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## Sally Yates, Ronald Dworkin, and the Best View of the Law

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# SALLY YATES, RONALD DWORKIN, AND THE BEST VIEW OF THE LAW

W. Bradley Wendel\*

## INTRODUCTION

Before January 30, 2017, Acting Attorney General Yates was relatively unknown, but her actions on that day ensure her name will now be remembered by generations of lawyers and law students. A holdover from the Obama Administration, Yates headed the Department of Justice, pending the confirmation of Senator Jeff Sessions for the position of attorney general.<sup>1</sup> During President Trump's first week in office, he issued an executive order prohibiting entry into the United States of all refugees and citizens from seven Muslim-majority countries, even those with lawful permanent residence in the United States.<sup>2</sup> The order was subsequently enjoined nationwide by a district judge in the Western District of Washington, and that injunction was upheld by the Ninth Circuit.<sup>3</sup> But rather than examine the litigation path of the executive order, let us remain with Yates. Three days after Trump signed the executive order, Yates wrote a letter to lawyers in the Department of Justice stating that the Department would not defend it.<sup>4</sup> The letter read, in part:

[I]n litigation, DOJ Civil Division lawyers are charged with advancing reasonable legal arguments that can be made supporting an Executive Order. But . . . [m]y responsibility is to ensure that the position of the Department of Justice is not only legally defensible, but is informed by our best view of what the law is after consideration of all the facts. In addition, I am responsible for ensuring that the positions we take in court remain consistent with

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1. E.g., Michael D. Shear et al., *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html> [<https://perma.cc/WET7-EWEE>].

2. See, e.g., Michael D. Shear et al., *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), [https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html?\\_r=0](https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html?_r=0) [<https://perma.cc/B3VQ-732H>].

3. See *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *stay pending appeal denied*, No. 17-35105, 2017 WL 526497 (9th Cir. Feb. 9, 2017).

4. Shear et al., *supra* note 1.

this institution's solemn obligation to always seek justice and stand for what is right. At present, I am not convinced that the defense of the Executive Order is consistent with these responsibilities nor am I convinced that the Executive Order is lawful.<sup>5</sup>

The lawfulness of the order is for the courts to determine. What interests me, as a scholar of legal ethics and jurisprudence, is whether Yates got it right when she said the responsibility of a lawyer for the government is to seek justice and stand for what is right, and that the position of the Department of Justice should be informed by the lawyer's best view of the law. Yates's claim that legal advice should be informed by the best view of the law sounds very much like the position of Ronald Dworkin. Dworkin argued that a judge should determine the legal rights and duties of the litigants by constructing the best possible interpretation of the principles of justice, fairness, and procedural due process, all considered from the standpoint of the community's political morality.<sup>6</sup> The judge's interpretation must fit with past legal decisions, but its aim is also to show the community's legal practices in their best moral light.<sup>7</sup> I do not know whether Yates was thinking about Dworkin when she wrote her letter, but I wish to use this Essay to seek to persuade legal advisors—whether for the government or a private client—that their role is not to construct an interpretation of the law that represents the best constructive interpretation of political morality but rather to serve as agents of their client.

There are several reasons that lawyers should not be Dworkinian interpreters, but this Essay will concentrate on two. First, Dworkin's jurisprudential vision has always sat uncomfortably with moral pluralism. Dworkin denies that his imaginary Judge Hercules merely imposes his own moral preferences under the guise of offering a legal interpretation.<sup>8</sup> He insists that Hercules instead provides the best account of the community's political morality.<sup>9</sup> But he has very little to say about the possibility that a faithful reconstruction of the community's moral principles will potentially establish multiple moral narratives bearing on the same question of legal interpretation.<sup>10</sup> The American experience with immigration shows that, as a political community, we have a remarkable capacity for tolerating both expansive execu-

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5. Letter from Sally Yates, U.S. Acting Att'y Gen., to U.S. Dep't of Justice Att'ys (Jan. 30, 2017), <https://assets.documentcloud.org/documents/3438879/Letter-From-Sally-Yates.pdf>. [<https://perma.cc/KK25-TCS2>].

6. See RONALD DWORKIN, *LAW'S EMPIRE* 225, 239, 243 (1986).

7. *Id.* at 227–28, 248.

8. *Id.* at 259–61.

9. *Id.* at 263.

10. See Jeremy Waldron, *Did Dworkin Ever Answer the Critics?*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 155, 162–63 (Scott Hershovitz ed., 2006).

tive power and discrimination on the basis of nationality (and, as demonstrated by the George W. Bush Administration, possibly discrimination on the basis of religion). As a community we also have become increasingly tolerant of strong executive power,<sup>11</sup> but in the immigration context the president's plenary power goes back more than a century, to the Chinese Exclusion Case.<sup>12</sup> Litigation after the September 11 attacks set some limits on the president's power, but left in place the deference given to the executive branch by the other branches on matters pertaining to national security. A program called the National Security Entry Exit Registration System (NSEERS), established by the Bush Administration, required the registration, fingerprinting, and questioning of aliens present in the United States from Muslim-majority countries, who were males over the age of sixteen. Courts sustained the registry features of the NSEERS program against due process and equal protection challenges, claims that the program amounted to racial profiling, and arguments regarding lack of statutory authorization for the program.<sup>13</sup> That is not the only story, but it is certainly an aspect of our political morality that sits alongside the antidiscrimination norms articulated in the Constitution and numerous judicial opinions. What is a lawyer modeling herself on Judge Hercules to do when seeking the best view of the law?

The second reason for disfavoring a conception of legal advising as seeking the best view of the law is the need to preserve the legitimacy of law as a normative system that resists reduction to either political preferences or raw power. Writing in the *Atlantic*, conservative commentator David Frum imagines the state of the nation on the eve of Trump's inauguration in 2021 to a second term as president.<sup>14</sup> Among many other moves in the playbook for accumulating power, Frum cited one particularly relevant to government le-

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11. E.g., Glenn Sulmasy, *Executive Power: The Last Thirty Years*, 30 U. PA. J. INT'L L. 1355, 1355 (2009) ("The last thirty years have witnessed a continued growth in executive power—with virtually no check by the legislative branch. Regardless of which political party controls the Congress, the institution of the executive continues to grow and increase in power.").

12. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889); see also Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550–52 (1990).

13. See *Rajah v. Mukasey*, 544 F.3d 427, 433–34 (2d Cir. 2008) (describing program); *Kandamar v. Gonzales*, 464 F.3d 65 (1st Cir. 2006); *Ali v. Gonzales*, 440 F.3d 678 (5th Cir. 2006). In a case not related to NSEERS, the Supreme Court held that 8 U.S.C. § 1252(g) precludes most selective prosecution claims by aliens. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

14. David Frum, *How to Build an Autocracy*, ATLANTIC (Mar. 2017), <https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872/> [https://perma.cc/77TF-5BN9].

gal advisors: delegitimizing accountability-enforcing institutions by framing opposition as partisan. He discusses Trump's tactic of repeating false statements (now inevitably referred to as "alternative facts") and then smearing fact-checking and neutral reporting as agenda-driven "fake news." A certain amount of "working the refs" and complaining about the biased media is an innocuous part of politics as usual, but the conflation of truth with power risks undermining the *raison d'être* of independent journalism. As Frum writes, the best defense against authoritarianism is "an unwearying insistence upon the honesty, integrity, and professionalism of American institutions."<sup>15</sup> The legal profession's capacity to resist the naked exercise of power depends on the perception that a difference exists between what is lawful and what is in someone's interests, whether those interests belong to the president or to some imagined cabal of liberal opponents. By referring to the obligation to "seek justice and stand for what is right,"<sup>16</sup> Yates left herself open to the criticism that she was acting as a partisan who objected to Trump's executive order on policy grounds, not an impartial gatekeeper advising the administration on the legality of its proposal.

#### I. DWORKIN ON THE BEST VIEW OF THE LAW

Yates can cite respectable authority for the position that her role required her to provide the best view of the law. Two former lawyers in the DOJ's Office of Legal Counsel (OLC) have argued that a legal advisor should seek the best view of the law.<sup>17</sup> Their argument, boiled down, is that high-level government legal advisors, such as those in the OLC, are acting in a quasi-judicial role.<sup>18</sup> Interpreting the law and ensuring that government actors comply with it is not a job only for courts.<sup>19</sup> The attorney general also interprets and applies the law, and in many cases, an opinion of the attorney general will be effectively final.<sup>20</sup> The president retains the final authority regarding questions of executive branch legal interpretation,<sup>21</sup> but to carry out

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15. *Id.*

16. Letter from Sally Yates to Dep't of Justice Att'ys, *supra* note 5.

17. See Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1579–80 (2007); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1309–12 (2000).

18. Johnsen, *supra* note 17, at 1579–80; Moss, *supra* note 17, at 1309–12.

19. Moss, *supra* note 17, at 1309–12.

20. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

21. See TUSHNET, *supra* note 20, at 15.

his obligations under the Take Care Clause of the Constitution,<sup>22</sup> the president needs fair, reliable, well-reasoned advice. It follows that a government lawyer advising the president should assist the president in complying with the law, not merely finding a position that might avoid Rule 11 sanctions if asserted in litigation.<sup>23</sup>

But what happens when there are competing accounts of what the law permits or requires? The president's plenary power to regulate immigration is broad, and he enjoys significant statutory authority under the Immigration and Nationality Act to exclude "any class of aliens into the United States [whose entry] would be detrimental to the interests of the United States."<sup>24</sup> But constitutional antidiscrimination norms may prohibit a travel ban that is specifically targeted at Muslims if the president's decision was "motivated by discriminatory animus and its application results in a discriminatory effect."<sup>25</sup> Facially, Trump's executive order applies only to nationality, but as a candidate he repeatedly stated that he would implement a Muslim ban.<sup>26</sup> Trump's advisor, Rudy Giuliani, also stated in an interview that Trump asked him how to implement a Muslim ban lawfully.<sup>27</sup> There is certainly evidence—though its sufficiency is unclear—to support the unconstitutionality of the order as an instance of targeted discrimination motivated by animus.

If the best view of the law is only that which reasonable lawyers would agree is the law, and if reasonable lawyers would agree the order is unlawful, then there would be nothing objectionable about Yates's letter. My suspi-

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22. U.S. CONST. art. II, § 3 ("He [the President] . . . shall take Care that the Laws be faithfully executed . . .").

23. FED. R. CIV. P. 11.

24. 8 U.S.C. § 1182(f) (2012).

25. *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977)).

26. See, e.g., Jenna Johnson, *Donald Trump is Expanding His Muslim Ban, Not Rolling it Back*, WASH. POST (July 24, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/?utm\\_term=.0f1ed3cb6d14](https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/?utm_term=.0f1ed3cb6d14) [<https://perma.cc/96LM-XGM6>]; Jenna Johnson, *No, Donald Trump Has Not Softened His Stance on Banning Muslims*, WASH. POST (May 12, 2016), [https://www.washingtonpost.com/politics/no-donald-trump-has-not-softened-his-stance-on-banning-muslims/2016/05/12/6ec8d514-185c-11e6-aa55-670cabef46e0\\_story.html?utm\\_term=.425ef7020cd2](https://www.washingtonpost.com/politics/no-donald-trump-has-not-softened-his-stance-on-banning-muslims/2016/05/12/6ec8d514-185c-11e6-aa55-670cabef46e0_story.html?utm_term=.425ef7020cd2) [<https://perma.cc/JP6-TXXX>]; Abby Phillip & Abigail Hauslohner, *Trump on the Future of Proposed Muslim Ban, Registry: "You Know My Plans"*, WASH. POST (Dec. 22, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/?utm\\_term=.8159a31acaf1](https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/?utm_term=.8159a31acaf1) [<https://perma.cc/B64A-LLLR>].

27. Rebecca Savransky, *Giuliani: Trump Asked Me How to Do a Muslim Ban "Legally"*, HILL (Jan. 29, 2017), <http://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally> [<https://perma.cc/2KXR-FQ7P>].

cion, however, is that she was concerned there was a sufficient basis for concluding the executive order was within the president's constitutional authority, but she regarded the order as morally repugnant. The tipoff is the reference in her letter to the DOJ's purported "solemn obligation to always seek justice and stand for what is right."<sup>28</sup> In other words, I think Yates is trying to be a Dworkinian (if Hercules is Dworkin's ideal judge, perhaps Yates was modeling herself after Athena).

The trouble with the Dworkinian move is that it depends on an unrealistic degree of consensus as to the community's political morality. This is not incidental to Dworkin's theory of law, but at the very core of it. Dworkin combines two inquiries that are often separated in jurisprudence: (1) What is the nature or concept of law, and (2) when does law rightfully obligate?<sup>29</sup> For Dworkin it is true by definition that law must be legitimate. Law is that which licenses the use of force based upon past political decisions "of the right sort."<sup>30</sup> Decisions of the right sort are those that secure equality among citizens as members of a community whose political decisions reflect shared moral commitments.<sup>31</sup>

Dworkin thinks a theory of law must walk a kind of tightrope between two dangers he calls conventionalism and pragmatism.<sup>32</sup> Conventionalism, better known as positivism, is the view that law can be identified by its social sources, generally having been promulgated by political institutions such as legislatures and courts.<sup>33</sup> In a nutshell, Dworkin contends that conventionalism fails at the justificatory task he sets for law: it does not explain why past political practices should be decisive of present rights and duties.<sup>34</sup> But pragmatism also fails. A pragmatic theory of law would aim directly at moral considerations, such as efficiency, utility, or fairness.<sup>35</sup> But pragmatism, according to Dworkin, fails to give a nonstrategic explanation for why we have rights or, to put it differently, why *principled* decisionmaking is so central to our conception of a legal system.<sup>36</sup> For Dworkin, genuine rights and duties depend on a foundation, not on anyone's all-things-considered judgment about what people ought to do. A Herculean moral reasoner would not be Dworkin's ideal judge. Rather, a judge ought to provide a constructive nor-

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28. Letter from Sally Yates to Dep't of Justice Att'ys, *supra* note 5.

29. DWORKIN, *supra* note 6, at 97, 190–92.

30. *Id.* at 93.

31. *Id.* at 96, 227.

32. *Id.* at 114, 151.

33. *Id.* at 114.

34. *Id.* at 116–17.

35. *Id.* at 151, 152, 160.

36. *Id.* at 180–83.

mative account that provides a reason to do something even if one disagrees as a first-order moral or political matter.

Dworkin's theory of law depends on the connection between, on the one hand, the demand for a principled justification for the use of coercion and, on the other, the capacity of common membership in a political community to legitimate the practices of a state.<sup>37</sup> It aims to underwrite a conclusion taking the following form: *even though the president believes considerations of national security require the travel ban, officials in the Department of Homeland Security have an obligation to admit visa holders from the seven specified countries*. What kind of reasoning could justify that proposition? Law purports to affect the practical reasoning of citizens subject to it, including government officials. The president, and presumably also his political appointees, have already reached a conclusion about what they think ought to be done as a moral and political matter. How can a conclusion of law supersede their conclusion?

Dworkin's insight, brought out in his critique of pragmatism, is that a legal conclusion cannot supersede if the proposition of law is merely the same type of judgment as the conclusion of moral reasoning.<sup>38</sup> Although Dworkin does not use Joseph Raz's terminology of first- and second-order reasons,<sup>39</sup> he appears to have something like that in mind when he defends the obligations arising from membership in a political community.<sup>40</sup> Considerations such as justice play a role in the reasoning process that determines the obligations community members have, but they are not conclusive.<sup>41</sup> A legitimate conclusion of law depends on showing that it is the best constructive interpretation of the community's political practices from the evaluative standpoint of political morality.<sup>42</sup> A legitimate demand comes to its subject in the first-person plural: *we have determined that we have a right to X and an obligation to Y*.<sup>43</sup> The law is therefore comprehensively intertwined with democratic self-governance. It requires obedience because it is a scheme of rights and duties that we, as a community, share. It is a commitment to treat one another with respect and as equals, even when we disagree.

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37. *Id.* at 191.

38. *Id.* at 180–81.

39. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 53–62 (1986) (arguing that authorities function by providing reasons that preempt the reasons that would otherwise have been conclusive for the subjects of the authority).

40. *Id.* at 263.

41. *Id.* at 203.

42. *Id.* at 263.

43. *Id.* at 189 (“[W]e are in some sense the authors of the political decisions made by our governors . . .”).



Legitimacy demands that we offer each other principled reasons for the use of coercive state power.

Dworkin's conception of legitimacy presupposes the coherence of the community's political morality. In my view, law ought to presuppose that the community disagrees about political and moral issues. For immigration, that includes the relative importance of a state's identity as a nation and a member of the global community, the balance between safeguarding national security and opening up to immigration, and the degree to which the executive ought to be able to make determinations about immigration and national security without the judiciary second-guessing it. The law is necessary precisely because we are nowhere close to reaching agreement on these issues as a matter of first-order political morality. It is too much to ask for consensus, but Dworkin legitimacy requires a sufficient degree of coherence so that citizens subject to the law can recognize, as suggested above, that the legal requirement is *our* demand. Additionally, they must see the subjects of the law as members of the relevant "us" issuing the demand. The scope of the demand for integrity is significant. Dworkin believes that Judge Hercules has to offer an interpretation that fits with the political decisions that have come before, including legislation and judicial opinions, and justifies them in the light of the community's political morality.<sup>44</sup> There may be some tension in the corpus of past political decisions, but the labor of Hercules is to show that they actually fit together as elements of a morally attractive "story worth telling now."<sup>45</sup>

To criticize Dworkin's demand for coherence is not necessarily to assert the indeterminacy of law. It is perfectly clear that the Immigration and Nationality Act grants broad authority to the president to make the type of determination reflected in Trump's executive order:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.<sup>46</sup>

The Supreme Court has sustained the president's plenary power against constitutional challenges based on racial discrimination and the First Amendment.<sup>47</sup> However, it is also clear that sufficient circumstantial evidence of discriminatory intent will support an equal protection or religious-

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44. *Id.* at 239, 263.

45. *Id.* at 227.

46. 8 U.S.C. § 1182(f) (2012).

47. *Jean v. Nelson*, 472 U.S. 846, 857 (1985); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

discrimination claim, notwithstanding the existence of executive authority.<sup>48</sup> The problem is not indeterminacy but pluralism. Hercules must somehow reach a conclusion that fits with the community's past political acts—the facts of both expansive executive power in the immigration and national security arenas, and the constitutional prohibition on singling out a group or religion for unfavorable treatment. The conclusion must not only fit both of these strands of law; it must justify them with reference to our political morality, showing our political practices in their best light. Hercules may find the order repugnant, but in order to remain faithful to the community's political-moral traditions and practices, he cannot avoid the deference traditionally given by courts to the other political branches in matters of immigration and national security. Yet he must also acknowledge that the Constitution prohibits open discrimination that interferes with fundamental rights such as religion.

From the point of view of a judge trying to tell a coherent, morally attractive story, there are at least two narratives at work in the law of immigration and national security, each with its own characteristic political moral values. One emphasizes the necessity of a strong and vigorous executive to react quickly to danger and protect American citizens.<sup>49</sup> The other foregrounds the vision of the United States as a nation of immigrants that, however imperfectly, has struggled to protect against discrimination on the basis of race, religion, and nationality.<sup>50</sup> An attempt to tell the American political and legal story without an acknowledgement of both preexisting narratives would be incomplete. Any given judge has the opportunity to lean more heavily on one of these normative visions, but fidelity to the community's history and values requires acknowledging the other. A philosopher with a less imperial vision of law than Dworkin, like H.L.A. Hart, would be willing to accept that at the margins of settled law, a judge has no option but to act frankly and creatively by establishing new law, not by interpreting law that already exists.<sup>51</sup> Dworkin's strong theory of associative political obligation, however, drives him to insist that Hercules provide a unitary account of the community's political and moral commitments.

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48. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533–35 (1993); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

49. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 32 (2d ed. 1996).

50. See 8 U.S.C. § 1152(a)(1)(A) (2012) (“[N]o person shall . . . be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”).

51. H.L.A. HART, *THE CONCEPT OF LAW* 135–36 (2d ed. 1994).

## II. NON-HERCULEAN LAWYERING

Reconciling diverse strands of the American political-moral tradition as they are expressed in executive actions, legislation, and judicial decisions may be an impossible task for a judge—the thirteenth labor of Hercules, as it were. Fortunately, a lawyer is situated differently with respect to the values of legality, legitimacy, and integrity. The difference stems from the lawyer’s ethical role as an agent of and an advisor to her client, and from the moral division of labor between lawyer and client.<sup>52</sup> The agency structure of the lawyer-client relationship is not an afterthought, but one of the features that makes the role of lawyer ethically distinctive. Lawyers are obligated to act with reasonable competence and diligence to pursue their client’s lawful objectives, as defined by the client after consultation.<sup>53</sup> A lawyer is free to counsel the client regarding “other considerations such as moral, economic, social and political factors.”<sup>54</sup>

As acting attorney general, Yates could have used her access to the president to lay out a political and moral case against the executive order. For example, she could have pointed out how vetting procedures for visa applicants, including refugees, from Muslim-majority countries are already quite stringent, maybe even “extreme.” Yates could have said there is no need for haste in implementing the travel ban, and an immediate effective date may lead to chaos at airports and appear unnecessarily cruel. She could have noted the appearance that the order is a “Muslim ban” may make our allies in the Islamic world understandably less likely to cooperate with the United States. And so on. There is nothing wrong, and a great deal right, with a high-level government lawyer having a conversation like this with the president. But a lawyer, even the attorney general, is always fundamentally an agent of her client.<sup>55</sup> Final responsibility for the “political, economic, social or moral” consequences of an action rests with the client, as a matter of the law of agency.<sup>56</sup>

This moral division of labor characterizes the relationship between lawyers and private clients. It is embodied in the distinction between the objectives of the representation, which are for the client to decide, and the tech-

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52. See generally W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010) (arguing for a conception of the lawyer’s role’s morality that emphasizes the lawyer’s moral obligation of neutrality regarding the client’s ends and the means by which they are furthered).

53. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1)–(2) (AM. LAW INST. 2000).

54. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2017) [hereinafter MODEL RULES].

55. See generally W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 68 HASTINGS L.J. (forthcoming 2017).

56. MODEL RULES, *supra* note 54, at r. 1.2(b).

nical aspects behind the means of the representation, which are for the lawyer to determine.<sup>57</sup> The same vision of labor applies to the representation of government clients, but the observation above concerning pluralism further justifies it. What show a community in its best light, from the standpoint of political morality, are questions about “who we are as a nation,” “what we believe to be in the public interest,” and “what we would like our government to do on our behalf.”<sup>58</sup> These are quintessentially questions to be resolved by elections. Although one often hears that lawyers, and particularly lawyers for the government, should take into account the public interest while representing clients, it is often unclear how a lawyer should ascertain the content of the public interest. In the representation of government clients there is a ready answer. We determine what is in the public interest through the means of elections.<sup>59</sup> If anything was clear in Trump’s campaign rhetoric, it was that he intended to curtail immigration significantly.<sup>60</sup> When Yates purported to reach a conclusion of law based on considerations of what is just and right, she was required *as an agent* to base that decision on the client’s views of what is just and right. Like it or not, those views are now represented by the president’s policies regarding immigration. If the order is unlawful, as an instance of invidious discrimination or otherwise, then she should so advise the president. But a lawyer—even the highest-ranking advisor to the government—does not have an open commission to serve the public interest. Her obligation is to advise her client on compliance with the law and to leave the moral and political decisions to the client.

Dworkin recognizes this problem and has an imaginary critic object that Hercules is substituting his own normative views of what the law should be for an interpretation of the law.<sup>61</sup> I think Dworkin is right to say that there may be a case in which there are two or more competing interpretations of the law, all of which fit comfortably with past political decisions, among which Hercules must decide.<sup>62</sup> In that case, Hercules has no choice but to rely on his own belief about which interpretation is best from the standpoint of political morality.<sup>63</sup> This seems like an unobjectionable thing for Hercules to

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57. *Id.* at r. 1.2(a).

58. See DWORKIN, *supra* note 6, at 96–97, 428.

59. See Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1295 (1987).

60. Louise Liu, *Here’s Where President-Elect Trump Stands on Immigration*, BUS. INSIDER (Nov. 9, 2016, 4:17 PM), <http://www.businessinsider.com/heres-where-donald-trump-stands-on-immigration-2016-11> [<https://perma.cc/NUP3-5CDT>].

61. DWORKIN, *supra* note 6, at 259.

62. *Id.* at 261.

63. *Id.* at 263.

do. As H.L.A. Hart pointed out decades previously, sometimes judges must make a choice which is neither arbitrary nor mechanical.<sup>64</sup> But this response risks undermining the legitimacy of law where the law's claim to legitimacy is its foundation in our political morality. When Yates said she would direct the Justice Department not to enforce the executive order because it was not the best view of the law, a Dworkinian would hear her as asserting that it was not best from the point of view of political morality. This has to be the case because, as noted above, Trump's interpretation is a plausible construction of the scope of the president's statutory authority and plenary power over immigration.<sup>65</sup> To assert that it is not the "best" view of the law, then, would be to assert that it is inconsistent with the political morality of our community as a whole. That is where Yates exceeded the limits of the ethical rights and responsibilities of her role. She was required to provide the president with candid and competent legal advice, but the question of coherence with our community's political morality is one which the democratic process entrusts to elections and whatever mandate they provide to the president for setting the normative agenda.

#### CONCLUSION

National security scholar and former OLC attorney Marty Lederman argues that Yates's critics are picking semantic nits when they focus on Yates's use of the phrase "wise or just" to claim that a government attorney should seek the best view of the law.<sup>66</sup> The best way to read Yates's letter, he argues, is as a contention that the executive order is unconstitutional because the president was motivated by religious discrimination. But Yates did not want to come out and say that directly. She did say she was not "convinced that the Executive Order is lawful," so perhaps her reference to morality and justice was merely a rhetorical flourish.<sup>67</sup> The "best view of what the law is" language may simply indicate that any lawyer has an obligation of competence, candid communication, and independent judgment.<sup>68</sup> Surely an ethical law-

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64. See HART, *supra* note 51, at 204.

65. See *supra* notes 13–14 and accompanying text.

66. Letter from Sally Yates to Dep't of Justice Att'ys, *supra* note 5. See Marty Lederman, *Sally Yates Did the Right Thing*, JUST SECURITY (Jan. 31, 2017), <https://www.justsecurity.org/37029/sally-yates/> [<https://perma.cc/V8CQ-6TR8>]; Jack Goldsmith, *Quick Thoughts on Sally Yates' Unpersuasive Statement*, LAWFARE (Jan. 30, 2017, 9:32 PM), <https://lawfareblog.com/quick-thoughts-sally-yates-unpersuasive-statement> [<https://perma.cc/T276-9497>]; Benjamin Wittes, *What Yates Should Have Done*, LAWFARE (Jan. 30, 2017, 9:51 PM), <https://lawfareblog.com/what-yates-should-have-done> [<https://perma.cc/7DF8-R6FM>].

67. Letter from Sally Yates to Dep't of Justice Att'ys, *supra* note 5.

68. *Id.*; MODEL RULES, *supra* note 54, at rr. 1.1, 1.4, 2.1.

yer would not want to provide only her second-best judgment about what the law requires.

This reading of Yates's letter may be persuasive, but the reason for composing this short Essay, with the seemingly quixotic discussion of Dworkin, was to distinguish sharply between a government action that is "[s]tupid but legal" and one that is unlawful, full stop.<sup>69</sup> Dworkinian jurisprudence invites this confusion, and I am afraid Yates's letter will set a bad example for other government lawyers advising the executive on the legality of proposed actions. There may be a legal argument, avoiding the detour into political morality, that the travel ban is unconstitutional because it is motivated by invidious discrimination. Alternatively, it could be within the president's broad plenary power and statutory authority. By trying to become Hercules, Acting Attorney General Yates gave insufficient attention to the fundamental responsibility of any attorney: to provide candid advice to her client on what the law permits or requires, and to repose the responsibility with the client for the political and moral consequences of his decision.

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69. Charles Krauthammer, *The Travel Moratorium: A Hopeless Disaster*, WASH. POST (Feb. 9, 2017), [https://www.washingtonpost.com/opinions/global-opinions/the-travel-moratorium-a-hopeless-disaster/2017/02/09/53e3bdde-eef5-11e6-b4ff-ac2cf509efe5\\_story.html?utm\\_term=.3c0308d0eb23](https://www.washingtonpost.com/opinions/global-opinions/the-travel-moratorium-a-hopeless-disaster/2017/02/09/53e3bdde-eef5-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.3c0308d0eb23) [<https://perma.cc/QD5R-ZUMW>].