justice Gorsuch voted with his more liberal colleagues to form 5–4 majorities in several significant (though not high profile) criminal law and Native American law cases that were not otherwise particularly ideologically salient.⁶⁰

The lawyers' participation in the torture programs is significant because it raises questions about whether there are certain actions that would disqualify elite lawyers from future government service in the eyes of their fellow lawyers.⁶¹ There were probably other competent,

Gorsuch to the Senate Judiciary Committee (Mar. 20, 2017), <https://www.judiciary.senate.gov/download/03-20-17-katyal-introduction> [<https://perma.cc/D3YG-59KL>].

58. David Lat, *Liberals and Gays for Gorsuch? (Or, the Virtues of Non-Ideological Clerk Hiring)*, ABOVE L. (Feb. 15, 2017), <https://abovethelaw.com/2017/02/liberals-and-gays-for-gorsuch-or-the-virtues-of-non-ideological-clerk-hiring/2/> [<https://perma.cc/7HXM-S5HE>]. His female law clerks wrote a separate letter after a former student

questioned his commitment to gender equity. Letter from Former Gorsuch Clerks, to Charles E. Grassley, Chairman, Comm. on the Judiciary, and Dianne Feinstein, Ranking Member, Comm. on the Judiciary (Mar. 20, 2017), <https://www.judiciary.senate.gov/imo/media/doc/Former%20Female%20Law%20Clerks.pdf> [<https://perma.cc/6BTR-PVCK>].

59. *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1231 (9th Cir.), *superseded by* 932 F.3d 742 (9th Cir. 2018).

60. *See, e.g.,* *Herrera v. Wyoming*, 139 S. Ct. 1686, 1688 (2019); *Wash. State Dep't of Licensing v. Cougar Den*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring); *United States v. Haymond*, 139 S. Ct. 2369, 2372 (2019); *United States v. Davis*, 139 S. Ct. 2319, 2322 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1233–34 (2018) (Gorsuch, J., concurring in part and dissenting in part).

61. For a comparison, consider what several Democratic nominees have been punished for. Dawn Johnsen's nomination to the Office of Legal Counsel was withdrawn after her arguments in support of a woman's constitutional right to end a pregnancy came under critical scrutiny. Charlie Savage, *Obama Nominee to Legal Office Withdraws*, N.Y. TIMES (Apr. 9,

principled Republicans who did not participate in or enable the United

States' torture program who could have been selected as nominees.⁶² But the lawyers' participation in the torture program was not viewed as disqualifying, including by the other elite lawyers who continued to support them.⁶³

The elite network of lawyers may not ultimately have the power to sway senators' votes on a particular nominee. But bipartisan support provides senators cover to vote for a nominee, especially relative to nominations that involve polarized opposition and criticism.⁶⁴ Bipartisan support also minimizes the time, resources, and political capital that an administration or a vulnerable senator would have to devote to

2010), <https://www.nytimes.com/2010/04/10/us/politics/10johnsen.html?mtrref=en.wikipedia.org&gwh=258D635098F562B7B69B1B12992E1ECB&gwt=pay&assetType=REGIWALL> – Dawn Johnsen. Debo Adegbile's nomination to the Justice Department's Civil Rights Division was withdrawn because of his pro bono work on behalf of a criminal defendant. See Josh Gerstein, *Obama's Civil Rights Nominee Withdraws*, POLITICO (Sept. 15, 2014), <https://www.politico.com/blogs/under-the-radar/2014/09/obamas-civil-rights-nominee-withdraws-195512> [https://perma.cc/EFN8-QZCB].

62. There were certainly less competent and less principled people to nominate for these positions who did not participate in or enable the United States' torture program. Natasha Bertrand, *Gina Haspel's Lose-Lose Proposition for Democrats*, ATLANTIC (May 7, 2018), <https://www.theatlantic.com/politics/archive/2018/05/gina-haspels-lose-lose-proposition-for-democrats/559826/> (noting Democrats' fears in the context of Gina Haspel). Gina Haspel, for example, was confirmed as director of the Central Intelligence Agency. Miriam Khan, *Senate Votes to Confirm Gina Haspel as Next CIA Director*, ABC NEWS (May 17, 2018), <https://abcnews.go.com/Politics/senate-votes-confirm-gina-hospel-cia-director/story?id=55240031> [https://perma.cc/E8M5-XBST]. "Haspel oversaw a CIA black site in Thailand where two terrorism suspects were tortured, and her name was on a cable that ordered the videotapes of their interrogations to be destroyed in 2005." Bertrand, *supra*. Fifty-four Senators voted for her confirmation, including Democratic Senators Mark Warner and Jeanne Shaheen. Khan, *supra*. Jeremy Bash, the "Democratic chief counsel to the House Permanent Select Committee on Intelligence and chief of staff at the CIA and the Department of Defense under President Obama," penned an op-ed in support of her nomination. Jeremy Bash, *Gina Haspel Is the Rare CIA Director Nominee That Both Parties Should Love*, NBC (May 2, 2018), <https://www.nbcnews.com/think/opinion/gina-haspel-rare-cia-director-nominee-both-parties-should-love-ncna870716> [https://perma.cc/2MYX-ZB73]. But some Democrats feared the prospect of a CIA director who lacked any training in intelligence and was merely a friend of the President. See Bertrand, *supra*.

63. See *supra* notes 43–58.

64. Patrick Gregory, *Trump's First Black Female Judicial Nominee a Bipartisan Pick*, BLOOMBERG L. (May 20, 2019), <https://news.bloomberglaw.com/us-law-week/trumps-first-black-female-judicial-nominee-a-bipartisan-pick> [https://perma.cc/5JSD-Q4LT].

a particular nominee.⁶⁵ And at a minimum, the networks could impose the social cost of a lack of support from one's own social and professional network. Some administrations even rely on particular networks to identify nominees for positions,⁶⁶ which means the networks can decide what disqualifies someone from future appointments.

III. FAMILY SEPARATIONS

The case studies of the officials involved in the enhanced interrogation program raise questions about whether any Trump Administration official will suffer long-term professional costs for participating in or defending the Administration's forcible separation of families, among other policies.

By now, the contours of the Administration's family-separation policy are clear. President Trump and then-Chief of Staff John Kelly, together with then-Attorney General Jeff Sessions, publicly floated the prospect of forcibly separating families in order to deter migrants from attempting to enter the United States (including migrants who are entitled to asylum).⁶⁷ The Administration ultimately chose to institute a "zero tolerance" policy to effectuate family separations and deter migration.⁶⁸ Under the zero tolerance policy, the Administration criminally prosecuted anyone who crossed the border (including persons whose asylum claims had not yet been processed or rejected).⁶⁹

The zero tolerance policy resulted in family separations because the Department of Justice (DOJ) conducts criminal prosecutions rather than the Department of Homeland Security (DHS), which polices the border and detains

65. See, e.g., *id.* (noting how Democratic support from outside the Senate will ease burden of judicial confirmation).

66. See LEVINSON & BALKIN, *supra* note 3, at 131; Dylan Matthews & Byrd Pinkerton, *The Incredible Influence of the Federalist Society, Explained*, VOX (June 3, 2019), <https://www.vox.com/future-perfect/2019/6/3/18632438/federalist-society-leonard-leo-brett-kavanaugh> [<https://perma.cc/UN7U-NARF>]; Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/>; *What Is the Federal Society and How Does It Affect Supreme Court Picks?*, NPR (June 28, 2018), <https://www.npr.org/2018/06/28/624416666/what-is-the-federalist-society-and-how-does-it-affect-supreme-court-picks> [<https://perma.cc/C898-47VU>].

67. See *id.* (cataloguing evidence of the Trump Administration's consideration of its family-separation policy).

68. Leah Litman & Hilary Robin Rosenthal, *Immigration Policy Parallels*, TAKE CARE (May 20, 2019), <http://takecareblog.com/blog/immigration-policy-parallels>.

69. *Id.*

persons during the course of immigration proceedings.⁷⁰ The criminal prosecutions therefore “separated” parents from their children because the parents were (temporarily) placed in the custody of the DOJ while their children remained in the custody of the DHS.⁷¹ The Administration maintained that when the DOJ took a parent into its custody (and out of DHS custody), the parent’s child became legally “unaccompanied,” since the child was in DHS custody and the parent was not.⁷² Under the relevant statutes, an unaccompanied minor must be placed in the custody of the Office of Refugee Resettlement (ORR), which is within the Department of Health and Human Services (DHHS), rather than the DHS.⁷³ As a result, once the parent returned to DHS custody (even after only a brief time in DOJ custody), the parent and child would be separated and in the custody of two different government agencies.⁷⁴

In other writings, I have debunked the argument that children who cross the border with their parents are unaccompanied for purposes of the relevant statutes that would allow ORR to take custody of them.⁷⁵ Other legal scholars have likewise discredited other arguments that the Administration is making in support of family separations.⁷⁶ District courts have

70. *See id.*

71. *Id.*

72. *Id.* This included even temporary changes in custody, such as when the parent attended a hearing on the unlawful-entry charge or was being transported to that hearing. *Id.* The Administration also maintained that placing a parent in DHS custody meant a child was unaccompanied. *See* Marty Lederman, Deborah Pearlstein & Ryan Goodman, *Unpacking DOJ’s New Claim That DHS Can Legally Detain Migrant Children with Their Parents for Longer than Twenty Days*, JUST SECURITY (July 6, 2018), <https://www.justsecurity.org/59046/unpacking-doj-claim-dhs-legally-detain-migrant-children-parents-longer-twenty-days/> [<https://perma.cc/GBP8-WZ98>].

73. *About the Program*, OFF. REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/programs/ucs/about> [<https://perma.cc/W9ZF-N557>]; Leah Litman, *How Trump Corrupts the Rule of Law*, N.Y. TIMES (June 18, 2018) [hereinafter Litman, *How Trump Corrupts the Rule of Law*], <https://www.nytimes.com/2018/06/18/opinion/trump-zero-tolerance-border.html>.

74. Litman, *How Trump Corrupts the Rule of Law*, *supra* note 73.

75. *Id.*; Leah Litman, *Forced Separation of Families & Forced to-Term Pregnancies*, TAKE CARE (June 7, 2018), <https://takecareblog.com/blog/forced-separation-of-families-and-forced-to-term-pregnancies>; Leah Litman, *Immigration Sins of the Past & the Forced Separation of Families*, TAKE CARE (June 4, 2018), <https://takecareblog.com/blog/immigration-sins-of-the-past-and-the-forced-separation-of-families>; Leah Litman, *Law and Farce: The Forced Separation of Families*, TAKE CARE (June 5, 2018), <https://takecareblog.com/blog/law-and-farce-the-forced-separation-of-families>.

76. Marty Lederman, Deborah Pearlstein & Ryan Goodman, *Unpacking DOJ’s New Claim That DHS Can Legally Detain Migrant Children with Their Parents for Longer than*

issued compelling and scathing opinions finding the Administration's family separations unlawful.⁷⁷ Even if the family separations are lawful, however, there is no serious question of whether they affect serious and long-term psychological and emotional costs on the families who are separated (even temporarily).

There have been calls to punish or shun any government official involved in the moral travesty of family separations.⁷⁸ In light of what happened to the officials involved in the torture program, that probably will not happen.⁷⁹ Some protesters may occasionally yell at Kirstjen Nielsen in restaurants.⁸⁰ But that will stop at some point.

Indeed, there are already signs that the lawyers involved in the forced separation of families will be welcomed back into the fold. One of the lawyers involved in family separations has already been promoted.⁸¹ Before he was confirmed to the U.S. Court of Appeals for the Sixth Circuit, Judge Chad Readler was the Assistant Attorney General whose name is on all of the briefs defending the forced separation of families.⁸² The vote to confirm Readler was along party lines.⁸³ But elite lawyers did not uniformly oppose Readler,⁸⁴ and his defense of the forced separation of families was

Twenty Days, JUST SECURITY (July 6, 2018), <https://www.justsecurity.org/59046/unpacking-dojs-claim-dhs-legally-detain-migrant-children-parents-longer-twenty-days/> [<https://perma.cc/9BSE-T643>].

77. *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018) ("The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*. Certainly, that cannot satisfy the requirements of due process.").

78. Michelle Goldberg, *Cancel Kirstjen Nielsen*, N.Y. TIMES (Apr. 8, 2019), <https://www.nytimes.com/2019/04/08/opinion/kirstjen-nielsen-family-separation-trump.html>.

79. *See supra* Part II.

80. Sarah Mervosh, *Kirstjen Nielsen Is Confronted by Protesters at Mexican Restaurant: 'Shame!'*, N.Y. TIMES (Jun. 20, 2018), <https://www.nytimes.com/2018/06/20/us/kirstjen-nielsen-protesters-restaurant.html>.

81. *See, e.g., Roll Call Vote 116th Congress-1st Session*, U.S. SENATE (Mar. 6, 2019), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=1&vote=00037 [<https://perma.cc/YV6S-6YGP>].

82. *Id.*

83. *Id.* Susan Collins was apparently allowed to cast an inconsequential *no*. *See id.*

84. *See, e.g., Eric Heisig, Abortions, the Muslim Ban and Other Controversial Cases of Trump's Ohio Nominees for a Federal Appeals Court*, CLEVELAND.COM (June 18, 2018), https://www.cleveland.com/news/erry-2018/06/7003c9e82e5691/abortions_the_muslim_ban_and_o.html [<https://perma.cc/Z7G6-ZKM6>] ("We say all parties under our legal system are entitled to balanced representation. That requires attorneys that are willing to take positions they do or do not agree with," Adler said. "The system can't work if we assume that attorneys agree with their clients.").

not enough to disqualify him from a judicial appointment with lifetime tenure.⁸⁵

IV. LAWYERS AND DEMOCRATIC DYSFUNCTION

The idea that elite lawyers should professionally sanction other elite lawyers who participate in the breakdown of important constitutional norms involves difficult line-drawing issues. Of course lawyers should not be penalized for defending any policy that pushes a line or that attempts to change the law. And of course lawyers should not demonize other lawyers merely because they disagree on some issues.

But some things have to be enough to warrant approbation, even within the network of elite lawyers. Lawyers are already sanctioned for myriad things that they do in the course of being a lawyer. Lawyers cannot suborn perjury.⁸⁶ They cannot conceal evidence.⁸⁷ They cannot commit securities fraud, even in the course of representing a client.⁸⁸ And that is just a partial list.⁸⁹ So it is not as if lawyers get a pass for anything they might do in the course of representing a client.

Why is enabling racist and cruel family separations not on the prohibited list of actions? Why does enabling family separations not suffice as a reason to disqualify someone from future government service? The Administration's

85. Readler was also involved in some of the Administration's other legally questionable policies. He defended the Administration's ability to prevent undocumented minor women in its custody from having abortions (even when the women became pregnant as a result of rape and threatened to harm themselves if they could not have an abortion). Defendant's Motion for Briefing on Class Wide Relief and Stay Pending Supreme Court Proceedings, *Garza v. Hargan*, No. 17-CV-02122 (TSC) (D.D.C. Nov. 3, 2017); *see generally* *Garza v. Hargan*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=16228> [<https://perma.cc/6474-BDDN>] (providing links to other briefs signed by Readler in the *Garza* case). He also made both the claim that the now-unenforceable minimum coverage requirement is unconstitutional and the legally outlandish claim that the rest of the Affordable Care Act (ACA) must be invalidated as a result. Fed. Defendants' Memorandum in Response to Plaintiffs' Application for Preliminary Injunction, *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018) (No. 4:18-cv-00167-O), 2018 WL 2750077. Readler's participation in the ACA litigation, and not his facilitation of the forced separation of families, apparently caused Senator Susan Collins (R-ME) to cast her inconsequential vote against his confirmation. *See Senator Collins to Oppose Administration's Judicial Nominee to 6th Circuit Court of Appeals*, SUSAN COLLINS: U.S. SENATOR ME. (Mar. 5, 2019), <https://www.collins.senate.gov/newsroom/senator-collins-oppose-administration-%E2%80%99s-judicial-nominee-6th-circuit-court-appeals> [<https://perma.cc/U5NA-4AY9>].

86. *See* MODEL CODE OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 1983).

87. *Id.* at r. 3.4.

88. *See id.* at r. 1.6.

89. *See id.*

forcible separation of families has little basis in the law, it has no appreciable deterrent effect on border crossings, and, most importantly, it works unspeakable pain and cruelty on the individuals affected.⁹⁰

If lawyers are not even willing to speak out against lawyers who are involved in the forced separation of families, then they will not speak out against lawyers who are involved in less morally abhorrent policies that nonetheless facilitate significant breakdowns in our constitutional order. Think of other policies that lawyers have been involved in because of their service in the Trump Administration. Lawyers were involved in allegedly covering up the purpose of adding a citizenship question to the census;⁹¹ lawyers continue to serve in an Administration that threatens to prosecute its political opponents and “send . . . back” a black, American congresswoman who is a naturalized citizen and refugee;⁹² lawyers continue to serve after the President maintained that there were “very fine” people on the neo-Nazi side of a Charlottesville rally that killed a young woman;⁹³ lawyers continue to serve after the President questioned the assessments of the intelligence

90. In fiscal year 2018, Customs and Border Protection apprehended 396,579 individuals crossing the southwestern border. *Total Illegal Alien Apprehension by Fiscal Year*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-apps-fy1960-fy2018.pdf> [https://perma.cc/4Y2E-JDNN]. Only 10 months into fiscal year 2019, Customs and Border Protection had already apprehended 760,370 individuals crossing the southwestern border. *Southwest Border Migration FY 2019*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019> [https://perma.cc/ZXQ6-5DFV].

91. See, e.g., Hansi Lo Wang, *Trump Officials Face Cover-up Allegations After Failed Citizenship Question Push*, NPR (July 16, 2019), <https://www.npr.org/2019/07/16/742259233/trump-officials-face-cover-up-allegations-after-failed-citizenship-question-push> [https://perma.cc/BS4Y-CPVQ]. Some government lawyers seemed willing to disavow the government's prior representations in court about the timing of the census. Hansi Lo Wang, *Judge Says Administration Can't Change Lawyers in Census Citizenship Question Case*, NPR (July 7, 2019), <https://www.npr.org/2019/07/07/739369416/justice-department-changes-legal-team-behind-census-citizenship-question-case> [https://perma.cc/HPG4-JSYN].

92. Rebecca Morin, *Ilhan Omar Trolls Trump with Tweet About Africa Visit, Weeks After 'Send Her Back' Chant*, USA TODAY (Aug. 1, 2019), <https://www.usatoday.com/story/news/politics/2019/08/01/send-her-back-ilhan-omar-trolls-trump-post-africa-visit/1895486001/>; Jonathan Allen, *Trump Turns the Full Force of the Government on Perceived Political Enemies*, NBC NEWS (May 24, 2019), <https://www.nbcnews.com/politics/white-house/trump-turns-full-force-government-perceived-political-enemies-n1010096> [https://perma.cc/MQ36-WSPZ].

93. See Rosie Gray, *Trump Defends White-Nationalist Protestors: 'Some Very Fine People on Both Sides'*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/>.

community about Russia's interference in the election;⁹⁴ lawyers continue to serve after the President took various actions to undermine the counterintelligence investigation into Russian interference in the election;⁹⁵ lawyers continue to serve after the President described a variety of African, South American, and Central American countries as "shithole countries" (and restricted immigration from those countries),⁹⁶ and so on.

Lawyers have also (reportedly) been involved in covering up President Trump's serious, antidemocratic breaches of his constitutional obligations and office. After the President asked the Ukrainian President to investigate his political opponent's son, lawyers directed White House officials to place records of the call on secret, classified servers—even though the call contained no classified information.⁹⁷ The call merely contained something that was politically embarrassing to the President and deeply destructive to our constitutional democracy.⁹⁸ Apparently, White House lawyers sought to keep secret several other presidential conversations, including one in which the President told the Russian government that he was fine with their interference in the 2016 election, which benefited him.⁹⁹

Lawyers can communicate their opposition to government misconduct through noisy withdrawals or resignations.¹⁰⁰ But there were no withdrawals or resignations when the Administration started separating families. Nor were there

94. See Peter Baker & Michael Crowley, *Trump and Putin Share Joke About Election Meddling, Sparking New Furor*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/politics/trump-putin-election.html>.

95. 2 SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, U.S. DEP'T OF JUSTICE 3–7 (Mar. 2019), https://www.justice.gov/storage/report_volume2.pdf [<https://perma.cc/F5AL-SWJ8>].

96. See Eli Watkins & Abby Phillip, *Trump Decries Immigrants from 'Shithole Countries' Coming to US*, CNN (Jan. 12, 2018), <https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html> [<https://perma.cc/7LJ8-4JUV>].

97. Letter from Whistleblower, *supra* note 30.

98. *See id.*

99. Shane Harris, Josh Dawsey & Ellen Nakashima, *Trump Told Russian Officials in 2017 He Wasn't Concerned About Moscow's Interference in U.S. Election*, WASH. POST (Sept. 27, 2019), https://www.washingtonpost.com/national-security/trump-told-russian-officials-in-2017-he-wasnt-concerned-about-moscows-interference-in-us-election/2019/09/27/b20a8bc8-e159-11e9-b199-f638bf2c340f_story.html.

100. See C. Ryan Barber, *'A Very Difficult Time': Challenges for Career Lawyers at Trump's DOJ*, LAW.COM (July 15, 2019), <https://www.law.com/nationallawjournal/2019/07/15/a-very-difficult-time-challenges-for-career-lawyers-at-trumps-doj/> [<https://perma.cc/P7AF-RBZ5>]; Josh Gerstein, *Justice Department Attorney Resigns After Legal Shift on Obamacare*, POLITICO (June 12, 2018), <https://www.politico.com/story/2018/06/12/obamacare-justice-department-resign-642992> [<https://perma.cc/SY2J-NKTZ>].

withdrawals after the President praised the neo-Nazi side of a rally at which a young woman was killed. And if going along with the destruction of whatever norm there was against supporting neo-Nazis does not carry any consequences, then there will probably not be any consequences when lawyers help break down more seemingly mundane and procedural norms that are nonetheless important to the orderly functioning of a system of constitutional government. Lawyers are challenging the idea that presidents can be investigated for breaking the law¹⁰¹ and are allegedly helping the President cover up potentially impeachable conduct,¹⁰² among other things.

When critics accuse lawyers of enabling government misconduct, one common defense is to insist there is space between the lawyer's views and the client's.¹⁰³ It is true, of course, that government lawyers do not necessarily believe all of the positions they argue for as government lawyers, and it is also important to ensure that the government is vigorously represented. But there is no norm in the United States that lawyers must accept every client who approaches them, at least outside the context of criminal defense.¹⁰⁴ Nor is there a norm that lawyers must advance every argument in support of a client or defend every decision their client wants (again, outside the context of criminal defense and in the particular setting of civil government representation).¹⁰⁵

There are, by contrast, norms (and even bar rules) to that effect in other countries. The United Kingdom generally requires lawyers to accept professional clients' instructions under the "cab-rank" rule.¹⁰⁶ Under that rule, if a lawyer "receive[s] instructions from a professional client"¹⁰⁷ and the "instructions are appropriate taking into account" the lawyer's "experience, seniority, and/or field

101. See, e.g., Igor Derysh, *Trump's New Argument: He's Immune from All Criminal Investigation in New Tax Return Lawsuit*, SALON (Sept. 21, 2019, 11:00 AM), <https://www.salon.com/2019/09/21/trumps-new-argument-hes-immune-from-all-criminal-investigation-in-new-tax-return-lawsuit/> [<https://perma.cc/CL46-CJEC>].

102. Harris, Dawsey & Nakashima, *supra* note 99; Letter from Whistleblower, *supra* note 30.

103. See Savage, *Gorsuch*, *supra* note 50.

104. MODEL RULES OF PROF'L CONDUCT r. 1.18 (AM. BAR. ASS'N 1983).

105. See *id.* at r. 3.1, 3.3.

106. BAR STANDARDS BD., THE BAR STANDARDS HANDBOOK 44 (4th ed. 2019).

107. A *professional client* is any client in a regulated industry. *Id.* at 247. This encompasses many different industries in the United Kingdom, including healthcare, education, law, finance, maritime officers, engineers, various security jobs, and various transport jobs. *Professions Regulated by Law or Public Authority*, CENTRE PROF. QUALIFICATIONS, <https://www.naric.org.uk/cpq/eu%20citizens/coming%20into%20the%20uk/Regulated%20Professions/Professions%20Regulated%20by%20Law%20or%20Public%20Authority.aspx> [<https://perma.cc/UDZ3-D4TS>].

of practice,” then the lawyer “*must* . . . accept the instructions, irrespective of” the client’s identity, the nature of the case, whether the client is paying privately or publicly, or “any belief or opinion” the lawyer has regarding “the character, reputation, cause, conduct, guilt or innocence of the client.”¹⁰⁸ A lawyer can only refuse when there is one of the following: a conflict of interest, a likelihood of breaching client confidentiality, an instruction to go against the law or code of ethics, a conflicting prior commitment, a potential liability for professional negligence that exceeds the scope of the amount available under malpractice insurance, a client that will not pay, a client that represents an unreasonable credit risk, or a belief that the lawyer cannot competently represent the client.¹⁰⁹

The United States has no similar rule. Outside the criminal context, lawyers can choose whether to represent particular clients.¹¹⁰ Nothing obligates lawyers to provide their services to anyone who asks for them, and nothing obligates lawyers to continue with particular representations or follow through with particular client directives.¹¹¹

At some point, it probably should not matter if the lawyers who are enabling the forcible separation of families or helping the President invite foreign interference in an election would personally like to see those things happen. What matters is that they are making it easier for those things to happen. Their professional skills and credentials are being leveraged to defend those policies, and their presence in government gives the government’s policies more credibility and authority than they would otherwise have.

Most importantly, if we do not want families to be separated, detainees to be tortured, or foreign governments interfering in our elections, then there need to be professional costs for the people who help the government do those things—including losing out on the opportunity for future government appointments. That is how deterrence works: There is a penalty for engaging in certain conduct, and that penalty deters others from doing the same thing. Here, it would mean that when you abuse a government office, you do not get to be in government office

108. BAR STANDARDS BD., *supra* note 106, at 44 (emphasis added) (citing rule rC29, the cab-rank rule).

109. *Id.* at 38, 39, 44, 45.

110. See Duncan Kennedy, *The Responsibility of Lawyers for the Justice of Their Causes*, 18 TEX. TECH L. REV. 1157, 1158 (1987) (“Your cases are yours to choose on any basis you want.”). For an argument that this choice involves a moral dimension, see Monroe Freedman, *The Lawyer’s Moral Obligation of Justification*, 74 TEX. L. REV. 111, 112 (1995).

111. Kennedy, *supra* note 110, at 1158 (arguing lawyers “should feel guilty, and [society] should disapprove of [them], if [they] go ahead and argue a case [they] think will do more harm than good.”).

again.¹¹²

Of course, there is something painful and unpleasant about making life uncomfortable for someone familiar, especially a professional colleague. There is also something deeply uncomfortable about calling out someone you know for immoral conduct. But our constitutional order depends on people doing just that. Scholars have identified professional networks as important guardians of norms: Government officials and elites abide by norms in part because they fear approbation or repudiation by their professional and social networks if they do not.¹¹³ Yet those networks are now sending the signal that their members have nothing to fear at all—because they will never be held accountable for participating in cruel and destructive policies.¹¹⁴

That does not mean elite lawyers' support for one another caused the dysfunction that Balkin and Levinson observe.¹¹⁵ Elite lawyers supported each other's careers before the rise of the kind of dysfunction that Balkin and Levinson document. But the state of the legal profession makes lawyers unable or unwilling to stop the kind of dysfunction they observe; instead, the lawyers contribute to it. In particular, lawyers' seemingly boundless commitment to supporting lawyers on both sides, and the related commitment to giving lawyers a pass for what they do in government, may be just fine when neither side is arguing for morally abhorrent policies or the destruction of democratic processes. But those commitments have pernicious effects when one side, while in government office, seeks to make

112. Cf. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO L.J. 949 (2003).

113. Political scientists emphasized the existence of “sanctions” (broadly defined) as a way to identify norms. Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 PERSP. ON POL. 37, 40 (2012); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2204 (2018) (identifying “institutional reinforcements” as a way of supplying force to norms); *id.* (“Structural norms constrain behavior . . . [because an actor] might seek to avoid the disapproval or sanction of other actors who accept [a norm].”); *id.* at 2205 (“[S]tructural norms tend to be preserved—and norm breaches sanctioned—not in the main through electoral politics, but through . . . institutional surroundings. The norms . . . will be more salient to elite political, professional, and social networks than to most voters most of the time.”); *id.* at 2279 (“[P]luralist norm enforcers, drawing on the soft powers of . . . civil society . . . have made some norms of the presidency more resilient than others.”); *id.* (“Administrative actors also have developed prophylactic procedures . . . to sanction norm breaching So too, when a range of participants in the practice can be sanctioned for norm breaching (professionally or otherwise), the structural norm may be more resilient.”); *id.* at 2279–80 (“Civil society actors similarly police presidential norms Other legal elites, including those in the academy, have long played a role articulating and critiquing the norms . . .”).

114. See *supra* Part II.

115. See LEVINSON & BALKIN, *supra* note 3, at 136–37.

elections less democratic and to carry out the separation of families.¹¹⁶

The idea that there is something untoward about calling someone a racist or a fascist¹¹⁷ appears in constitutional jurisprudence as well as in the behavior of lawyers.¹¹⁸ And if it is concerning in constitutional jurisprudence (as many scholars have suggested it is), then it should be concerning in the behavior of networks too.¹¹⁹ Consider, for example, the Supreme Court's decision in *Shelby County v. Holder*.¹²⁰ *Shelby County* invalidated the statutory provision that gave life to Section 5 of the Voting Rights Act (VRA), which required states with histories of racial discrimination to preclear any changes to their voting laws.¹²¹ The Court invalidated the VRA provision in part because of the Court's apparent misgivings about being too hard on the U.S. South for its history of state-sponsored terrorism and violence against racial minorities.¹²² The Court has also limited federal courts' ability to oversee the desegregation of public schools on the ground that it is unfair to hold districts responsible for actions that occurred more than a decade ago (the time it takes one child to complete elementary through high school).¹²³ And the Court has created an extremely high threshold for concluding government officials discriminated on the basis of race,¹²⁴ emphasizing the need to presume that states are acting out of good motives, since a conclusion that they acted out of bad

116. See, e.g., David Pozen, *The Shrinking Constitution of Settlement*, BALKINIZATION (May 6, 2019), <https://balkin.blogspot.com/2019/05/the-shrinking-constitution-of-settlement.html> [<https://perma.cc/V5XN-L522>]. Levinson has elaborated on a similar idea in a recent piece with Mark Graber about how traditional constitutional interpretation may not be well-suited to addressing officeholders who are unsuited or unfit for the constitutional office they hold. See Sanford Levinson & Mark Graber, *The Constitutional Powers of AntiPublian Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 CHAP. L. REV. 133, 138–39 (2018). In that piece, the authors offer a partial critique of certain forms of legal analysis as insufficiently attuned to—and not having the vocabulary to assess—substantive decisions and morality, although they also describe how legal doctrine has been responsive to these calculations. See *id.* at 138, 154–64.

117. Leah Litman, *In Tribute: Justice Anthony Kennedy*, 132 HARV. L. REV. 1, 22 (2018).

118. That is unsurprising insofar as the people who are a part of the network of elite lawyers are also the people who shape constitutional jurisprudence.

119. See, e.g., Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 92–93 (2013).

120. *Shelby County v. Holder*, 570 U.S. 529 (2013).

121. *Id.* at 535, 557.

122. See *id.* at 552–56.

123. See *Milliken v. Bradley*, 418 U.S. 717, 752 (1974). A desegregation decree should be dissolved “after the local authorities have operated in compliance with it for a reasonable period of time.” *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991).

124. See Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 535 (2018).

motives would be unfairly harsh.¹²⁵

These judicial decisions have the same untoward effects as the networks' unwillingness to sanction lawyers who engage in norm-breaking conduct. That is why scholars have identified these decisions as cause for concern: By making it difficult to call out government officials who participate in the destruction or violation of any given norm, these decisions, together with the elite network of lawyers, protect government officials who participate in the destruction of norms that are integral to a healthy constitutional democracy.

The judicial decisions that express concern about identifying government officials as racist provide some reasons for their reluctance, such as the limited fact-finding capacity of the federal courts, the federal courts' relative expertise in certain areas, or the judicial deference that is due to the political branches.¹²⁶ But these justifications do not explain why professional and social networks are unwilling to hold their members responsible for facilitating the breakdown of some constitutional norm. And the networks' failure to hold their members accountable is just as bad for our constitutional order as the federal courts' unwillingness to call out racism or other antidemocratic actions. By eliminating one important mechanism for policing norms, the unconditional loyalty within the elite network of lawyers contributes to the kind of dysfunction that Balkin and Levinson's book concerns.¹²⁷

125. See *Abbott v. Perez*, 138 S. Ct. 2305, 2324–27 (2018). Another mechanism the Court and commentators have used is adopting a narrow definition of what constitutes racism, sometimes with reference to historical examples, such as slavery or Jim Crow. See *Shelby County*, 570 U.S. at 547 (“Nearly 50 years later, things have changed dramatically.”); see also Helen Klein Murillo & Leah Litman, *What Does It Mean to Be Pro-LGBT?*, TAKE CARE (Aug. 27, 2017), <https://takecareblog.com/blog/what-does-it-mean-to-be-pro-lgbt>; Kyle Skinner & Leah Litman, *The Long-Term Costs of Trump's Racism*, TAKE CARE (Aug. 6, 2019), <https://takecareblog.com/blog/the-long-term-costs-of-trump-s-racism>.

126. *Trump v. Hawaii*, 138 S. Ct. 2392, 2409, 2419 (2018).

127. Cf. CHARLES TILLY, *DEMOCRACY* 39 (2007) (“[R]apid de-democratization resulted not from popular disaffection with democracy but chiefly from elite defection.”).