

# POLITICALLY MOTIVATED BAR DISCIPLINE

JAMES E. MOLITERNO\*

*Bar discipline and admission denial have a century-long history of misuse in times of national crisis and upheaval. The terror war is such a time, and the threat of bar discipline has once again become an overreaction to justifiable fear and turmoil. Political misuse of bar machinery is characterized by its setting in the midst of turmoil, by its target, and by its lack of merit. The current instance of politically motivated bar discipline bears the marks of its historical antecedents.*

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\* James E. Moliterno is the Tazewell Taylor Professor of Law at the College of William & Mary School of Law. Thanks to Erin Green and Elisa Nethercott for excellent research assistance and to the William & Mary Graduate Research Fellows program for continued provision of research assistance. William & Mary librarians Chris Byrne, Jennifer Sekula and Fred Dingley found the most obscure resources. I am grateful for the comments of colleagues on drafts of this Article. Thanks to Jayne Barnard, David Barnhizer, Susan Carle, David Caudill, Neal Devins, Charles DiSalvo, Dave Douglas, Kenney Hegland, John Levy, Jon Sheldon, William Simon, David Wilkins, and Fred Zacharias. Errors that remain are mine.

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INTRODUCTION

Jesselyn Radack sat in her office at the Department of Justice (“Justice” or “DOJ”) that morning, December 7, 2001, unaware of the trouble that was on the horizon. A 1995 Yale Law graduate, she had spent the six-plus years since graduation in government, first as an Attorney General’s Honors Program lawyer, representing the United States of America first at DOJ’s Civil Division, and then in the Professional Responsibility Advisory Office (PRAO).<sup>1</sup> In this capacity, Radack gave advice to inquiring DOJ lawyers about a wide range of ethics issues. She had never herself been the subject of a bar discipline complaint. According to DOJ, she was good at her work until that day.<sup>2</sup>

John Walker Lindh had been captured a couple of weeks earlier, on November 21, 2001, in Afghanistan. On December 7, John DePue, a Terrorism and Violent Crime Section DOJ lawyer, asked Radack what the law of professional responsibility said about whether Lindh could be directly interviewed in a custodial, overt way; specifically, whether he should be made aware that his father had retained counsel to represent him.<sup>3</sup> She gave her opinion in a series of at least fourteen exchanged emails with Mr. DePue. In part, she said: “I consulted with a Senior Legal Advisor here at PRAO and we don’t think you can have the FBI agent question Walker. It would be a pre-indictment, custodial overt interview,

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1. Motion to Inspect and Copy, Exhibit 15, Jessica Radack affidavit, *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002) (No. 02-37-A) [hereinafter Exhibit 15].

2. *Id.*

3. *Examining the E-mail* (June 15, 2002), at [www.msnbc.msn.com/id/3067190/](http://www.msnbc.msn.com/id/3067190/). *See also* Exhibit 15, *supra* note 1. The lawyer to whom Mr. DePue referred, James Brosnahan, eventually did meet with Lindh more than a month later, on January 24, 2002. Brosnahan, among other things having served with the Special Prosecutor for the Iran/Contra matters investigating the first President Bush’s pardon of Caspar Weinberger, represented Lindh as lead counsel in negotiating his later plea agreement. Brosnahan complained fervently about his many faxes to Justice asserting his representation of Lindh during December 2001. Byron York, *American Tali-lawyer: Defending John Walker Lindh*, NATIONAL REVIEW, Feb. 25, 2002, at 22–23; Washington File, John Walker Lindh Was Denied Legal Representation, Defense Says, U.S. Dep’t of State, <http://usinfo.state.gov/topical/pol/terror/02012417.htm>.

which is not authorized by law.”<sup>4</sup> She was asked her advice, the sort of advice given regularly to DOJ lawyers for the nearly three years since her transfer to PRAO. She gave it. It seems not to have been the advice her client, the United States of America, wanted to hear. Her advice was not taken. Instead, her client, through FBI agents on the ground in Afghanistan, decided to question Lindh without informing him that his family had retained counsel to represent him.<sup>5</sup>

In the eyes of top administration officials, the Lindh case was unquestionably an important one in the war on terror. Attorney General Ashcroft, in announcing the ten count indictment against Lindh, stated:

The United States does not casually or capriciously charge one of its own citizens with providing support to terrorists. We are compelled to do so today by the inescapable fact of September the 11th—a day that reminded us in no uncertain terms that we have enemies in the world and that these enemies seek to destroy us.<sup>6</sup>

As the indictment states, prior to being interviewed by the FBI, Walker was informed of his Miranda rights, including the right to speak to counsel. He acknowledged that he understood each of his rights, and he chose to waive them, both verbally and in a signed document.

Ashcroft was questioned by a reporter at the news conference:

Q: Sir, even though he was “Mirandized,” his family has complained several times that they haven’t had the chance to get his lawyer in to talk to him yet. Do you know how soon his lawyer will have access to him now that these charges have been filed?

ATTY GEN. ASHCROFT: Well, I think it’s important to understand that the subject here is entitled to choose his own lawyer, and to our knowledge, has not chosen a lawyer at this time. And as such, when he is brought into the Eastern District for the process, which is beginning today, he’ll have every right to counsel.<sup>7</sup>

For reasons tactical and political, it was a case the government had to make good on. The credibility of the war on terror demanded success in this prosecution.

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4. *Examining the E-mail*, *supra* note 3.

5. *Id.*

6. Attorney General Transcript, John Walker Lindh Press Conference (Jan. 15, 2002), at <http://www.usdoj.gov/archive/ag/speeches/2002/011502walkertranscript.htm>.

7. *Id.*

Radack's advice had been inconsistent with the actions taken by the government on the ground and with the legal position taken by the Attorney General. Her advice was unwelcome. Within two months of advising that the government should not interview Lindh without informing him of his right to counsel, and shortly after Lindh's indictment, Radack was issued an unscheduled, unsigned, undated, uncharacteristically negative job evaluation by her DOJ supervisor<sup>8</sup> and encouraged to find other employment or have the evaluation made part of her permanent personnel file.<sup>9</sup> She did leave, entering private practice in early April 2002. Radack had been with her private law firm employer for a short time when she heard a news story to the effect that Justice had never taken a position that Lindh should have been informed of the lawyer his father had hired for him. This she knew to be false, having given that advice on PRAO's behalf herself. Contacted by *Newsweek* reporter Michael Issikoff, Radack gave him copies of her e-mails. They appeared days later in the June 15, 2002, issue of the magazine. Two weeks after the *Newsweek* story appeared, and on the day scheduled for Lindh's motion to suppress his statements on denial of right to counsel grounds, Lindh and the Government entered a plea bargain. Under the agreement, Lindh pleaded guilty and was convicted of two counts, one from the original ten count indictment and one charged later by Information. Nine of ten original counts, including the most serious counts, were dismissed. Within weeks after the Lindh plea, Justice instituted a criminal investigation of Radack. Radack learned of the investigation from her private employers, who had been interviewed by an Office of the Inspector General (OIG) agent.<sup>10</sup> More than a year later, on September 11, 2003, the criminal investigation was terminated without charges being brought.<sup>11</sup> The investigation, however, cost Radack her private law firm position.<sup>12</sup> Within weeks of the close of the criminal investigation, on October 31, 2003, Justice filed its bar complaints with the District of Columbia and Maryland bars<sup>13</sup> on behalf of Radack's former client, the United States of America.

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8. Exhibit 15, *supra* note 1.

9. *Id.* ¶ 27.

10. *Id.* ¶ 34.

11. *Id.* ¶ 32.

12. Motion to Inspect and Copy, Exhibit 8, Unemployment Comp Order, *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va.) [hereinafter Exhibit 8].

13. Motion to Inspect and Copy, Exhibits 2 and 3, *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va.) [hereinafter Exhibits 2 and 3].

Radack's story is reminiscent of past times when the bar admission process or the disciplinary process was used to oust or punish those with unpopular political views, those who deigned to represent clients with unpopular views, or those who bore ethnic identities that the organized bar found threatening to its homogeneity of thought. Perhaps being unsympathetic with the view that the government can do whatever it pleases in the name of the war on terror may be the new "disqualification" from the character and fitness to be a lawyer.

There have always been neutral-sounding reasons given for withholding or taking away a bar license in these cases: coming from civil law systems, turn of the 20th century immigrants lacked the background to understand what America is all about, and this robbed them of the capacity to practice in our courts and serve as the guardians of liberty that lawyers must be;<sup>14</sup> members of Communist Party USA and those who represented suspected members could not be lawyers for fear of their subversion of the judicial process; civil rights activists were trouble-makers unworthy of civil membership in the profession; and Jesselyn Radack breached the United States's (her client's) confidence by revealing that she had once advised it to forego custodial, overt questioning of a terror suspect without first clearing the communication with counsel retained for him.<sup>15</sup> In many of these instances, bar officials and bar complainers have had good motives, or at least have sincerely believed they were acting in the profession's and the nation's best interests. But despite the neutral-

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14. "While the quest was 'aimed in principle against incompetence, crass commercialism, and unethical behavior,' the ostensibly 'ill-prepared' and 'morally weak' candidates were often in fact of foreign parentage, and, most pointedly, Jews." Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 *YALE L.J.* 491, 500 (1985) (quoting M. Larson, *THE RISE OF PROFESSIONALISM*, 173 (1977)). That urban immigrants, declared George W. Wickersham, Attorney General to President Taft and senior partner in a prestigious New York law firm, "with their imperfect ideas of our political institutions, having an influence upon the development of our constitution and the growth of American institutions" is appalling. *Conference on Legal Education*, 8 *A.B.A. J.* 137, 149-50 (Mar. 1922). See also George W. Wickersham, *The Moral Character of Candidates for the Bar*, 9 *A.B.A. J.* 617 (Oct. 1923). Southern, Eastern and Central European immigrants were described by one lawyer as possessing little fairness, justice, and honor; the result, he continued, would threaten the Anglo-Saxon law of the land. *Id.*; see also JEROLD S. AURBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 107 (1976); William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 *ILL. L. REV.* 591, 593, 601-04 (1917); John B. Sanborn, *Law Schools and Admission to the Bar*, 36 *A.B.A. REP.* 671, 683-89 (1911).

15. As of this writing (February 10, 2005), I wonder what is going to happen next to Sally Frank, a Clinical Professor at Drake Law School. In early February, 2004, Frank was the subject of a gag order and subpoena in conjunction with a grand jury probe of her and her students' National Lawyers Guild meeting. After the meeting, during an otherwise peaceful anti-war protest at the National Guard STARC Armory on November 14, 2003, a protester was arrested and charged with assault. In February 2004, the criminal investigation of Frank ended without charges being filed, the gag order was lifted and the subpoena dissolved.

sounding reasons, and despite sometimes good or benign intentions, political use of the bar machinery has been about exclusion, repression, and retribution.

By politically motivated bar complaints, I mean complaints that would not be lodged but for a political motivation. They are not pursued to vindicate the lawyer ethics issues raised by the complaints, but rather to achieve some political goal or effect. Such complaints often play a part in a larger drama. Commonly, politically motivated bar actions lack merit. Some politically motivated bar complaints or bar actions may have technical merit, at least at the time of their initiation. But even the meritorious ones would not be filed in the usual course of things without the impetus of some political or other untoward motivation. In the absence of merit, if a bar complaint bears other marks of political action (other interests of the complaining party, context of the complaint), a political motive for the action is highly likely.

In Part I of this Article, I trace the history of twentieth century misuse of the bar machinery to punish government dissenters, maintain homogeneity of thought, and preserve the social and political status quo, particularly in times of national crisis. In Part II, I turn explicitly to the Justice bar complaint against Radack, arguing that the complaint lacks merit, further raising the likelihood of its political motivation. Coming as it has during a time of national crisis, emerging from an administration that has asserted that those who disagree with its methods are giving comfort to America's enemies, and being demonstrably meritless, the bar complaint fits the historical pattern of politically motivated bar discipline complaints.

#### I. A CENTURY OF POLITICAL USE OF BAR MACHINERY

At critical periods in the nation's 20th Century history, bar machinery has been used as a tool of repression and preservation of homogeneous thought.<sup>16</sup> Political actions and views that are out of conformity with those currently in power, particularly in times of perceived national crisis, have been costly for lawyers.<sup>17</sup> By contrast, bar discipline machinery has moved

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16. See AURBACH, *supra* note 14; David Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 795 (1991); Carrie Menkel-Meadow, *Private Lives and Professional Responsibilities? The Relationship of Personal Morality to Lawyering and Professional Ethics*, 21 PACE L. REV. 365, 389 (2000); Rhode, *supra* note 14 (extensive survey of bar officials accompanying analysis of character issue in admissions).

17. See Rhode, *supra* note 14, at 566-70.

slowly, if at all, against the politically well-connected.<sup>18</sup> In some of these historical instances of political use of the bar admission and disciplinary machinery, the bar itself was both the instigator and the decision-maker;<sup>19</sup> in other cases, like Radack's, the bar is a hoped-for accomplice of a powerful actor;<sup>20</sup> in still others, coordination with the bar was planned in advance.<sup>21</sup> Most of the historical instances summarized here now seem uncontroversially meritless. Nonetheless, when the actions were taken, then current doctrine sometimes appeared to support the bar action. Even when reasonable doctrinal arguments could be made to support the bar action, courts most frequently vindicated the subject of the politically motivated bar action.<sup>22</sup> The bar actions, arguably supported by doctrine, were not instituted to vindicate the doctrine, but rather to vindicate the political needs of the complainer.

#### A. *Unwashed Immigrants and Plaintiffs' Lawyers*

At its beginnings, the organized American bar<sup>23</sup> attempted to keep the stream of its members "pure."<sup>24</sup> Much of the early work of the American Bar Association (ABA) was targeted at keeping membership in the bar homogeneous.<sup>25</sup> Homogeneity preserves views within a narrow range.

18. American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement, Final Draft, June 1970, 1-2 (A.B.A. 1970) (reciting faults of bar disciplinary practice including failures to proceed against lawyers who are professionally or socially associated with bar authorities).

19. Most of the bar admission cases fit this model, as do some bar discipline cases, such as the move against William Kuntzler during the Chicago Seven trial. See *infra* note 129 and accompanying text.

20. Recommendations of bar discipline by HUAC against suspected Communists and by California agriculture interests against CRLA, for example.

21. See *In re Ruffalo*, 370 F.2d 447, 460-61 (6th Cir. 1966); *Chicago Bar Ass'n v. McCallum*, 173 N.E. 827 (Ill. 1930) (railroad lawyers conspire to create and report charges of personal injury lawyers); *In re Sizer*, 267 S.W. 922 (Mo. 1924) (conglomeration of railroads, utilities and their lawyers hired investigator to pursue charges against plaintiffs' lawyers for providing financial assistance to clients); *Mahoning County Bar Ass'n v. Ruffalo*, 199 N.E.2d 396 (Ohio 1964).

22. See *infra* notes 105, 106 and accompanying text.

23. Although state bar associations preceded the formation of the ABA in 1878, for these purposes I mark the birth of the organized bar at about 1900, the beginning period of national influence of the ABA as the first purportedly unified voice for the American legal profession. All of the ABA's most important early work began roughly in this time period: the advancement of the bar exam, raising of educational standards, accreditation of law schools, and the formulation and adoption of a national code of ethics.

24. AUERBACH, *supra* note 14, at 113; *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 A.B.A. REP. 656, 681 (1921).

25. Kalven & Steffen, *The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black*, 21 LAW IN TRANSITION 155, 178 (1961) ("[w]hat is really at stake" in certification

Homogeneity resists change. Homogeneity preserves the status quo for those in power.

Among the earliest actions of the organized bar were efforts to raise educational barriers to entry,<sup>26</sup> take charge of law school accreditation,<sup>27</sup> and adopt a national ethics code, the chief new feature of which was a harsher ban on advertising and solicitation of clients engaged in by plaintiffs' lawyers whose clients were litigation opponents of the rules' drafters.<sup>28</sup> All of these were largely motivated by a desire to maintain homogeneity.<sup>29</sup>

Prior to the onset of substantial Eastern and Southern European immigration, bar membership had not traditionally been restricted to citizens. But in 1879 (shortly after the Supreme Court had upheld a prohibition on women's membership in the state bar), Connecticut began a trend toward adoption of such restrictions.<sup>30</sup>

Raising education barriers to bar entry were purportedly meant to increase the professional standing of lawyers, but even that salutary goal was tied by historical events to a desire to keep out recent immigrants. Law school accreditation itself was used to root out urban, part-time law schools that were educating working people, women, and immigrants.<sup>31</sup>

procedures is the "image of what kind of conformity the Bar will require.").

26. See *Proceedings of the Section of Legal Education and Admissions to the Bar*, 46 A.B.A. REP. 656-90 (1921).

27. See *supra* note 26.

28. See James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 791 (1997) [hereinafter Moliterno, *Creeds*]; see generally *In re Sizer*, 267 S.W. 922 (Mo. 1924); see also HENRY S. DRINKER, *LEGAL ETHICS* 213 (Greenwood Press 1980) (1953); *Canons of Ethics Canon 27*, reprinted in 33 A.B.A. REP. 575, 582 (1908); James E. Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223, 229 (2003); *Proceedings of the House of Delegates*, 62 A.B.A. REP. 216, 349-52 (1937).

29. I am not the first to connect these various missions into one. "[T]he established bar adopted educational requirements, standards of admission, and 'canons of ethics' designed to maintain a predominantly native-born, white, Anglo-Saxon, Protestant monopoly of the legal profession." MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 3 (1990); see also AUERBACH, *supra* note 14, at ch. 4, *Cleansing the Bar*; Rhode, *supra* note 14, at 500 ("Although most of the profession's efforts focused on strengthening educational requirements and ethical codes rather than on screening for character, the enterprises were by no means unrelated.").

30. Sanford Vinson, *National Loyalty, Communalism, and the Professional Identity of Lawyers*, 7 YALE J.L. & HUMAN. 49, 64 (1995) ("Justice Powell suggested [that Connecticut's action] was the precursor to a host of restrictions adopted throughout the land designed 'to impair significantly the efforts of aliens to earn a livelihood in their chosen occupations.' Whether motivated by nativism or rentseeking desires of citizens to limit the number of potential competitors, these nationality-based restrictions were, for many years, upheld against challenge.").

31. Night schools, observed the Dean of the University of Wisconsin Law School, enrolled "a very large proportion of foreign names." Harry S. Richards, *Progress in legal Education*, 15 ASS'N AM. L. SCH. PROC. 63 (1915). See also AUERBACH, *supra* note 14, at 100 n.62.



Changes in the bar rules targeted urban ethnic lawyers who in large proportion represented personal injury and workplace plaintiffs. During the first half of the twentieth century, one of the surest ways to become a target of bar discipline charges was to be a successful personal injury or injured worker plaintiffs' lawyer. The organized bar pursued them with uncommon vigor and uncommon tactics.<sup>32</sup> Nearly half of the American Bar Association (ABA) ethics opinions decided between 1921-1936 addressed advertising and solicitation topics.<sup>33</sup> No other categories of disciplinable conduct were pursued with such single-minded zealous effort by the bar. The pursuit sought both to maintain the purity of bar membership and to coincidentally aid the clients of the bar leadership.<sup>34</sup> The mere statement of seeing nothing wrong with advertising could lead to denial of admission.<sup>35</sup>

In 1929, after a lengthy, publicized investigation in New York into the evils of ambulance chasing, resulting in recommendations of disciplinary proceedings against seventy-four lawyers, the chief counsel pointedly observed that some attorneys who had testified "could not speak the King's English correctly . . . . These men by character, by background, by environment, by education were unfitted to be lawyers." The only remedy, he suggested, was a character examination, prior to law-school admission, to eliminate those who lacked proper antecedents, home environment, education, and social contacts. If such an examination created a legal aristocracy, he told applauding members of the New York State Bar Association, so be it.<sup>36</sup>

Large numbers of immigrants presented a challenge for the nation and the legal profession. For the legal profession, the challenge of assimilating newcomers and learning from them was unwelcome. The legal profession,

32. Some leaders of the bar went to extraordinary lengths to pursue ethics charges against offenders. See, e.g., *In re Ruffalo*, 370 F.2d 447, 461 (6th Cir. 1966); *Chicago Bar Ass'n v. McCallum*, 173 N.E. 827 (Ill. 1930); *In re Sizer*, 267 S.W. 922 (Mo. 1924); *Mahoning County Bar Ass'n v. Ruffalo*, 199 N.E.2d 396 (Ohio 1964).

33. JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 331 (1950).

34. James E. Moliterno, *Why Formalism?*, 49 KAN. L. REV. 135, 138 (2000).

35. Walter C. Douglas, Jr., *The Pennsylvania System Governing Admission to the Bar*, 54 A.B.A. REP. 701, 703-05 (1929).

36. Moliterno, *Creeds*, *supra* note 28 at 812 (citing AUERBACH, *supra* note 14, at 48-49); see also Isador Kresel, *Ambulance Chasing, Its Evils and the Remedies Therefore*, New York State Bar Association, Proceedings 52, 337-39 (1929); Supreme Court of the State of New York, Report to Appellate Division, First Judicial Department James Wasservogel 11-15 (Sept. 26, 1928) (alternative proposal to cap contingent fee percentages of personal injury plaintiffs lawyers).

slow to change, resisted the influence of the immigrants' perspectives on justice, particularly justice for workers and victims of product injuries. Increasing educational standards, establishing preceptor systems, and creating, or in some instances invigorating, enforcement of rules against advertising and solicitation prohibitions represented the bar's effort to maintain homogeneity. The efforts were successful for a generation or more. Although lawyers continue today to perceive race and gender bias in the legal profession,<sup>37</sup> the persistence of early 20th century immigrants in the face of systematic politically motivated bar action laid the groundwork for advances in diversity in the legal profession in recent decades.

### *B. Lawyers and Communists*

During two post-war periods, following the First and Second World Wars, the American legal profession was caught up in the national fear of communists.

#### *1. Red Scare*

The post-World War I Red Scare had its effect on actively left-wing lawyers.<sup>38</sup> The mood of the times and bar association interest in it is reflected by the culminating words of a 1921 speech by the Vice President to the Virginia State Bar:

[W]e have permitted to drag their green trunks across and along the planks at Ellis Island thousands and hundreds of thousands of anarchists, revolutionists, mad men, fellows who propose to take charge of this republic of ours.<sup>39</sup>

The fear was not entirely unwarranted. Anarchists' bombs were exploding across America, from Boston to New York to Seattle; the Bolsheviks had taken power in Russia.<sup>40</sup> Panic-stricken with fear of communists, socialists, and anarchists, both the organized bar and the DOJ acted in conformity with the Vice President's views of the world.

Making warrantless mass arrests, DOJ agents engaged in unprecedented abuses of Fourth and Sixth Amendment rights. Specific

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37. See, e.g., Md. State Bar Ass'n, Professionalism Task Force Report 31 (comments of Pamela J. White at 3, 10–12) (on file with author).

38. See, e.g., *In re Margolis*, 112 A. 478 (Pa. 1921).

39. Thomas R. Marshall, *Altruistic Evil*, 55 AM. L. REV. 349, 362–63 (1921).

40. See, e.g., ROBERT K. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920* (1955); REX A. WADE, *THE BOLSHEVIK REVOLUTION AND RUSSIAN CIVIL WAR* (2001).

instructions from a young J. Edgar Hoover, then Special Assistant Attorney General, were to keep the arrestees from contacting counsel or other advisors until they could be interrogated at an initial hearing.<sup>41</sup> In a report “to the American People,” a group of lawyers and law professors that included Roscoe Pound, Zechariah Chafee, and Felix Frankfurter, documented astonishing stories from across the nation of abuse of suspected communists and labor activists.<sup>42</sup> Lawyer activity was repressed along with that of everyone else.

Antiwar activists have always been regarded as insufficiently patriotic during times of great national need and crisis, making them sometimes indistinguishable from political deviants such as communists and anarchists.<sup>43</sup> Resistance to World War I was no different.

During World War I, Jacob Margolis and others were disbarred for openly helping men resist induction.<sup>44</sup> Margolis actively advocated civil disobedience, in particular, the violation of conscription laws.<sup>45</sup> John Arctander was charged by the bar with “unpatriotic, unethical, and unprofessional conduct.”<sup>46</sup> When orders came from the federal government for men to fill out selective service questionnaires, advisory boards of lawyers were organized to assist men in doing so without charge. Arctander did essentially two things that drew the bar’s and court’s disbarment orders. First, he charged a fee to a number of men for the service of assisting them with their selective service questionnaires.<sup>47</sup> Patriotism dictated that lawyers refer men to the free service advisory boards, the bar and court ruled.<sup>48</sup> Second, Arctander assisted alien clients who had previously registered their intention to become United States citizens with documents meant to assert their foreign allegiance and withdraw their intent to become United States citizens.<sup>49</sup> Such an act

41. MURRAY, *supra* note 40, at 193–97, 213.

42. Report Upon the Illegal Practices of the United States Department of Justice (National Popular Government League, 1920). The parallels to the current Order regarding detention of Terror War suspects are striking. *See infra* note 185.

43. David Ray Papke, *The Watergate Lawyers All Passed the Character and Fitness Test*, 2 COLUM. U. F. 15, at 17–18 (1973) (discussing Ohio committee’s equation of pacifists and communists).

44. *See In re Hofsteda*, 173 P. 1087 (Idaho 1918); *In re Margolis*, 112 A. 478 (Pa. 1921); *In re Arctander*, 110 Wash. 296, 188 P. 380 (Wash. 1920); *see also* Charles R. DiSalvo, *The Fracture of Good Order: An Argument for Allowing Lawyers to Counsel the Civilly Disobedient*, 17 GA. L. REV. 109 nn.127–30 (1982).

45. *Margolis*, 112 A. at 479–80.

46. *Arctander*, 188 P. at 380.

47. *Id.* at 382.

48. *Id.* at 381–83.

49. *Id.* at 382.

removed these men's obligations to serve in the United States armed services. The court was especially miffed with the unpatriotic tone of Arctander's correspondence with the Norwegian embassy in which he expressed his views of the war. "[Arctander] shows no feeling on his part that the result of that war was of any importance to him."<sup>50</sup> He bought no war bonds until after he was under investigation by the War Department and gave only \$100 to the Red Cross.<sup>51</sup> All were indicators of his lack of patriotism and unfitness to practice law.<sup>52</sup> Other lawyers obstructed the military's recruitment efforts and were disciplined for the activity.<sup>53</sup> Still others were associated with the Industrial Workers of the World when it advocated the use of strikes and industrial sabotage to disrupt the war effort.<sup>54</sup>

## 2. *McCarthyism*

Following World War II, when the necessity of feigned alliance with Russia had largely passed, the nation turned to obsession and fear. Senator Joseph McCarthy took advantage of the national mood and thrust himself into the national limelight by announcing his knowledge of the names of communists in the State Department. His name became synonymous with narrow-minded, obsessive repression. Perhaps his greatest impact was felt in the entertainment industry and among lawyers. Among the lawyer-targets, some had their own left-leanings, others merely dared to represent alleged communists, and a few were simply unwilling to submit to demands for disclosure of their political views.<sup>55</sup> In this hysterical time, the latter was taken as a certain sign of hidden fault.

The ABA allowed its patriotic fervor to blind it to abuses of civil liberties without and within the ABA. Among many actions undertaken by the ABA at the time was the recommendation that state bar leaders demand of lawyers a loyalty oath.<sup>56</sup> The oath was praised by national leaders as a means of ridding the profession of the disloyal, but most state

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50. *Id.* at 383.

51. *Id.*

52. *Id.*

53. *See In re O'Connell*, 194 P. 1010 (Cal. 1920).

54. *See In re Smith*, 233 P. 288 (Wash. 1925).

55. *See, e.g., In re Anastaplo*, 121 N.E.2d 826 (Ill. 1954); *In re Anastaplo*, 163 N.E.2d 429, 928 (Ill. 1959), *aff'd* 366 U.S. 82 (1961).

56. *See AUERBACH, supra* note 14, at 239; *Proceedings of the House of Delegates*, 76 A.B.A. REP. 527, 531-32 (1951).

associations did not follow the ABA recommendation and few commanded members to take the oath.<sup>57</sup>

Nonetheless, the ABA continued its effort to purge Communists from the profession by generating lists of those who had exercised their Fifth Amendment rights at various committee inquiries and encouraging state and local bar associations to move against the licenses of those on the list.<sup>58</sup>

Representing accused Communists was hazardous. After representing Smith Act defendants,<sup>59</sup> five lawyers<sup>60</sup> were sentenced for contempt.<sup>61</sup> Dissenting from the Supreme Court's affirmance of the contempt judgment, Justice Black wrote, "[T]his summary blasting of legal careers . . . constitutes an overhanging menace to the security of every courtroom advocate in America. The menace is most ominous for lawyers who are obscure, unpopular, or defenders of unpopular persons or unorthodox causes."<sup>62</sup>

Two lawyers, Harry Sacher and Abraham Isserman, were especially affected by their representation of alleged Communist Party members. Prior to their representation of the *United States v. Dennis* defendants, each had many years of practice, some of which had been spent representing civil rights parties and labor.<sup>63</sup> Before his contempt conviction and later disbarment, Sacher had a "twenty-four-year record of 'unblemished conduct.'"<sup>64</sup> The trial judge who cited Sacher for contempt received praise from then Attorney General Clark, who had written that politically wayward lawyers should be punished.<sup>65</sup> After being jailed for contempt, the two were pursued by bar authorities. Sacher was disbarred by the Bar Association of the City of New York; Isserman by the New Jersey Bar.<sup>66</sup> Isserman's disbarment in New Jersey was followed by disbarment from the United States Supreme Court Bar.<sup>67</sup> Both were

57. AUERBACH, *supra* note 14, at 240.

58. *Id.* at 238–39; *Proceedings of House of Delegates*, 37 A.B.A. J. 309, 312–13 (1951).

59. *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950).

60. Three of the five were Jewish, one was black, and one was Irish Catholic. AUERBACH, *supra* note 14, at 237.

61. Fowler Harper & David Haber, *Lawyer Troubles in Political Trials*, 60 YALE L.J. 1 (1951); *see also* AUERBACH, *supra* note 14, at 237; VICTOR S. NAVASKY, *NAMING NAMES* 37 (1980).

62. *Sacher v. United States*, 343 U.S. 1, 18 (1952) (Black, J., dissenting).

63. AUERBACH, *supra* note 14, at 242.

64. *United States v. Sacher*, 182 F.2d 416 (2d Cir. 1950); AUERBACH, *supra* note 14, at 244–45.

65. AUERBACH, *supra* note 14, at 241.

66. *In re Isserman*, 87 A.2d 903 (N.J. 1952).

67. 348 U.S. 1 (1954).

eventually reinstated after many years, during which the hysteria of the communist scare had subsided.<sup>68</sup>

Sacher and Isserman were not alone in being targets of bar punishment and harassment. Many others who deigned to represent unpopular, feared clients followed in their steps.<sup>69</sup> The prospect of professional discipline from representation of communists became so likely that representation in these cases became almost impossible to find.<sup>70</sup> A lawyer willing to represent the government's mortal enemy risked near certain professional annihilation.<sup>71</sup> The raw number of reported cases of professional discipline can be found. But the number of lawyers silenced and the number of clients who went unrepresented can never be known. Justice Douglas described the professional phenomenon as a "black silence of fear."<sup>72</sup>

Although Isserman and Sacher were reinstated after a measure of the hysteria died down, George Anastaplo was refused twice, first at the height of the hysteria<sup>73</sup> and later when much of it had subsided.<sup>74</sup> Anastaplo's fault was a refusal to answer the bar committee's questions about his affiliations and associations.<sup>75</sup> By all accounts a man of excellent character, ability, and intellect,<sup>76</sup> Anastaplo was refused bar membership.

To the extent it had not been so before, membership in the National Lawyers Guild (NLG) became synonymous with communist associations. At the ABA House of Delegates meeting on August 28, 1953, then Attorney General Herbert Brownell announced that the NLG would henceforth be listed as a subversive organization, calling it the "legal mouthpiece" of the Communist Party.<sup>77</sup>

Needless to say, lawyers with communist or socialist ties or leanings were more likely to have difficulty gaining admission than to be disbarred if already licensed.<sup>78</sup> Several prominent lawyers were initially denied

68. *Ass'n of the Bar of the City of New York v. Isserman*, 271 F.2d 784 (2d Cir. 1959); *In re Isserman*, 172 A.3d 425 (N.J. 1961).

69. *In re Sawyer*, 360 U.S. 622, 626-27 (1959) (disciplining Smith Act defense counsel by Hawaii bar for criticism of trial judge).

70. AUERBACH, *supra* note 14, at 246-58; NAVASKY, *supra* note 61.

71. AUERBACH, *supra* note 14, at 246-58 (rendering numerous instances of professional discipline and harassment); NAVASKY, *supra* note 61; Rhode, *supra* note 14; Note, *The Privilege to Practice Law versus the Fifth Amendment Privilege to Remain Silent*, 56 NW. U. L. REV. 644 (1961).

72. William O. Douglas, *The Black Silence of Fear*, N.Y. TIMES, Jan. 13, 1952 (magazine), at 7, 37-38.

73. *In re Anastaplo*, 121 N.E.2d 826 (Ill. 1954).

74. *In re Anastaplo*, 163 N.E.2d 429 (Ill. 1959).

75. *Id.* at 430.

76. *Id.* at 432.

77. NAVASKY, *supra* note 61, at 37.

78. The Communist bar admissions issues persisted long after one might have thought they

admission by some bar based on various political associations. For example, George Anastaplo, who was denied admission for failure to disclose his political associations, became a highly respected scholar on constitutional history.<sup>79</sup> Clyde Summers, who was excluded because his conscientious objector status restricted his ability to support the U.S. Constitution,<sup>80</sup> is a member in good standing of the New York bar and the Jefferson B. Fordham Professor of Law, Emeritus, at the University of Pennsylvania. Robert Cover, one of the plaintiffs in *Law Students Civil Rights Research Council v. Wadmond*,<sup>81</sup> died at age 42 in 1986, having only two years before been at long last admitted to the New York Bar.<sup>82</sup> At his death, he was the Chancellor Kent Professor of Law and Legal History at Yale Law School. At the time of their initial attempts at admission, each was regarded as unfit for membership in the legal profession. Lawyers must, after all, be guardians of liberty.

### C. Activist Civil Rights Lawyers

In a wide variety of contexts, civil rights lawyers and activists, and early federally-supported legal aid lawyers were disciplined or threatened with discipline. Together, their collective fault in the eyes of the organized, traditional strength-center of the bar was the disruption to the legal, social, and cultural status quo that their work promised.

Fierce criticism of poverty lawyers and civil rights activists lawyers came from the highest levels of judicial, government, and bar leadership. Ronald Reagan was openly hostile to legal services lawyers, first as California governor<sup>83</sup> and later as President.<sup>84</sup> Warren Burger, in his pleas for civility,<sup>85</sup> gave substantial blame for the impending downfall of the

would pass. In one case, a legal aid lawyer fought for two years to be licensed because he answered the "Communist question" by checking "decline to answer," which was among the choices permitted on the application. The bar refused his admission and asked him to answer the question "yes" or "no." The applicant declined to do so. His admission was eventually ordered by the state supreme court. *See Pushinsky v. Bd. of Bar Exam'rs*, 266 S.E.2d 444 (W.Va. 1980).

79. Rhode, *supra* note 14, at 543-44 n.226 (quoting Andrew Patner, *The Quest of George Anastaplo*, CHICAGO, Dec. 1982, 185, 189); *cf. In re Anastaplo*, 366 U.S. 82 (1961).

80. Rhode, *supra* note 14, at 567.

81. *Law Students Civil Rights Research Council, Inc. et al. v. Wadmond et al.*, 401 U.S. 154 (1971).

82. *See Biography: Robert Cover*, <http://www.saltlaw.org/publicinterestcover.htm>.

83. Fred J. Hiestand, *The Politics of Poverty*, in *WITH JUSTICE FOR SOME* 160, 182 (Bruce Wasserstein & Mark J. Green eds., 1970).

84. ALAN HOUSEMAN & LINDA PERLE, CTR. FOR LAW AND SOC. POLICY, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* 27-29 (2003) [hereinafter *SECURING JUSTICE FOR ALL*].

85. At the dedication of the Georgetown Law School building in 1971, a most striking contrast

profession to lawyers in political trials, or as Burger called them, the “new litigation.”<sup>86</sup> He encouraged the legal profession to apply “rigorous powers of discipline” to the misbehaving lawyers by using either the judicial or bar enforcement systems.<sup>87</sup> Failure to do so, he warned, would allow “the jungle [to] clos[e] in on us.”<sup>88</sup> Bar leaders and commentators followed Burger’s lead.<sup>89</sup>

### 1. *Civil Disobedients*<sup>90</sup>

Civil rights worker and civil disobedient Terrence Hallinan was denied admission by the California Committee of Bar Examiners.<sup>91</sup> Hallinan had graduated from Hastings Law School and passed the bar exam in 1965.<sup>92</sup> He had for some time been engaged in various civil rights activities. His first arrest was in England at a 1960 peace march attended by about one hundred thousand people. Hallinan was in a group of about 300-400 who, led by Bertrand Russell, attempted to deliver a protest letter to the American Embassy. The letter refused, the group sat on a sidewalk, blocking passage. Hallinan was convicted of “blocking a footpath.”<sup>93</sup> Once back in the United States, Hallinan joined the Student Non-Violent Coordinating Committee and worked on voter registration in Mississippi in 1963. There he was arrested on separate occasions for loitering and littering. No conviction resulted; he was released after the Attorney General and the National Council of Churches intervened.<sup>94</sup> Once back in San Francisco, he joined the Congress on Racial Equality, the NAACP, and the Ad Hoc Committee to End Racial Discrimination. With these organizations, Hallinan engaged in picketing and several sit-ins at businesses thought to engage in racial discrimination in hiring practices.

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was framed by Chief Justice Burger’s dedication speech and William Kunstler’s “counter dedication” speech. Kunstler and others delivered their student-organized counter dedication speeches from the bed of a pick-up truck parked outside the building. *Burger Speaks and Kunstler ‘Counters,’* N.Y. TIMES, Sept. 18, 1971, at 25.

86. *Id.*

87. *Id.*

88. Fred P. Graham, *Burger Assails Unruly Lawyers*, N.Y. TIMES, May 19, 1971, at 1 (quoting and excerpting from speech).

89. See generally Report of the Ass’n of the Bar of the City of New York, Special Committee on Courtroom Disorder (1973) xiii–xiv; ABA Special Comm. on Evaluation of Disciplinary Enforcement xvii (1970); William Stanmeyer, *The New Left and the Old Law*, 55 A.B.A. J. 319 (1969).

90. See generally DiSalvo, *supra* note 44.

91. *Hallinan v. Comm. of Bar Exam’rs*, 421 P.2d 76 (Cal. 1966).

92. *Id.* at 79.

93. *Id.* at 82.

94. *Id.* at 83.



These activities resulted in six arrests, four of which were dismissed. The other two resulted in trials and convictions for unlawful assembly, disturbing the peace, remaining present at place of unlawful assembly, and trespass.<sup>95</sup> Hallinan represented himself at these trials. Both the presiding judge and the prosecutor prepared documents for the Bar Examiners stating that Hallinan had “appli[ed] the standards of conduct required of a member of bar.”<sup>96</sup> After a lengthy hearing, the Committee found Hallinan lacking good moral character. More than a year later, over a dissent, the California Supreme Court reversed the Committee and concluded the matter in Hallinan’s favor.<sup>97</sup>

One reported case likely hides the rest of an iceberg’s worth of prospective lawyers refused law school admission, denied bar admission, or deterred from the attempt.

## 2. 1960s and 70s Cause Lawyers

Together, lawyers for various civil rights causes and the early government-supported lawyers for the poor created a fresh ethos of lawyering, often producing friction with political and bar leaders, and sometimes attacks on their bar membership.

### a. Civil Rights Movement Lawyers

Terrance Hallinan found that civil disobedience against unjust laws would draw the bar admission committee’s ire. A few years prior, in North Carolina, James Gilliland gained the attention of bar discipline authorities for publicly advocating compliance with the law, specifically court ordered school desegregation pursuant to *Brown v. Board of Education*.<sup>98</sup> Gilliland was disbarred by the North Carolina Bar Association for claimed ethical violations in two domestic relations matters.<sup>99</sup> The charges were brought against him by bar authorities following two related events.<sup>100</sup> Gilliland, commander of his American Legion Post and secretary of the local Lions Club, was asked to speak about the recent school

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95. *Id.*

96. *Id.* at 81.

97. *Id.* at 95.

98. DiSalvo, *supra* note 44, at 133 n.130 (citing Daniel H. Pollitt, *Counsel for the Unpopular Cause: The “Hazard of Being Undone,”* 43 N.C. L. REV. 9, 10 (1964)).

99. Pollitt, *supra* note 98, at 10.

100. *Id.*

desegregation cases.<sup>101</sup> In his talk, he asserted that he supported the Court's ruling and that the desegregation mandate should be followed locally.<sup>102</sup> Not long after, while representing about a dozen individuals before the Charlotte session of the House Un-American Activities Committee, he asserted that the Committee's time would better be used pursuing school officials who were evading the school desegregation mandates.<sup>103</sup> Although Gilliland had never before been the subject of bar complaints, the bar shortly thereafter instituted proceedings against his license and entered orders of disbarment.<sup>104</sup> His disbarment order was remanded by the Supreme Court of North Carolina for failure of bar authorities to honor Gilliland's jury trial right.<sup>105</sup> Once remanded, Gilliland was acquitted.<sup>106</sup>

From his earliest days leading the NAACP's legal team, Charles Hamilton Houston understood the threat of bar hostility to unpopular groups and causes. In one of his earliest cases, Houston, assisted by Thurgood Marshall, represented Bernard Ades against bar complaints.<sup>107</sup> Ades represented the Industrial Labor Defense, an organization with communist party leanings and a social reform agenda. Ades was charged with a variety of bar violations, including solicitation of clients, stirring up racial unrest, court criticism, and pressuring a capital defendant to bequeath his body to Ades for its later use in a death penalty protest.<sup>108</sup> Ades was reprimanded for the inappropriate disposal of his client's body and his court criticism.<sup>109</sup> Houston would be forever concerned about the use of bar discipline against NAACP lawyers.<sup>110</sup> In a variety of ways, Houston, and later Thurgood Marshall, sought to guard NAACP lawyers against anticipated bar discipline.<sup>111</sup>

Harassment of southern lawyers who represented civil rights workers was fierce. Very few white southern lawyers were willing to represent civil rights workers in the deep south. Among the few who did, one was

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *In re Gilliland*, 103 S.E.2d 807 (N.C. 1958).

106. Pollitt, *supra* note 98, at 10.

107. *In re Ades*, 6 F. Supp. 467 (D. Md. 1934); Susan D. Carle, *From Buchanan to Button: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281, 296 (2001).

108. *See* Carle, *supra* note 107, at 296.

109. *Id.* at 297.

110. *Id.* at 297-98. *See also* MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 105 (1987).

111. *See* MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 272-300 (1994).

disbarred in Mississippi.<sup>112</sup> A black lawyer representing school desegregation plaintiffs in Mississippi was harassed by a federal district judge regarding his professionalism, threatened with findings of professional misconduct, and interrogated for a length of time that filled 118 pages of transcript.<sup>113</sup> The harassment continued until the court of appeals said that the district judge was creating “humiliation, anxiety, and possible intimidation of . . . a reputable member of the bar.”<sup>114</sup> The claims against the lawyer were entirely baseless. “All of the testimony in this matter . . . completely exonerates Brown from any improper conduct.”<sup>115</sup>

Once northern lawyers began to undertake representation and organization of southern civil rights clients and causes, southern lawyers responded with law practice restrictions. Five southern states enacted harsher restrictions on client getting, unauthorized practice, and community organizing activities in an effort to prevent outside lawyers (especially NAACP lawyers) from organizing and recruiting plaintiffs for school desegregation cases that would effect compliance with *Brown v. Board of Education*.<sup>116</sup> The Virginia bar’s efforts to keep outside lawyers outside resulted in the Supreme Court’s entry into the fray in *NAACP v. Button*.<sup>117</sup> The NAACP and its affiliate, the Legal Defense and Education Fund (LDF) had chapters in Virginia.<sup>118</sup> Through these chapters, Virginia residents were informed of the possibilities of pursuing school desegregation suits by retaining NAACP and LDF lawyers.<sup>119</sup> Lawyers affiliated with the NAACP were paid a per diem during such representation, but often no other compensation.<sup>120</sup> The Virginia bar proceeded against these lawyers and the NAACP on the ground that their conduct amounted to inappropriate solicitation of business and in particular that the NAACP, which was not a party to the various school desegregation litigation, had unlawfully interjected itself into litigated matters by soliciting plaintiffs and supplying lawyers.<sup>121</sup> The Virginia courts held that the NAACP and its lawyers had acted unethically.<sup>122</sup> The

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112. AUERBACH, *supra* note 14, at 264–65.

113. *In re Brown*, 346 F.2d 903, 908 (5th Cir. 1965).

114. *Id.*

115. *Id.* at 909–10.

116. 349 U.S. 294 (1955).

117. 371 U.S. 415 (1963).

118. *Id.* at 419.

119. *Id.* at 420–21.

120. *Id.* at 420.

121. *Id.* at 417–19.

122. *See NAACP v. Harrison*, 116 S.E.2d 55, 60 (Va. 1960) (accompanying case to *NAACP v. Button*). The Virginia Supreme Court held that the actions of the NAACP constituted “fomenting and

Virginia courts asserted that their purpose and the statute's purpose was to uphold high standards of the legal profession.<sup>123</sup> Eliminating the activities of the NAACP at that juncture would likely have spelled an end to school desegregation in Virginia for the foreseeable future. The Supreme Court reversed the Virginia courts' treatment of the issue, holding that such an application of the solicitation rules violated expression and association rights under the First and Fourteenth Amendments.<sup>124</sup>

Among the lawyers whose work acted as a lightning rod for organized bar criticism was William Kunstler. Kunstler's identification with his activist clientele broke sharply with traditional lawyer norms of professional separation from clients and earned him a folk hero status among law students and young lawyers.<sup>125</sup> Kunstler, one of the many unwelcome Northern lawyer-invaders, went from representing civil rights workers, including Mississippi Freedom Riders, and other protesters in the south, to Black Panthers, to the Chicago Seven.<sup>126</sup> As a traveling civil rights activist lawyer, Kunstler needed pro hac vice admission in various courts to represent his clients, which was not always freely given.<sup>127</sup> The bar reaction to his ferocious representation in Chicago<sup>128</sup> was strikingly swift. The Association of the Bar of the City of New York so anxiously awaited the opportunity to discipline Kunstler that it began proceedings before the Chicago Seven trial had ended, violating its own rules of procedure.<sup>129</sup>

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soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control."

123. *Id.*

124. Other "association" cases followed, arising largely from a new ethos of cause or issue lawyering that accompanied the first federally funded legal aid programs. *See, e.g.*, *UMW v. Ill. State Bar*, 389 U.S. 217 (1967); *R.R. Trainman v. Va. Bar*, 377 U.S. 1 (1964). *See infra* notes 131–37.

125. *See* Victor S. Navasky, *Right On! With Lawyer William Kunstler*, N.Y. TIMES, Apr. 19, 1970 (magazine), at 30.

126. AUERBACH, *supra* note 14, at 289–90.

127. John Kifner, *Kunstler Upheld by Appeals Court*, N.Y. TIMES, May 19, 1973, at 34 (describing a district court's refusal to admit Kunstler to represent a client, in prison for refusing induction, who was transferred after participating in a Reverend Daniel Berrigan led prison protest). After excluding Kunstler, the district judge appointed the former Indiana state chairman of the Republican Party to represent the defendant. *Id.*

128. *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972) (reversing district court's imposition of four-year, thirteen-day sentence for contempt).

129. Tom Goldstein, *Bar Group Withdraws Charges Against Kunstler*, N.Y. TIMES, Feb. 21, 1974, at 34.

*b. Government-Funded Lawyers for the Poor*

When the National Lawyers Guild proposed government-funded legal services for the poor in the 1950s, the proposal was roundly criticized by leaders of the organized bar, perceiving it to be a step toward socialism which at the time could only serve to further identify the Guild with the communist threat. The proposal was a component of the Guild resume that led to persecution of its members by the bar in the years to follow. So certain was the persecution of identified Guild members that when a Hale & Dorr lawyer was identified as a Guild member during a 1954 HUAC hearing, the hearing witness, Joseph Welch, lamented that the lawyer would “always bear a scar.”<sup>130</sup>

Professional opposition and harassment of legal aid lawyers proceeded on two fronts and with two different rationales: local bar associations expressed the concerns of solo and small firm lawyers who feared some of their marginal-but-paying clients would be served by legal aid lawyers,<sup>131</sup> and state bars and powerful institutional interests saw their economic and political interests threatened by the lawsuits and legislative lobbying being done by legal aid lawyers on behalf of clients.<sup>132</sup>

State and local bar associations in California, Texas, Florida, Pennsylvania, and Washington D.C. unsuccessfully sued OEO, claiming it was violating ethical canons.<sup>133</sup> They claimed that legal services lawyers were engaged in unauthorized practice and were unlawfully soliciting clients.<sup>134</sup> In doing so, they were largely protecting local practitioners’ turf.

The most dramatic statewide move against legal services lawyers occurred in North Carolina. Spurred by complaints of local bar associations, the North Carolina Bar Association moved to block legal services lawyers’ work entirely. The North Carolina Bar Association promulgated a rule that would disbar any lawyer working in a legal services office. Essentially, the new rule prohibited practicing with an organization whose directors included non-lawyers. OEO regulations

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130. AUERBACH, *supra* note 14, at 236–37.

131. See EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM 84–86 (1974) (summarizing various conflict-producing combinations of political and bar interests); A. Kenneth Pye & Raymond F. Garraty, Jr., *The Involvement of the Bar in the War Against Poverty*, 41 NOTRE DAME LAW. 864–65 (1966).

132. See Harry P. Stumpf, *Law and Poverty: A Political Perspective*, 1968 WIS. L. REV. 694 (1968).

133. See *Troutman v. Shriver*, 417 F.2d 171 (5th Cir. 1969); see also AUERBACH, *supra* note 14, at 273; JOHNSON, *supra* note 131, at 91; Bethel & Walker, *Et Tu, Brute!*, 1965 TENN. S.B.A.J. 11 (quoted in 41 NOTRE DAME LAW. at 866–67).

134. See JOHNSON, *supra* note 131, at 91.

required some representation on legal services boards by income-eligible, non-lawyer community members. If successful, the move would have disbarred or run off every legal services lawyer in the state. The miscalculation was in not accounting for a single program in Winston-Salem that had been founded by a few prominent state lawyers. Negotiations in the shadow of a federal lawsuit threat resolved the crisis, allowing legal services programs to continue operation.<sup>135</sup>

Perhaps the most vociferous fight between legal aid lawyers and a coalition of business and government interests was spawned by the California Rural Legal Assistance (CRLA) farm worker representation.<sup>136</sup> CRLA moved in a variety of ways to increase wages and to demand government services for farm workers. These lawsuits drew the ire and outrage of then Governor Ronald Reagan and Senator George Murphy, speaking and acting on behalf of the California agribusiness industry.<sup>137</sup> At the time, state governors had the power to veto funding for their state's federally funded legal aid programs, but that veto could be overridden by the OEO Director. Only once was a California governor's veto sustained: in 1970, Ronald Reagan vetoed the funding and the veto was sustained by then OEO Director Donald Rumsfeld.<sup>138</sup> Unsuccessful efforts by Murphy would have placed control of legal services programs in the hands of governors, localizing control to suppress locally unpopular legal aid activities, and would have prohibited legal aid suits against the government.<sup>139</sup> The latter effort was a part of a national affront<sup>140</sup> to successes of legal aid lawyers in various government-defendant matters, especially in welfare reform.<sup>141</sup>

In some instances, courts refused to certify legal aid organizations whose community organizing went beyond traditional law service bounds. A New York Appellate Division<sup>142</sup> court objected to certifying more than one legal services provider for a particular county for fear of their "unseemly competition," and out of worry that the court could not maintain minimum standards of conduct.<sup>143</sup> The court also expressed

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135. *Id.* at 89–90.

136. SECURING EQUAL JUSTICE FOR ALL, *supra* note 84, at 15–16.

137. Hiestand, *supra* note 83, at 160–89; John D. Robb, *Controversial Cases and the Legal Services Program*, 56 A.B.A. J. 329 (1970); *see also* AUERBACH, *supra* note 14, at 274–75.

138. Hiestand, *supra* note 83, at 182.

139. Robb, *supra* note 137, at 329.

140. *Id.* at 329–30.

141. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); King v. Smith, 392 U.S. 309 (1968).

142. *In re Cmty. Action for Legal Servs., Inc.*, 26 A.D. 2d 354 (1966).

143. *Id.* at 359–60.

concern about the applicants' mixing of community action goals and legal service.<sup>144</sup>

Along with labor union lawyers, federally funded legal aid lawyers were a significant part of a new style of lawyering, cause or group lawyering, that did not go unchallenged by the organized bar and, acting through the bar, powerful economic interests. The standard one-client-at-a-time model of lawyering did not suit the goals of legal aid lawyers and union lawyers. Their strength lay in collective action that allowed a marshaling of modest resources in pursuit of a cause. The standard bar obstruction first took the form of unauthorized practice restrictions and later advertising and solicitation rules.

Having failed in its efforts to restrict the activities of school desegregation lawyers,<sup>145</sup> the Virginia Bar worked to stifle opportunities for labor unions to provide counsel to their members.<sup>146</sup> The Illinois Bar initially prevented the United Mine Workers (UMW) from hiring inside house counsel.<sup>147</sup> Each of these efforts was rejected by a Supreme Court whose decisions fostered the accumulation of power through collective legal action. "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."<sup>148</sup> The Court's rejection of the bar's insistence on the traditional one lawyer-one client notion of lawyering laid the legal groundwork for legal aid lawyers' representation of causes and groups and social issues rather than individual clients. This sort of representation presented an unusual circumstance for powerful economic interests and government agencies not used to having to deal with poor people on so nearly an equal footing.<sup>149</sup> As the lawyer in charge of OEO programs in California put it, "What we've created in CRLA is an economic leverage equal to that of large corporations. Clearly that should not be."<sup>150</sup> The mere concept of such a power residing in poor people and their lawyers seemed foreign to the legal profession.

Lawyers representing causes could not simply wait in their offices for the causes to arrive in the personage of an eligible client. While serving as Attorney General, Nicholas Katzenbach tried to deter bar resistance and

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144. *Id.* at 362–63.

145. *NAACP v. Button*, 371 U.S. 415 (1963).

146. *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964).

147. *United Mine Workers of Am., Dist. 12 v. Ill. Bar Ass'n*, 389 U.S. 217 (1967). The Bar had claimed this to amount to the unauthorized practice of law.

148. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971).

149. Robb, *supra* note 137, at 330–31; Houseman & Perle, *supra* note 136, at 10.

150. AUERBACH, *supra* note 14, at 274.

use of advertising and solicitation restrictions against poverty lawyers when he announced that lawyers should “go out to the poor rather than wait . . . . To be reduced to inaction by ethical prohibitions is to let the canons . . . serve the cause of injustice.”<sup>151</sup>

An uneasy, conditional cooperation emerged from the organized bar at the national level.<sup>152</sup> Even as the ABA began to cooperate with federally funded legal services, its best and most able spokespersons continued to put an unduly positive face on the organization’s prior record of supporting meaningful legal services for the poor. William McCalpin, who was truly instrumental in shaping the ABA’s more enlightened position on legal services, prefaced his strong advocacy for support of legal services by imagining an ABA utterly unaware of the legal needs of the poor: “Recently we have begun to be aware of the possible legal needs of 40,000,000 disadvantaged citizens . . . .”<sup>153</sup> The prior month’s issue of the same *ABA Journal* featured an article by Marvin Frankel that began with a statement more reflective of reality outside the walls erected by the ABA: “It is no new discovery that the promise of equal justice is a hollow one for people too poor to retain counsel.”<sup>154</sup>

The ABA adopted a resolution of support for the new federal legal services program as long as its lawyers would operate within the “ethical standards of the legal profession.”<sup>155</sup> In many respects, the announced constraint was no constraint at all: legal aid lawyers, like any lawyers, would of course be expected to comply with lawyer ethics rules relating to confidentiality, conflicts and the like. But the rules regarding solicitation, not yet reformed by later decisions,<sup>156</sup> would dampen the activism that was envisioned and would subject legal aid and other cause lawyers engaged in

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151. National Conference on Law and Poverty, Proceedings, at v, 64–65 (D.C. 1965).

152. In later years and controversies, the ABA grew to be almost unerringly supportive of legal services programs, fighting against, for example, President Reagan’s proposal to zero fund the Legal Services Corporation in 1980. Houseman & Perle, *supra* note 136, at 27–29.

153. F. William McCalpin, *The Bar Faces Forward*, 51 A.B.A. J. 548, 550 (1965).

154. Marvin E. Frankel, *Experiments in Serving the Indigent*, 51 A.B.A. J. 460 (1965) (hoping against some of the early evidence that the ABA would allow new, OEO funded legal services offices to be established rather than merely pressing for additional funding for the traditional legal aids under the supervision of NLADA). Ironically, some years later in an oral history of his ABA involvement, McCalpin himself described the unfortunate introspection practiced by the ABA in dealing with difficult issues. Interview by Olavi Maru with F. William McCalpin, in St. Louis, Mo. (Aug. 22, 1975), at <http://www.abf-sociolegal.org/oralhistory/mccalpin.html>.

155. Resolution Adopted by House of Delegates, reprinted in McCalpin, *supra* note 153, at 551; Richard Pious, *Congress, the Organized Bar, and the Legal Services Program*, 1972 WIS. L. REV. 418, 420–21 (discussing the political background on the ABA resolution).

156. See *In re Primus*, 436 U.S. 412 (1978). In later adopting the Model Rules, the ABA accounted for its inability to propose enforceable rules on soliciting lawyers who lacked financial gain incentives. See MODEL RULES OF PROF’L CONDUCT R. 7.2 (2004).



community organizing to harassment by bar authorities for direct solicitation of clients.

That is precisely what happened to ACLU affiliated lawyer Edna Primus.<sup>157</sup> In South Carolina, Medicaid assistance to pregnant mothers on public assistance was being conditioned on the mother's sterilization.<sup>158</sup> At the invitation of a local businessperson, Edna Smith Primus, one of three lawyers practicing with what they called the "Carolina Community Law Firm," spoke at a meeting of mothers affected by this practice.<sup>159</sup> Among those at the meeting was Mary Etta Williams, who had been sterilized by Dr. Clovis H. Pierce after the birth of her third child.<sup>160</sup> At the meeting, Primus advised those present of their legal rights and suggested the possibility of a lawsuit.<sup>161</sup> Primus and her office mates had a relationship with the ACLU.

Subsequently, the ACLU informed Primus that it was willing to provide representation for the mothers who had been sterilized.<sup>162</sup> By letter, Primus then informed Williams of the ACLU's offer of free legal representation.<sup>163</sup> When Williams visited Dr. Pierce to discuss the progress of her third child who was ill, she was met by Dr. Pierce's lawyer.<sup>164</sup> While Williams was there with her sick child, the lawyer asked her to sign a release of liability in favor of Dr. Pierce.<sup>165</sup> Williams showed Primus's letter to the doctor and his lawyer, and they made a copy.<sup>166</sup> Williams never pursued the matter against Dr. Pierce.<sup>167</sup>

Shortly thereafter, however, the South Carolina Bar moved against Primus's license, imposing discipline that was later reversed on First Amendment grounds in the Supreme Court.<sup>168</sup> Stymied in its efforts to restrain poor people's lawyers from directly offering their pro bono services, the organized bar eventually adopted rules that acknowledged the First Amendment's constraints on bar power.<sup>169</sup>

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157. *Primus*, 436 U.S. at 412. Compare *ACLU v. Bozardt*, 539 F.2d 340 (4th Cir. 1976) with *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (politics-neutral case decided same day as *Primus*).

158. *Primus*, 436 U.S. at 415.

159. *Id.*

160. *Id.*

161. *Id.* at 416.

162. *Id.*

163. *Id.* at 416–17 n.6.

164. *Id.* at 417.

165. *Id.*

166. *Id.*

167. *Id.* at 416–17.

168. *Id.* at 421.

169. Compare MODEL RULES OF PROF'L CONDUCT R. 7.1–7.5 (2004) with MODEL CODE OF

Perhaps not surprisingly, bar associations renewed their interest in applicants' views and beliefs and organizational membership during this same time period, resulting in further engagement in the issue by the Supreme Court.<sup>170</sup> Removing those with dissenting views is less efficient and more difficult than keeping them out in the first instance.

In the end, confession came, as some elements within the organized bar realized that repressive mistakes had been made, especially in the context of efforts to chill zealous representation of the so-called new left. The bar had "misconstrued . . . the dimensions and causes of courtroom disorders . . . confus[ing] zeal in the defense of clients with revolution . . . [in its movement to] intimidat[e] defense counsel."<sup>171</sup>

### 3. *Anti-war Protest Lawyers*

Much like civil rights activists, anti-war protest lawyers have been subject to bar discipline and admissions barriers. Twentieth century pacifists and anti-war protest lawyers have been excluded or disciplined during World War I,<sup>172</sup> World War II, and Vietnam. Anti-war activists have always been regarded as insufficiently patriotic during times of great national need and crisis, making them sometimes indistinguishable from political deviants such as communists and anarchists.<sup>173</sup>

During World War II, Illinois bar examiners excluded conscientious objector Clyde Summers because he could not in good conscience support a state constitutional provision requiring service in the state militia.<sup>174</sup> Summers is now the Jefferson B. Fordham Professor of Law, Emeritus, at the University of Pennsylvania.

One prominent Vietnam era anti-war organizer was the subject of eight hearings, spanning fourteen months, before finally gaining admission.<sup>175</sup> Others, despite best efforts, could not gain admission.<sup>176</sup>

PROF'L RESPONSIBILITY DR 2-101 to 2-105 (2004) for ABA treatment of advertising and solicitation pre- and post-*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

170. *Baird v. State Bar of Ariz.*, 401 U. S. 1 (1971); *In re Stolar*, 401 U.S. 23 (1971).

171. NORMAN DORSEN & LEON FRIEDMAN, PREFACE TO DISORDER IN THE COURT: REPORT OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM DISORDER, at xiii-xvi (1973).

172. *See supra* notes 44-54 and accompanying text.

173. Papke, *supra* note 43, at 17-18 (discussing Ohio committee's equation of pacifists and communists).

174. *In re Summers*, 325 U.S. 561 (1945).

175. Rhode, *supra* note 14, at 563 n.331 (citing Papke, *supra* note 43, at 21).

176. Application of Brooks, 355 P.2d 840, 840-01 (1960) (conscientious objector's failure to report for alternative duty constituted ground for denial), *cert. denied*, 365 U.S. 813 (1961); Application of Walker, 539 P.2d 891, 895-97 (1975) (denying admission for failure to register for

#### D. *Questioners of the Terror War*

The new disqualification may be deigning to question or disrupt the war or terror. The horrendous atrocities committed on September 11, 2001, shook people's foundations and faith. We may all remember what we were doing when that morning's tragedies occurred. Commensurate with the attacks themselves, the government's reaction was swift and striking. In the weeks that followed, troops were deployed to Afghanistan, airports were closed, security everywhere was enhanced to historic levels, and investigations of intelligence lapses began.

Americans' fears are real and justified. But as seems always the case in times of such intense crisis, the fears become diffused in ways that create unjust, overly zealous responses. Fear of immigrants in the wake of World War I,<sup>177</sup> fear of Japanese-Americans after Pearl Harbor,<sup>178</sup> fear of communism after World War II and during the Korean conflict,<sup>179</sup> fear of civil rights activists and the changes to social order that their work wrought,<sup>180</sup> all serve as twentieth century examples of fears, the core of which may be understood if not in every case condoned, that spun out of control creating overreactions and hateful, bigoted responses. Here too, among the reactions to the September 11 atrocities were increased violence against people of Middle Eastern appearance,<sup>181</sup> government rounding up of young men of Muslim faith in the absence of probable cause for open-ended questioning,<sup>182</sup> Patriot Act<sup>183</sup> grants of excess authority to the executive branch,<sup>184</sup> interminable detention of a new class

draft), *cert. denied*, 424 U.S. 956 (1976).

177. *See supra* notes 38–42 and accompanying text.

178. James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, TEMPLE POL. & CIV. RTS. L. REV. (forthcoming 2005) ("Many government lawyers remained quiet in the face of government fraud and wrongdoing . . . during litigation of the Hirabayashi and Korematsu cases . . . John J. McCloy, Assistant Secretary of War, and Assistant Attorney General Hebert Wechsler, in particular, knowingly allowed the Supreme Court to be misled regarding the record in the case.").

179. *See supra* notes 56–68 and accompanying text.

180. *See supra* notes 98, 104, 122 and accompanying text.

181. *See, e.g.*, Eric Lichtblau & James Gerstenzang, *After the Attack: Anti-Muslim Violence Up, Officials Say*, L.A. TIMES, Sept. 18, 2001, at 3 (reporting on alarming rate of apparent hate-crimes); Henry Weinstein, Daren Briscoe, & Mitchel Landsberg, *A Changed America: Civil Liberties Take Back Seat to Safety*, L.A. TIMES, Mar. 10, 2002, at 1; *Caught in the Backlash*, <http://acluweb.best.vwh.net/911/backlash/sodhi.html>.

182. Lynn Marshall & Tom Gorman, *Responses to Terror: Treatment of Foreigners: Now Portland Comes in for Questioning*, L.A. TIMES, Nov. 30, 2001, at 1 (regarding Portland, Oregon refusal to cooperate with FBI national questioning round-up of "foreigners").

183. USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

184. Serious concern over misuse of Patriot Act powers have come from voices as diverse as Nadine Strossen and Representatives C.L. "Butch" Otter (R-ID), Bob Barr (formerly R-GA.), and

of prisoner without access to counsel,<sup>185</sup> and (with history yet to bear out the results) a preemptive war against an unquestionably unjust and repressive and violent regime in Iraq in search of as yet undiscovered weapons of mass destruction.

In the past, political misuse of bar machinery has been among the overreactions to times of crisis. Political misuse of bar machinery has been marked by its setting in a time of crisis, by its target (someone whose actions disrupt either the status quo or government efforts to quell the crisis), and by its lack of merit. The complaint against Jessilyn Radack, set in the terror war context, is such an instance.

## II. JUSTICE'S BAR COMPLAINTS AGAINST JESSELYN RADACK AND THE FEDERAL GOVERNMENT LAWYER'S DUTY TO BREACH CONFIDENTIALITY

Politically motivated bar complaints are rarely meritorious. In nearly all of the instances of bar action taken described in Part I, courts have eventually, often after years of litigation, ruled against the bar's action of exclusion.<sup>186</sup> In retrospect, most of the historical instances summarized in

James Sensenbrenner (R-WI). See Gabe Rottman, *Protecting Freedom in Perilous Times: The ACLU's Legislative Advocacy in the 108th Congress* 5, 7 (2005), <http://www.aclu.org/Files/OpenFile.cfm?id=17516>.

185. Molly McDonough, *Lawyers Blast Talk with Terror Suspect*, 3 A.B.A. Journal eReport 8.

On November 13, 2001, the President issued a Military Order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in The War Against Terrorism" (the "Military Order"). 66 Fed. Reg. 57,833 (Nov. 16, 2001). Section 1(e) of the Military Order states that, "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained . . . ." Section 2 provides that any non-citizen of the United States may be detained if the President determines "in writing" that "there is reason to believe" he or she "is or was a member of the organization known as al Qaida" or has engaged in or supported terrorism or other acts aimed at injuring the United States. *Id.* at 834.

This language and the activity it supports compare quite closely with the Justice Department Order under which 1920s communists and anarchists were detained without warrants based solely on their suspected membership in the Communist Party or the Communist Labor Party. The former was declared unlawful later in 1920; the latter never was declared unlawful. The one miss in the comparison between the current event and the 1920 event is that the 1920 raids and detention lasted a few days; the current detentions are ongoing, some having passed the two year mark.

186. *In re Primus*, 436 U.S. 412 (1978); *UMW v. Ill. Bar Ass'n*, 389 U.S. 217 (1967); *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *In re Sawyer*, 360 U.S. 622, 626–27 (1959); *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972) (reversing district court's imposition of four-year, thirteen-day sentence for contempt); *Troutman v. Shriver*, 417 F.2d 171 (5th Cir. 1969); *In re Ruffalo*, 370 F.2d 447, 461 (6th Cir. 1966); *In re Brown*, 346 F.2d 903 (5th Cir. 1965); *Ass'n of the Bar of the City of New York v. Isserman*, 271 F.2d 784 (2d Cir. 1959); *Chicago Bar Ass'n v. McCallum*, 173 N.E. 827 (Ill. 1930) (railroad lawyers hired agent to pose as worker, fake an accident and serious injuries, retain target personal injury lawyers, and defraud court in effort to entrap target personal injury lawyers into engaging in financial assistance violations); *United States v. Sacher*, 182 F.2d 416 (2d Cir. 1950); *In re Sizer*, 267 S.W. 922 (Mo. 1924) (conglomeration of

Part I now seem uncontroversially meritless. Nonetheless, when the actions were taken, then current doctrine sometimes appeared to support the bar action. The bar actions, arguably supported by doctrine but ultimately without merit, were not instituted to vindicate the doctrine, but rather to vindicate the political needs of the complainer. The bar complaint against Jesselyn Radack is no different. The complaint grew out of a time of national crisis. It followed the government's frustrating litigation of the Lindh matter, the low-yield plea bargain which occurred on the day set for the beginning of a suppression hearing regarding Lindh's right to counsel and the government's claim that he had waived that right.<sup>187</sup> The complaint followed a failure of DOJ to follow its own policies for reporting professional misconduct of its lawyers.<sup>188</sup> The complaint itself fails to account for the differences in confidentiality norms between private and government counsel.<sup>189</sup> It fails to account for D.C. Bar ethics rules that reflect that difference. It fails to account for applicable exceptions to the duty of confidentiality.<sup>190</sup> The setting and the complaint's patent weaknesses raise the inference that the complaint represents a new form of politically motivated bar discipline complaint.

#### A. *The Setting*

From within the fear created by the September 11 atrocities, and early on in the reactions to it, Jesselyn Radack's story begins. John Walker Lindh, captured in late November 2001, made hearts sink: an American fighting Americans in the cause of terror. "Conspiracy to murder . . . American military personnel . . . following the terrorist attacks of September 11," and "contributing services to al Qaeda,"<sup>191</sup> the indictment read.<sup>192</sup> Radack gave her advice about John Walker Lindh's interrogation before Justice had yet determined with certainty whether to treat him as a criminal defendant or an enemy combatant. Lindh was the first American citizen captured in the terror war.

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railroads, utilities and their lawyers hired investigator to pursue charges against plaintiffs' lawyers for providing financial assistance to clients); *In re Gilliland*, 103 S.E.2d 807 (N.C. 1958); *In re Cmty. Action for Legal Servs., Inc.*, 26 A.D.2d 354 (N.Y. App. Div. 1966) (later application granted); *Pushinsky v. Bd. of Bar Exam'rs*, 266 S.E.2d 444 (W.Va. 1980).

187. See *supra* note 7 and accompanying text; *supra* note 11.

188. Exhibits 2 and 3, *supra* note 13.

189. Exhibit 8, *supra* note 12.

190. Exhibits 2 and 3, *supra* note 13.

191. Indictment at 4, *United States v. John Phillip Walker Lindh*, No. 02-37-A (E.D. Va. Feb. 5, 2002) (Among the ten counts.).

192. *Id.*

It was unusual for PRAO's advice to be ignored, and even more unusual for PRAO to decline to follow up on a matter in which its advice had not been heeded, but that was the position taken by Radack's supervisor. Radack pushed to have reasons given for PRAO's uncharacteristic withdrawal from the matter in which its advice had not been followed. Her pushing on this issue was nearly simultaneous with Attorney General Ashcroft's announcement accompanying Lindh's indictment that his right to counsel was being scrupulously protected. Ashcroft may have been technically correct about Lindh's right to counsel.<sup>193</sup> And Radack could have been mistaken about the application of Rule 4.2.<sup>194</sup> But neither point matters for purposes of Justice's eventual bar complaint against Radack.

Soon after Radack's inquiries into PRAO's premature extraction from the matter were rebuffed, she received an unscheduled negative performance review and a threat that it would be made part of her file unless she left Justice.<sup>195</sup> In the same time frame, Radack discovered that AUSA Randy Bellows, one of the Lindh prosecutors, had received from her supervisor only two or three of her dozen or so e-mails, all of which would be subject to the Lindh district judge's order to produce all internal DOJ correspondence regarding the Lindh interrogation.<sup>196</sup> Upon discovering that the hard copies of the e-mails were missing from the file into which she had placed them, she recovered them with the help of information technology personnel.<sup>197</sup> When her offer to make these available to AUSA Bellows was refused by her supervisor,<sup>198</sup> Radack could draw no reasonable inference but that her e-mails had not been and were unlikely to be delivered to the district court. Such failures to comply with the court order were unlawful and represented frauds on the court. Within weeks of the threatening meeting with her supervisor, she left Justice on April 5, 2002.<sup>199</sup> A few days before she left, but unknown to

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193. See *Moran v. Burbine*, 475 U.S. 412 (1986). The Court was careful in *Moran* to distinguish an ethical responsibility to avoid misleading the defendant or the lawyer from the defendant's Sixth Amendment right to counsel. *Id.* at 423. Egregious forms of misleading about the defendant's access to counsel, the Court suggests, would not only violate ethical norms but also make out a due process violation. *Id.* at 432. In any event, the supervising DOJ lawyer's conduct in having the FBI secure Lindh's waiver under the circumstances may also have violated the prosecutor's duties under Model Rule of Professional Conduct 3.8.

194. Arguably, Lindh was not a "represented person" within the meaning of Model Rule of Professional Conduct 4.2.

195. Exhibit 15, *supra* note 1, ¶ 22.

196. *Id.* ¶ 14.

197. *Id.* ¶¶ 16–18.

198. *Id.* ¶¶ 19–21.

199. *Id.* ¶ 22.

her, Justice submitted thirty-three documents under seal. The district court had entered the protective order four days before her departure, on April 1, 2002. Clearly some, but unlikely all, of Radack's e-mails were among those submissions.<sup>200</sup> Because the submitted materials are still under court seal, it is impossible for Radack or anyone not associated with the Lindh submission to know precisely what those submitted documents are.

Meanwhile, Lindh's defense (led by the lawyer who had been hired by his parents initially) argued that Lindh's statements had been taken in violation of his right to counsel. A suppression hearing was scheduled for late June 2002. Radack had been with her private law firm employer for a short time when she heard a news story to the effect that Justice had never taken a position that Lindh should have been informed of the lawyer his father had hired for him. This she knew to be false, having given that advice on PRAO's behalf herself. Contacted by *Newsweek* reporter Michael Issikoff, Radack gave him copies of her e-mails. They appeared days later in the June 15, 2002 issue of the magazine. The district court, knowing that at least some of those e-mails had been filed under seal, ordered Justice to determine the source of the e-mails. This, the Office of the Inspector General (OIG) did, determining that Radack was the source.

Two weeks after the *Newsweek* story appeared, Lindh and the Government entered a plea agreement by which Lindh pleaded guilty and was convicted of two counts, one from the original ten count indictment and one charged later by Information. The convictions were for "supplying services to the Taliban"<sup>201</sup> . . . and for carrying an explosive during the commission of a felony<sup>202</sup> which may be prosecuted in the United States."<sup>203</sup> The Government dismissed nine other counts:

- (i) conspiracy to murder nationals of the United States, including American military personnel and other governmental employees serving in Afghanistan following the September 11, 2001 terrorist attacks, in violation of 18 U.S.C. § 2332(b)(2) (Count One);

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200. See *United States v. Lindh*, No. 02-37-A, 2002 U.S. Dist. LEXIS 16529 (E.D. Va. June 17, 2002) (District judge's order that the government address "whether any documents ordered protected by the Court were disclosed by any person bound by an Order of this Court."). Although this order refers to "classified material regarding this case . . . [in the possession of] a national periodical," the court later clarified that the materials in question were not classified. *Id.* The court later ruled that no violation of its order occurred when Radack revealed her e-mail messages.

201. In violation of 50 U.S.C. § 1705(b), 18 U.S.C. § 2 and 31 C.F.R. §§ 545.204, 545.206(a).

202. In violation of 18 U.S.C. § 844(h)(2).

203. *United States v. Lindh*, 237 F. Supp. 565, 566 (E.D. Va. 2002).

- (ii) conspiracy to provide material support and resources to Harakat ul-Mujahideen (HUM), a foreign terrorist organization, in violation of 18 U.S.C. § 2339B (Count Two);
- (iii) providing material support and resources to HUM, in violation of 18 U.S.C. § 2339B and 2 (Count Three);
- (iv) conspiracy to provide material support and resources to al Qaeda, a foreign terrorist organization, in violation of 18 U.S.C. § 2339B (Count Four);
- (v) providing material support and resources to al Qaeda, in violation of 18 U.S.C. § 2339B and 2 (Count Five);
- (vi) conspiracy to contribute services to al Qaeda, in violation of 31 C.F.R. §§ 595.205 and 595.204 and 50 U.S.C. § 1705(b) (Count Six);
- (vii) contributing services to al Qaeda, in violation of 31 C.F.R. §§ 595.204 and 595.205 and 50 U.S.C. § 1705(b) and 18 U.S.C. § 2 (Count Seven);
- (viii) conspiracy to supply services to the Taliban, in violation of 31 C.F.R. §§ 545.206(b) and 545.204 and 50 U.S.C. § 1705(b) (Count Eight); and
- (ix) using and carrying firearms and destructive devices during crimes of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(B)(ii) and 2 (Count Ten).<sup>204</sup>

Within weeks after the Lindh plea (sometime before August 15, 2002), Justice instituted a criminal investigation of Radack. Radack learned of the investigation from her private employers who had been interviewed by an OIG agent.<sup>205</sup> More than a year later, on September 11, 2003, the criminal investigation was terminated without charges being brought.<sup>206</sup> The investigation, however, cost Radack her private law firm position.<sup>207</sup> Within weeks of the close of the criminal investigation, on October 31, 2003, Justice filed its bar complaints.<sup>208</sup>

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204. *Id.* at n.2.

205. Exhibit 15, *supra* note 1, ¶ 34.

206. *Id.* ¶ 32.

207. Exhibit 8, *supra* note 12.

208. Exhibits 2 and 3, *supra* note 13.



*B. The Merits of the Bar Complaint*

The two bar complaints are essentially identical to one another: each refers to Radack's "possible" misconduct, charging that Radack "may" have breached her duty of confidentiality to the United States by revealing the email exchange in which she gave advice regarding the propriety of direct FBI contact with John Walker Lindh in an overt, custodial setting.<sup>209</sup> Each bar complaint letter is two-and-a-half pages long, and mostly devoted to the government's conclusion that Radack was the source of the e-mails published in *Newsweek* magazine.<sup>210</sup> Each begins with a paragraph that alleges that Radack "may have violated her duty to not knowingly reveal attorney-client privileged information [pursuant to the relevant rule of professional conduct, e.g., Rule 1.6 of the District of Columbia Rules of Professional Conduct]."<sup>211</sup> Each complaint then recites the publication of e-mails in *Newsweek* magazine, "several [of which] had been filed under seal in the . . . Lindh case."<sup>212</sup> The government's use of the word "several" indicates that not all of the published e-mails had been filed under seal with the district court. The complaints then proceed to summarize the OIG investigation that correctly concluded that Radack was the source of the e-mails and report on various articles that have been published regarding Radack's post-Justice employment plight and her allegations of Justice retaliation.<sup>213</sup> The complaints then indicate that a Justice investigation into Radack's allegations is ongoing and offers assistance to the Bar in its investigation of Radack. The complaints do not analyze the duty of confidentiality or its exceptions; the complaints do not claim that such analysis has been done, much less that OPR has concluded that professional misconduct has occurred; the bar complaints against Radack lack merit.

Government lawyers certainly have some confidentiality duty to their client, but their lawyer-client relationship is in so many ways strikingly different from that of a private lawyer and client that the government lawyer's duty is much more modest in scope and perhaps even different in kind. The client of the government lawyer is plainly not the private lawyer's privately interested client without special public-abiding interests and duties. Just who the government lawyer's client is has been subject to

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209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

widely different claims. Roger Cramton has usefully articulated the spectrum of possibilities, ranging from the people and the public interest, to the United States as a whole, to the branch of government within which the lawyer works, to the specific agency for whom the lawyer works.<sup>214</sup> He suggested that the Attorney General ought to be an independent advisor to the President, willing to demand that the President comply with legal authority and execute the laws without favor, and if the President refuses, “resign and *publicly explain the circumstances* that led to his resignation. . .” (emphasis added).<sup>215</sup> Some have argued that the specific identity of the government lawyer’s client does not matter so much as an understanding of the lawyer’s particular role.<sup>216</sup>

Whatever may be the precise answer, if indeed the answer matters, it is plain that the government lawyer represents a public-abiding client whose genuine interests will not be served by the same level of secrecy to which private clients may be entitled, no matter how much particular agents of the government may sometimes wish to have that higher level of secrecy.

For instance, if a government lawyer has information that will aid a criminal defendant,<sup>217</sup> or if a government agency has wrongfully behaved,<sup>218</sup> the government lawyer’s duty of confidentiality and ability to resist official demands for information will be far more restricted than is the case in the private sector.

A loyal government lawyer should swallow doubts about differences in legal and policy arguments, but not about the truth of critical underlying facts and certainly not about willingness to submit materials ordered produced by courts. In Radack’s instance, the district court requested information regarding internal Justice advice and positions. Radack’s e-mails were just such positions taken. They were for this purpose, facts, not mere debates over legal arguments to be made. The existence of Radack’s e-mails was not a confidence the government had a right to expect its lawyers to protect.<sup>219</sup>

The public interest is difficult to identify, of course, and each government lawyer cannot be charged with the responsibility of acting

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214. Roger C. Cramton, *The Lawyer As Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991).

215. Moliterno, *supra* note 178 (quoting Roger C. Cramton, *On the Steadfastness and Courage of Government Lawyers*, 23 J. MARSHALL L. REV. 165, 173–74 (1990)).

216. Robert P. Lawry, *Who Is the Client of the Federal Government Lawyer: An Analysis of the Wrong Question*, 37 FED. B. ASS’N. J. 61 (1978).

217. *See Brady v. Maryland*, 373 U.S. 83 (1963).

218. *See* FED. B. ASS’N. RULES OF PROF’L CONDUCT R. 1.13 cmt. (2004).

219. *See In re Grand Jury Duces Tecum*, 112 F.3d 910, 920–22 (8th Cir. 1997).

purely on his or her sense of it. Rather, the government lawyer functions in a direct line from some legitimate articulator of the public interest.<sup>220</sup> But disclosing wrongful conduct is not reflective of a mere public interest dispute about the better course of government action to take. That judgment, that a colleague's or superior's conduct is wrongful or criminal, is the individual lawyer's judgment to make.<sup>221</sup> The individual's judgment is not final, of course, but is determinative for purposes of defining the lawyer's proper conduct when faced with acting on the wrongful conduct.

Outside of discrete areas of protection and always when wrongdoing has occurred, information about a client that a private lawyer should protect, a government lawyer should reveal.

### 1. "Other Law"

The D.C. Bar, with its great experience dealing with government lawyer issues, provides an exception to the duty of confidentiality that expresses this difference of roles between government and private lawyers. Its bar rules allow revelation by government lawyers whenever law permits revelation. Alternatively stated, the government-client has consented to such revelations or its public-abiding nature has stripped it of the power to demand such secrecy from its lawyers.

In general, lawyers are permitted to reveal client confidences when *required* by other law.<sup>222</sup> Government lawyers in the District of Columbia are permitted to reveal client confidences when *permitted* by other law.<sup>223</sup> Other jurisdictions should consider following the District's lead on this issue, with which the District obviously has substantial experience and expertise.

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220. Moliterno, *supra* note 178 (citing Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000)).

221. Moliterno, *supra* note 178 (citing William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539, 556 (1986)).

222. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2004). The rule's permission to reveal what is required by law to be revealed is internally misleading. The permission relieves the lawyer of disciplinary liability when she does what other law requires. Thus, a lawyer is not merely permitted to make such revelations; she is required to do so.

223. DC Bar Rule 1.6(d)(2)(B).

*a. The Federal Whistleblower Statute*

The Whistleblower Protection Act<sup>224</sup> (the Act) occupies a middle status between other law that requires and other law that permits disclosure of otherwise confidential information. It may not require disclosure, but it more than merely permits it. The statute's very purpose is to *encourage* disclosure of information regarding violations of law, rules, or regulations, and other abuses of authority.<sup>225</sup> Whistleblowers have permission to reveal information within the scope of the statute, but they need more than mere permission to make disclosures. The personal and professional disadvantages of whistleblowing are substantial.<sup>226</sup> Without substantial encouragement to disclose in the form of protection and, when appropriate, causes of action, few whistles will be blown.<sup>227</sup> The Act occupies a legislative place analogous to a common law tort claim for wrongful discharge, the purpose of which is to encourage disclosures that advance certain important public policies.<sup>228</sup> Conduct protected by a whistleblower statute should not produce lawyer discipline. Especially when that conduct is engaged in by a government lawyer, exposing government misconduct, bar discipline is a highly inappropriate, unproductive response.<sup>229</sup>

The Whistleblower Protection Act encourages federal employees to “serve the public interest by assisting in the elimination of fraud . . . .”<sup>230</sup> The encouragement comes in the form of protection from retaliation for disclosures that the employee reasonably believes will expose the fraud or

224. Whistleblower Protection Act of 1989, Public L. No. 101-12, 103 Stat. 16 (1989) [hereinafter Whistleblower Protection Act].

225. 5 U.S.C. § 2302(b)(8) (2000).

226. CHARLES PETERS & TAYLOR BRANCH, *BLOWING THE WHISTLE: DISSENT IN THE PUBLIC INTEREST* (1972) (collecting government whistleblower stories).

227. Deborah L. Rhode, *Symposium: The Future of the Legal Profession: Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 702–03 (1994).

228. *See, e.g.*, *Liberatore v. Melville Corp.*, 168 F.3d 1326 (D.C. Cir. 1999) (pharmacist stated wrongful discharge claim when he was fired because he intended to report violations to the FDA); *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799 (D.C. 1999) (director of hospital security stated wrongful discharge claim when he was fired because he reported bribe to FBI officials and cooperated in subsequent investigation); *Balla v. Gambro*, 584 N.E.2d 104 (Ill. 1991) (rejecting common law retaliatory discharge action in favor of in-house corporate lawyer because ethical requirements to make the same disclosure obviated need for tort action encouragement to report).

229. The statute supplies its own protection from retaliation for protected revelations. That protection likely extends to prohibit the employer from making a bar ethics complaint, but that issue, the statute's explicit protection, is largely outside the scope of this Article. For the issues discussed in this Article, the statute occupies the place of other law that permits disclosure of client confidences.

230. 5 U.S.C. § 1201 (2000) (“The Congress finds that—(1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest . . .”).

violation of law.<sup>231</sup> More than mere permission to disclose certain facts, the Act serves the interests of the United States (the government lawyer's client) by empowering those most likely to know of such frauds to act to remedy them.

The Act affords its protection to applicants, employees, and former employees.<sup>232</sup> Nothing less would serve the statutory purpose. Applicants might learn of government frauds and be deprived job opportunities because of disclosure. As a former employer of a covered employee, the government retains significant power to punish harmful or embarrassing revelations by alumni whistleblowers. Former employees have substantial, continuing exposure to retaliatory conduct by the government: negative references, government threats of disclosures to current employers, even bar discipline complaints.

The Act does not afford protection for disclosures merely within the chain of command.<sup>233</sup> Disclosures to anyone else ("including, for example, a reporter, a congressional staffer, or an interest group representative")<sup>234</sup> are protected and therefore encouraged.<sup>235</sup>

The Act itself would not protect a government lawyer from a bar association imposition of discipline.<sup>236</sup> The bar association is not the government employer; the Act does not explicitly restrict the bar. Nonetheless, some have asserted that bar discipline is prohibited by inference from the Act.<sup>237</sup> The Act's coverage prohibits the government employer from taking the retaliatory action of filing a bar complaint. The Act's real protection against bar discipline comes from its status as other

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231. 5 U.S.C. § 2302(b)(8)(A) (2000).

232. See 5 U.S.C. § 1221 (2000).

233. *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1344, 1351 (Fed. Cir. 2001) (disclosures to a supervisor are not protected but disclosures to press are).

234. Cramton, *supra* note 214, at 308.

235. See *Horton v. Dep't of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (noting that disclosures to the press are protected disclosures); H.R. Rep. No. 100-413, at 12-13 (1988) (listing the media as an independent entity, such as Congress, to which disclosures may be made).

236. Project on Government Oversight (POGP); Government Accountability Project (GAP); Public Employees for Environmental Responsibility (PEER); *The Art of Anonymous Activism: Serving the Public While Surviving Public Service* 58 (Nov. 2002). Other government whistleblowers have been subjected to bar complaints based on their conduct. Cindy Ossias, who disclosed frauds in the California Department of Insurance was the subject of a bar complaint. The bar committee concluded that she had not engaged in disciplinable conduct. Nancy McCarthy, *Rule Change Proposed to Protect Government Whistleblowers*, CAL. B. J., Mar. 2002; Editorial, *A Gadfly Wins at Last*, S.F. CHRON., Aug. 16, 2000, at A28.

237. Cramton, *supra* note 214, at 312 ("Although the whistleblower protections deal expressly only with retaliatory actions of the employing agency, the application of professional discipline by a state disciplinary board is likely to be precluded.").

law that permits disclosure, taking the material revealed outside the protection of the duty of confidentiality.<sup>238</sup>

*b. 28 U.S.C. § 535(b)*

As discussed in section I, 28 U.S.C. § 535(b) demands that federal employees, lawyers included, report criminal misconduct of other federal employees. This obligation represents “other law” that requires disclosures of otherwise confidential government-client information.<sup>239</sup>

*2. Client Waiver*

Considered another way, the government lawyer’s client has consented to the revelation of certain kinds of otherwise confidential information. The government-client, by enacting statutes such as 28 U.S.C. § 535(b) and the Whistleblower Protection Act, has instructed its lawyers to behave in a way that allows, encourages, and sometimes requires categories of information to be revealed. No agency head, let alone lesser government official, has the power to speak for the government-client in a way that controverts what the law enacted by that client has said in more forceful, public, and binding ways.

These statutory provisions amount to more than an “other law” exception to confidentiality. For the federal government lawyer, they represent the best statement of what the lawyer’s client wants the lawyer to do with the client’s confidences. Private clients may, of course, give informed consent to disclosures of confidences.<sup>240</sup> Federal government lawyers ought to look to their superiors and the articulators of government policy for guidance regarding disclosure of confidences. But those murky indicators cannot trump the clear, positive law statement of the legislature, signed by the President in the form of statutory pronouncements. Statutes such as 28 U.S.C. § 535(b) and the Whistleblower statute are express waivers of confidences by the government lawyer’s client, whatever might be the preference of current policymakers and superiors.

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238. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(6) (2004); DC Bar Rule 1.6(d)(2)(B) (1999).

239. *In re Lindsey*, 158 F.3d 1263, 1274 (D.C. Cir. 1998); *In re Grand Jury Duces Tecum*, 112 F.3d 910, 920–21 (8th Cir. 1997).

240. MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2004).

### 3. *The Waning Appeal of Confidentiality Generally*

In general, the balance between revealing a client's frauds and protecting legitimate confidences is moving toward disclosure and away from protection of confidentiality. Even with private sector clients, the August 2003 amendment to ABA Model Rule 1.6 has moved the balance away from confidentiality and toward revelation by inserting exceptions that have been proposed and re-proposed on several occasions.<sup>241</sup> While confidentiality is a core lawyer duty to be protected at great cost, ultimately confidences are either legitimate or illegitimate. In effect, the rules identify which nuggets of client information are illegitimate confidences and permit or require their revelation. Without question, the balance's movement has been in reaction to public frauds that lawyers have claimed an inability rectify because of their confidentiality duty.<sup>242</sup>

Further general erosion of the duty of confidentiality is indicated by the new obligations to report on client misconduct, such as Sarbanes-Oxley,<sup>243</sup> which have joined old obligations to report such as 20 U.S.C. § 535(b), permitting and in some instances requiring lawyers to reveal what would otherwise be confidential client information. In the pages of the DC Bar's official magazine, addressing D.C. lawyers concerned that reporting under Sarbanes-Oxley could subject them to discipline for revealing confidences, SEC Commissioner Harvey Goldschmid offered reassurance:

Federal law is supreme. Any lawyer in D.C. who finds material, ongoing financial fraud, reports it up, and sees that the wrongful conduct has not stopped, is in a position to go outside, pursuant to the Sarbanes-Oxley section 307 and the SEC's rulemaking. *No one* may discipline that lawyer for properly reporting out.<sup>244</sup>

Supremacy clause argument or not, Sarbanes-Oxley and other laws requiring disclosure, or for government lawyers, permitting disclosure, fit the other law exception to the duty of confidentiality.

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241. Moliterno, *supra* note 178 (citing MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)(3) (as amended August 2003); CENTER FOR PROFESSIONAL RESPONSIBILITY ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 47-51 (1987); Margaret Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 450-51 (2002)).

242. Moliterno, *supra* note 178 (citing Watergate; the S&L debacle; Enron; Dan Ackman, *It's the Lawyers' Turn to Answer for Enron*, FORBES, Mar. 14, 2002, at <http://forbes.com/2002/03/14/0314topnews.html>).

243. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

244. Robert Pack, *Dilemmas in Attorney Client Confidentiality*, WASHINGTON LAWYER, Jan. 2004, at 27.

The August 2003 amendment to ABA Model Rule 1.6 and even former notions of noisy withdrawal both suggest that even if she had been private counsel, Ms. Radack's conduct was permissible, if not required. Under Model Rule 1.16, when a client, even a private client, misuses the lawyer's work as part of a fraud, a lawyer may reveal the client's confidences to rectify the fraud or wrongdoing.<sup>245</sup> Radack's client has an even less legitimate expectation that its lawyers will remain silent when it uses their work in a fraud. Radack's advice was reflected in a series of at least a dozen e-mails. When the Lindh court ordered the production of internal DOJ communications regarding Lindh's right to counsel, Radack discovered the hard copies of her e-mails had been purged from the file. She had placed the hard copies in the file. They were gone. Only three of them had been delivered to AUSA Bellows for submission to the court. Initially, the government's response to the court's order was resultantly incomplete. Radack's advice regarding Lindh's right to counsel had been ignored. Radack was simultaneously threatened with a sudden change in job performance evaluation by her superiors. She had good reason to believe that DOJ would not reveal her advice to the court, and that DOJ's submission of some but not all of her e-mails was a fraud on the court. A fraud on a court accomplished by misuse of the lawyer's services requires the lawyer to undertake "reasonable remedial measures," including revelation of the fraud.<sup>246</sup> Under principles of noisy withdrawal, even as a private lawyer and even had the fraud not been perpetrated on a court, she would have been entitled to withdraw and give notice identifying the fraudulent submissions from which she was disassociating herself. While the notion of noisy withdrawal does not explicitly permit revelation of client confidences, careful commentators recognized that the permitted notice effectively reveals confidences and operates as a hidden exception to the confidentiality rule.<sup>247</sup>

The privilege and the duty of confidentiality are not the same, of course. But it matters to say that the Radack e-mails were not privileged. The fact that hard copies of them were missing from the office file was not privileged. The fact that all the emails were not initially (perhaps ever) submitted to the district court was not privileged. Radack did not have to

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245. MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. (2004); see Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 306 (1984).

246. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3)(b) (2004).

247. See, e.g., Hazard, *supra* note 245, at 306 ("some fools may not understand that Rule 1.6 does not mean what it seems to mean."); Monroe Freedman, *Ethical Ends and Ethical Means*, 41 J. LEGAL EDUC. 55, 61 (1991).



wait for a court request for this information to reveal it. Exceptions to the duty of confidentiality permit her disclosures. “Other law” rationales fit the exception to the duty. The unprivileged nature of the facts revealed makes clearer still that Radack has not breached her duty of confidentiality to her former client.

#### 4. DOJ's Failure to Follow Its Bar Referral Guidelines

The Department of Justice failed in many fundamental respects to follow its own guidelines for filing bar complaints, raising the inference of an untoward motive for the bar complaint against Radack.

Within the Department of Justice, responsibility to investigate most instances of lawyer professional misconduct belongs to the Office of Professional Responsibility (OPR).<sup>248</sup> “OPR’s jurisdiction is limited to reviewing allegations of misconduct made against Department of Justice employees which involves the core functions of prosecution, litigation, and investigation.”<sup>249</sup> Some overlap of jurisdiction exists between OPR and the Office of the Inspector General (OIG) and some history of disputes exists between the two offices regarding jurisdiction.<sup>250</sup> The two offices are directed by policy to cooperate,<sup>251</sup> and OIG is directed to inform OPR of its investigations that “reflect[] upon the professional ethics . . . of a Department attorney.”<sup>252</sup> Nothing in the applicable AG Order authorizes OIG to make findings of professional misconduct.

The vast run of cases handled by OPR involve allegations of federal prosecutors’ (both United States Attorney personnel and Justice prosecutors) forensic misconduct. Strikingly, a significant number of “example” cases reported by OPR in its 2000 and 2001 Annual Reports follow a pattern: a district court or court of appeals has found the lawyer to have engaged in professional misconduct; OPR has investigated and determined that the lawyer did not engage in professional misconduct, often remarking specifically that the lawyer “acted appropriately.”<sup>253</sup> The

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248. Att’y Gen. Order 1931-94, I, Nov. 8, 1994 [hereinafter Att’y Gen. Order]; OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, OPR ANN. REP., 2001, at 1, available at <http://www.usdoj.gov/opr/annualreport2001.htm> [hereinafter 2001 ANN. REPORT].

249. *The OPR Process: How to File a Complaint*, at <http://www.usdoj.gov/opr/process.htm> (last visited Mar. 3, 2004) [hereinafter *How to File a Complaint*]; Att’y Gen. Order, *supra* note 248, ¶ IA.

250. Information on the Office of Professional Responsibility’s Operations, GAO/GGD 00-187, 4, 17 (Aug. 2000) [hereinafter Information on the OPR].

251. Att’y Gen. Order, *supra* note 248, ¶ IIA.

252. Att’y Gen. Order, *supra* note 248, ¶ IID.

253. Of the twenty-four examples used by OPR in 2000, twelve involved referrals from court action on the case based on professional misconduct. In nine of those twelve, OPR found no

remaining examples involve a smattering of alleged misconduct, mostly involving various forensic issues, but also including an example of “[u]nauthorized [d]isclosure of [i]nformation.”<sup>254</sup> In this example, a DOJ lawyer was found to have disclosed “sensitive, internal DOJ e-mail messages to a private attorney” representing plaintiffs in a related civil matter. Nothing in the example indicates that the messages involved materials ordered produced by a court, as was the case with Radack’s e-mails. The misconduct was found in part because the DOJ lawyer had used the information “for the benefit of private persons.”<sup>255</sup> The DOJ lawyer received a written reprimand and OPR, having made a finding of intentional misconduct according to its policies, referred the matter to state bar authorities.

On those relatively few occasions when OPR finds misconduct,<sup>256</sup> it is characterized as either intentional misconduct,<sup>257</sup> reckless disregard of professional obligations,<sup>258</sup> or poor judgment.<sup>259</sup>

misconduct. Of the twenty-three examples in 2001, twelve involved court referrals based on findings of lawyer misconduct. In eight of these, OPR found the lawyer acted properly. Two of the four instances of OPR findings of lawyer misconduct involved speedy trial act violations. A few such examples follow.

“A district court found that a DOJ attorney violated a state bar rule prohibiting contacts with a represented party. . . . OPR conducted an investigation and found that the DOJ attorney did not commit professional misconduct, but instead acted appropriately . . . .” 2001 ANN. REPORT, ex. 7.

“A court of appeals reversed a conviction because the DOJ attorney used allegedly perjured testimony. . . . OPR conducted an investigation and found that the DOJ attorney acted appropriately . . . .” *Id.* at ex. 12.

“A district court found that a parole revocation hearing was tainted by prosecutorial vindictiveness . . . . OPR conducted an investigation and found that the DOJ attorney did not act vindictively and did not commit professional misconduct, but rather acted appropriately . . . .” *Id.* at ex. 17.

254. *Id.* at ex. 13.

255. *Id.*

256. In 2000, OPR received 992 complaints and found misconduct in 12 matters. OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, OPR ANN. REP., 2000, available at <http://www.usdoj.gov/opr/annualreport2000.htm>. In 2001, OPR received 844 complaints and found misconduct in 21. 2001 ANN. REPORT, *supra* note 248, at 6–7. Not all complaints were resolved in the year received.

257.

OPR finds intentional professional misconduct when it concludes that an attorney violated an obligation or standard by (1) engaging in conduct with the purpose of obtaining a result that the obligation unambiguously prohibits; or (2) engaging in conduct knowing its natural or probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits.

2001 ANN. REPORT, *supra* note 248, at conclusion n.4.

258.

OPR finds that an attorney has engaged in professional misconduct based upon the reckless disregard of a professional obligation or standard when it concludes (1) that the attorney knew, or should have known, based on his or her experience and the unambiguous nature of the obligation or rule of conduct, of an obligation or rule of conduct; (2) that the attorney

Prior to June 1, 2001, OPR's policy was to report lawyer misconduct to the lawyer's state bar of membership only when the misconduct fit its intentional misconduct definition. Frequency of bar reports increased after June 2001 when OPR informed Congress by letter that it would henceforth report both intentional and reckless misconduct to the bar. With the exception of the June 2001 change, an August 2000 GAO report effectively summarizes the OPR investigation procedures with elaborate flowcharts.<sup>260</sup> From the point of receiving an inquiry, eleven steps mark the path to a possible OPR report to bar disciplinary authorities.<sup>261</sup> In Radack's case, some of those steps might fairly be said to have been substituted for by the OIG investigation, but several cannot be so substituted, including review by Assistant Counsel, opportunity for the subject of the complaint to submit written responses to the allegations, and critically, a finding of misconduct by OPR. The OIG investigation of Radack determined some factual matters; in particular, who revealed e-mails regarding PRAO discussions of Lindh's FBI interview. OIG's investigation did not make a finding of professional misconduct, a far different question than OIG set out to answer.

OPR policy for making bar reports required a finding of misconduct and several procedural steps before a bar complaint would be filed. Further, in instances where a lawyer had already left Justice, OPR policy indicated that the lawyer would be afforded an opportunity to formally respond to OPR's findings and conclusions.<sup>262</sup>

In such cases, OPR offered the attorney involved an opportunity to review a redacted version of the OPR report, to submit evidence and to respond orally and in writing to the findings and conclusions. The responses were submitted to a panel composed of two supervisory OPR attorneys who were not involved in investigating the allegations and one senior attorney from another Department

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knew or should have known based on his or her experience and the unambiguous applicability of the obligation or rule of conduct, that the attorney's conduct involved a substantial likelihood that he or she would violate or cause a violation of the obligation or rule of conduct; and (3) that the attorney nevertheless engaged in the conduct, which was objectively unreasonable under all the circumstances.

*Id.* at conclusion n.5.

259. "OPR finds that an attorney has exercised poor judgment when, faced with alternate courses of action, the attorney chooses a course that is in marked contrast to the action the Department might reasonably expect an attorney exercising good judgment to take." *Id.* at conclusion n.6.

260. Information on the OPR, *supra* note 250, at 24–25.

261. The standard for the last step's inquiry, but not the procedures, were modified by the June 2001 letter.

262. 2001 ANN. REPORT, *supra* note 248, at 1–5.

component. The panel then made a recommendation to the Counsel as to whether the report's conclusions should be affirmed or modified, or whether further investigation should be conducted. The Counsel's decision was then provided to the Office of the Deputy Attorney General.<sup>263</sup>

None of these procedures were followed in Radack's case. OPR's referral letter reveals no investigation, let alone finding, that Radack has violated state bar rules, no investigation or finding that she committed professional misconduct within the meaning of OPR's policies, and no investigation or finding that if she did commit misconduct either of the intentional or reckless variety.

"OPR's jurisdiction is *limited* to reviewing allegations of misconduct made against Department of Justice *employees* which involve the core functions of prosecution, litigation, and investigation."<sup>264</sup> Ms. Radack's alleged misconduct occurred after she had left Justice. She was not an employee of the Department of Justice when she released copies of her e-mails to *Newsweek*. That is the instance of conduct reported to the state bar by OPR. None of the case examples offered by OPR in its 2000 or 2001 reports involve conduct of a lawyer who had already left Justice. Further, a January 2001 GAO report includes an OPR-provided summary of every closed investigation from 1997 through the first half of 2000 that involved a lawyer who had resigned or retired.<sup>265</sup> Forty-nine such investigations are summarized. Several of these investigations began after the subject lawyer had left the government, but none appear to be based on conduct of the lawyer that occurred after the lawyer's departure, except for an instance of "post employment restrictions."<sup>266</sup>

While a lawyer has a duty to report serious misconduct of fellow lawyers (Justice employee or not), OPR is not a lawyer. OPR is an agency component, a creature of statute and administrative process. As an entity, it has no lawyer duty to report misconduct. Its duty to report misconduct is the result of its charge from the Attorney General to investigate and recommend discipline for conduct of Department of Justice lawyers, not

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263. *Id.* at 3-5.

264. *The OPR Process*, *supra* note 249 (emphasis added).

265. Office of Professional Responsibility Follow-up, GAO-01-135R, 3 and Enclosure III.

266. I infer that the "post employment restrictions" are pursuant to a statute such as 18 U.S.C. § 201, restricting former government employees' lobbying efforts and conflicts of interest. One of the other investigations is described in ambiguous language. It appears to be based on conduct that occurred while the lawyer was still in the government, but it is unclear. All others clearly refer to conduct during the course of the subject lawyer's government employment.

conduct engaged in by former federal lawyers now in private practice. An exception might arguably occur when the lawyer violates statutes such as 18 U.S.C. § 201. That statute specifically controls the post employment lobbying conduct of government lawyers. Radack's conduct, however, is claimed to violate state bar rules regarding confidentiality. An individual lawyer, aware of Radack's conduct and believing it to "raise substantial questions about her . . . fitness to be a lawyer . . .,"<sup>267</sup> would have a duty to report. And any lawyer, aware of the conduct and believing in good faith that it is disciplinable, would be entitled to report. OPR's decision to report conduct that is outside its self-announced jurisdiction raises questions about the good faith of the reporting decision.

Three arguments, each fatally flawed, might be seen to support OPR's filing of a bar complaint reporting misconduct that occurred after the lawyer left Justice.

First, DOJ, through OPR, is entitled to enforce certain "post-employment restrictions" on departed DOJ lawyers.<sup>268</sup> A departed government lawyer is to continue to be bound by court orders to which they were subject at the time of departure. When Radack left DOJ, the district court order was in effect, sealing certain documents that had been submitted to that court by the Government.<sup>269</sup> Some of her e-mails are among those documents under seal. This argument might be availing if Radack had been, as would be true under ordinary circumstances, aware of what had been submitted and of the court's seal order itself. But these very facts were kept from Radack by her supervisors. The district court order was entered on April 1, 2002; Radack's resignation was effective on April 5, 2002.<sup>270</sup> She knew that her e-mails were not initially submitted to the court in response to its order to produce such documents. She knew that most of her e-mails were missing from the hard copy file into which she had placed them. She knew that she had been threatened with a devastating evaluation and encouraged to leave Justice. She did not know that additional e-mails were later submitted to the court, nor that any of the e-mails were sealed by the court. She knew that in ordinary circumstances, the source of materials such as her e-mails would be involved in the process of producing those materials for a court order, but she had been excluded from the process. She knew these were not ordinary times.

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267. MODEL RULES OF PROF'L CONDUCT R. 8.1 (2004).

268. *See, e.g.*, 18 U.S.C. § 201 (2000).

269. Lindh, *supra* note 1, at Doc. No. 66 (court Order sealing unspecified documents).

270. Exhibit 15, *supra* note 1, Introduction and ¶ 5.

Second, all lawyers have an obligation (however rarely it might be observed) to report the serious misconduct of fellow lawyers, but only when the lawyer knows of the misconduct.<sup>271</sup> OPR is simply an institution that ought also to follow the lawyer obligation. If OPR concludes that Radack committed serious misconduct, it should report and let the chips fall where they may. But OPR has not claimed to “know” that Radack committed misconduct. Their bar report letter itself reports that Radack “may” have engaged in “possible misconduct.” The lawyer’s obligation, like OPR’s if one accepts the argument that OPR has a parallel obligation, is not to report suspected or possible misconduct. Lawyers, while they should more faithfully follow their duty to report serious misconduct of which they know, should not report suspicions of lawyer misconduct. Doing so would clog and misuse the already thin bar resources devoted to the disciplinary investigation process. Further, charges of misconduct ought not be made lightly and without a determination that misconduct has occurred. Charges of misconduct, even unfounded ones, harm the charged lawyer. Imposing that harm on suspicion is unwarranted and wasteful. Of course, lawyers are required to report misconduct when they know of it, but they may report misconduct with less than knowledge. Given the general disinclination to report misconduct, however, reports based on less than knowledge raise inferences of ulterior motives in the reporter. Reports based on too little information are reasonably frequent only in the context of unfair advantage-taking in ongoing litigation.<sup>272</sup>

Third, OPR is in the best position to express the views of the United States in a matter such as this. If the United States, Radack’s former client, feels a former DOJ lawyer breached its confidence, no one but OPR is in a position to report it. Without OPR doing so, how could the United States ever report its former lawyers’ breaches of duties to it? While it is true that OPR is vested with the duty to report such things and they are perhaps best situated to do so on the United States’s behalf, except that the United States is not a lawyer, this argument has no greater force than the second. The wisdom of encouraging bar complaints based on suspicion rather than knowledge by sophisticated clients is no different from that of encouraging such reports by lawyers. The United States should be expected to evaluate the quality of a possible bar complaint before filing it and burdening both the bar and the charged lawyer. The shoot-first, ask-questions-later approach to bar complaining undermines the complainer’s

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271. MODEL RULES OF PROF’L CONDUCT R. 8.3 (2004).

272. See CHARLES WOLFRAM, MODERN LEGAL ETHICS 684–85 (1986).

claims of objectivity and neutrality. OPR's own policies require a determination of misconduct. Reporting based on less in the face of contrary policy is wasteful, inappropriate, and suspicious.

OPR's bar complaint letter refers to the OIG investigation, but not to any investigation by OPR. By all indications, OPR merely relied on the OIG report. OIG's investigation was an effort to determine the source of *Newsweek's* report regarding Radack's e-mails. The OIG report concluded correctly that Ms. Radack was the source of the e-mails, but the report was never intended to determine whether Ms. Radack had engaged in professional misconduct. The report makes no mention of OPR misconduct standards, bar rules, the whistleblower statute or 28 U.S.C. § 535(b). The report was simply not about OPR or state bar standards of professional misconduct. The report merely concludes, correctly if perhaps by the wrong inferential path,<sup>273</sup> that Radack was the *Newsweek* source for her e-mails. That factual finding is not the same as concluding that Radack committed professional misconduct. The factual conclusion that Clyde Summers was a pacifist was not the same as a determination that he lacked the good moral character required for bar admission.<sup>274</sup> The finding that Edna Primus had solicited clients for the ACLU to litigate regarding their forced sterilization was not the same as a determination that she committed professional misconduct.<sup>275</sup> The fact that James Gilliland had spoken favorably regarding *Brown v. Board of Education* and encouraged compliance with its mandate was not the same as a determination that he had engaged in professional misconduct.<sup>276</sup> And OIG's finding that Radack revealed her e-mails to *Newsweek* is not the same as an OPR determination of professional misconduct by Radack.

In these several respects, OPR failed to follow its own policies when deciding to report Radack's conduct to bar authorities.

#### CONCLUSION

Reports to bar authorities, even meritless ones, can seriously disrupt a lawyer's life, particularly one who has been fired from her employment and is seeking work. Naturally, prospective employers will hesitate, recognizing that their interests are best served by waiting for the bar

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273. The smoking gun fax identified in the OIG Report as the likely transmission of Radack's e-mail to Issikoff was actually a transmission of a law review article from Radack to Issikoff. Letter Response from Radack's counsel to DC Bar (Nov. 14, 2003) (on file with author).

274. *In re Summers*, 325 U.S. 561 (1945).

275. *In re Primus*, 436 U.S. 412 (1978).

276. *In re Gilliland*, 103 S.E.2d 807 (N.C. 1958); Pollitt, *supra* note 98.

machinery to complete its review: hiring a lawyer who any day may have a suspended bar license is hardly a wise investment for a law firm. And in cases like Radack's, firms that deal with the government regularly, as most Washington firms do, risk the government's ire for hiring a whistleblower whom the government has investigated for criminal activity and reported to the bar.

Bar discipline and admission denial have a century-long history of misuse in times of national crisis and upheaval. The terror war is such a time, and bar discipline has once again become an overreaction to justifiable fear and turmoil. Political misuse of bar machinery is characterized by its setting in the midst of turmoil, by its target, and by its lack of merit. The Justice Department action against Radack bears the marks of its politically motivated historical antecedents.

The American legal profession, the organized bar in particular, has a dreadful history of political misuse of bar discipline and admission in the name of character evaluation and ethical principles. The dubious merits of the Radack bar complaint, the filing of it despite it failing to meet DOJ's internal guidelines for filing bar complaints, and its filing following DOJ's own determination that no criminal activity had occurred, combine to leave substantial doubt as to DOJ's good faith. It appeared that history had been laid to rest. The instances of politically motivated bar discipline of the type discussed in this Article had all but vanished by the late 1970s and early 1980s. If the D.C. and Maryland bars rebuff Justice's efforts to misuse their disciplinary machinery better used for policing actual instances of serious lawyer misconduct, the history of bar machinery abuse during times of national crisis and upheaval will not re-emerge in the context of the terror war. Even if unsuccessful, Justice has done what political bar complainers have always done: embarrass, harass, and burden their target, and potentially deter others who would dare to take a position against them.