

White Paper: The Ethical Responsibility of Public Lawyers at a Time When Most Americans Distrust Their Government

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Under our democratic system of governance, decisionmakers for government institutions have a duty to foster the trust of society at large in the decisions they make on behalf of their institutions. For inside—i.e., public—lawyers, this duty to foster trust constitutes an ethical responsibility requiring them, during their decision-making processes, to take into account the extralegal considerations affecting the public’s willingness to trust and accept their decisions. At a time when the majority of the American public does not trust its government, and while claims of “fake news” seek to deepen that distrust by undermining the credibility of government institutions, inside lawyers must give practical effect to this ethical responsibility.

Recommended Citation:

R. A. CUEVAS, JR., THE ETHICAL RESPONSIBILITY OF PUBLIC LAWYERS AT A TIME WHEN MOST AMERICANS DISTRUST THEIR GOVERNMENT (Neb. L. Rev. Bull. ed., 2018), <https://lawreview.unl.edu/The-Ethical-Responsibility-of-Public-Lawyers>.

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I. INTRODUCTION

The professor who taught my introductory political science course at the University of Florida was fond of reminding his students that “[d]emocracy is government the hard way.”¹ This was a shorthand acknowledgement that in order to function successfully over time, a representative democracy must continue to earn and renew public trust in the institutions through which it governs.²

According to a 2015 Pew Research Center poll, only nineteen percent of Americans said they trust the federal government to do what is right just about always or most of the time.³ Further, only nineteen percent said that government is “run for the benefit of all people.”⁴ In light of such low levels of trust, some are questioning whether our system of governance can remain viable.⁵

The use of the term “fake news” in our political discourse exacerbates this situation, for as noted by political reporter Glenn Thrush, the goal of those who make claims of “fake news” is to undermine the credibility of our country's institutions.⁶ Russian dissident Garry Kasparov has pointed out that challenging our ability to believe in facts and what is true begins to destroy the

¹ Dr. Ernest R. Bartley, Professor Emeritus of the Department of Urban and Regional Planning and former Professor of Political Science, University of Florida.

² See *infra* Part II.

³ PEW RES. CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 18 (Nov. 23, 2015), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2015/11/11-23-2015-Governance-release.pdf> (noting that in 1964, 77% of the public said that they could trust the federal government to do what is right just about always or most of the time, and by 2015, that the percentage had decreased to 19%).

⁴ *Id.* at 35 (noting that between 1964 and 2015, the percentage of the public that said government was “run for the benefit of all people,” had decreased from 64% to 19%).

⁵ Jeff Greenfield, *Has the U.S. Motto Become “In Nothing We Trust?”* (essay on the PBS Newshour, February 5, 2016) (asking how does a nation thrive when year after year, our motto is, “in nothing we trust?”); IVAN KRASSTEV, IN MISTRUST WE TRUST 3, 19 (TED Book 2013) (noting the loss of trust in democratic institutions and asking if democracy can survive without trust).

⁶ See, e.g., *Hardball with Chris Matthews: The Real World Impact of Fake News* (discussion with Glenn Thrush of Politico) (MSNBC television broadcast Dec. 6, 2016), transcript at p. 28. (where political reporter Glenn Thrush notes that the goal of those who make claims of “fake news” is to undermine the credibility of the country's institutions).

notion of truth and to make it difficult for the public to trust in decisions made by government institutions.⁷

In light of this distrust, this essay focuses on the ethical responsibility that inside lawyers—those who act as decisionmakers for government institutions—have to society at large to foster trust in the decisions they make.⁸

II. THE INSIDE LAWYER’S ETHICAL RESPONSIBILITY

A society functions through private and government institutions. Public trust in these institutions is required in order for a democratic system of governance to succeed in governing a society.^{9,10,11} With regard to the necessity for public trust in decisions of government institutions, it has been noted that “[t]rust in public institutions and in official decisionmakers is a major value democratic governments are supposed to achieve.”¹² Those who make decisions on behalf of government institutions therefore have a duty to society at large to foster public trust in their decisions.

⁷ *Stay Tuned with Preet, Putin, Pawns and Propaganda (with Garry Kasparov)*, WNYC STUDIOS (Dec. 6, 2017), <http://www.wnystudios.org/story/putin-pawns-and-propaganda-garry-kasparov>.

⁸ See *infra* Part II.

⁹ Michael Ignatieff, Professor, Harvard Kennedy School, *Representation and Responsibility: Ethics and Public Office*, address at the University of Oxford (May 30, 2013), THE TANNER LECTURES ON HUM. VALUES, at 112–113, <http://tannerlectures.utah.edu/Ignatieff%20Tanner%20Lecture.pdf> (noting that trust in representative institutions is necessary for democracy to work).

¹⁰ See Ben W. Heineman, Jr., William F. Lee & David B. Wilkins, *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, at 22, 64 (2014), https://cip.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf (noting in the corporate sphere that inside general counsel is in a position to play a key role in a corporation's realization of the ideals of high performance with high integrity that “creates fundamental trust” among the various groups participating in or affected by corporate activities, including the general public, that “is essential to sustaining the corporate power and freedom that drives the economy”; further noting the importance of teaching law students the broader ethical values that are central to the identity, prestige and power of the legal profession because the profession's adherence to these ideals contributes to “the fundamental trust upon which our shared economic, political, and social order is based”).

¹¹ See also Ben W. Heineman, Jr., *How Global Corporations Should Confront Pervasive Distrust*, FORTUNE, at 2 (July 12, 2016), <http://fortune.com/2016/07/12/corporate-citizenship-trust> (noting that “trust . . . is the foundation for business durability and sustainability”).

¹² Mathilde Cohen, *Reason for Reasons*, at 14 (Fall 2007), electronic copy available at: <http://ssrn.com/abstract=1401707>.

For an inside lawyer who performs the role of decisionmaker for his or her government institution, this duty constitutes an ethical responsibility to society at large that is *in addition to* the other ethical responsibilities the lawyer has in performing this role: to clients and stakeholders; to the rule of law; and, to his or her government institution.¹³

III. WAYS TO GIVE PRACTICAL EFFECT TO THIS RESPONSIBILITY

The social science literature indicates that the public's willingness to trust in and accept a decision of a government institution as legitimate is dependent on two factors: (1) its sense that there is some minimum degree of shared truth about the matter decided, and (2) its sense that the decision-making process employed was fair and impartial.^{14,15,16} In order to foster trust in the decision the inside lawyer makes on behalf of his or her government institution, the lawyer must address these two factors.

Applying the first factor means that the inside lawyer needs to consider whether some minimum degree of shared truth regarding the matter that is being decided exists or whether a basis for some degree of shared truth can be identified.¹⁷ It further means that if necessary, the lawyer needs to be prepared to articulate what the facts of the matter are on which he or she is relying for that determination, and why the lawyer has accepted them as true.

In regards to the second factor, Tom R. Tyler has identified attributes of a decision-making process that the public views as indicia that the process is fair and impartial—in other words, a process that produces decisions the public is willing to trust and accept. These attributes are as

¹³ See Heineman, Jr., Lee & Wilkins, *supra* note 10, at 11–12, 22, 64.

¹⁴ Ignatieff, *supra* note 9, at 112–113.

¹⁵ Tom R. Tyler, *Governing amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 L. SOC'Y REV. 809, 827–829 (1994).

¹⁶ Tom R. Tyler & Johnathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, PSYCHOL., PUB. SAFETY & THE L., at 6–7 (2013), <https://www.yale.edu/system/files/area.center/justice/document/ssrnpopularlegitimacy.pdf>.

¹⁷ Ignatieff, *supra* note 9.

follows: whether the decisionmaker is seen as (1) having been honest in the way the decisionmaker went about making the decision; (2) having considered differing points of view; (3) having sought the kind of information necessary to make an informed decision; (4) having tried to be fair; (5) and having evinced a concern for protecting the average citizen's rights.¹⁸

In other words, the inside lawyer needs to ensure that these attributes are part of the decision-making process, and he or she must be prepared to demonstrate how such is the case if necessary.

IV. CONCLUSION

When performing the role of decisionmaker for a government institution, an inside lawyer can find himself or herself thrust into the fray regarding the trustworthiness of government. This can occur when those opposed to decisions that the lawyer makes seek to undermine the decision's legitimacy by claiming that it is based on facts that are "fake news," or by claiming that it is the result of an unfair or "rigged" decision-making process. Taking into account the extralegal considerations cited in this essay can afford a means of countering such claims in the event they are made and provide a basis for the public to trust in and accept the decision. This is important for the continued viability of our democratic system of governance.

¹⁸ Tyler, *supra* note 15, at 824, 827–829.