

Transcript of Panel 3 at the October 14, 2021 Convocation:
Watchdogs or Lap Dogs? The Ethical Challenges Facing Government Lawyers

Michael A. Cardozo:

Welcome to Panel Three. Let me briefly introduce our three panelists, whose bios are in the overall link. Start off with Loretta Lynch, former United States Attorney General, now a partner at Paul Weiss, Rebecca Roiphe, who is a professor at New York Law School, and Steven banks, who's, today, the Commissioner of the New York City Department of Social Services, and prior to that, was the longtime attorney and chief of the Legal Aid Society. So, we have an interesting hypothetical, which I distributed to the panelists a few moments ago, and let me read it for the benefit of the audience.

Michael A. Cardozo:

It's entitled Burqas On the Beach. "You are the General Counsel of Little Town, a small beach town on Long Island. You've been hired by the mayor, Lucy Loser, and you are paid directly by the town. The town has a small beach on the ocean, and only town residents and their guests may use it. When you were hired, Mayor Loser reminded you that you work for her, that your conversations with her are confidential, and that they are covered by the attorney-client privilege. One day, soon after you were hired, the mayor asked you to prepare a memorandum for her, describing her authority with respect to the beach. Specifically, she asked you whether and under what circumstances she can close the beach, and whether she has the authority to require that appropriate attire be worn on the beach.

Michael A. Cardozo:

You do a little research and learn that there is a New York State law that permits town mayors to close town beaches if they deem it necessary in the public interest. There is also a state law that permits town mayors to require that appropriate attire be worn on the beach. You prepare the memorandum and give it to Mayor Loser. A few weeks later Mayor Loser asked to see you. She says that in recent days, a number of women who live in the town, who are ultra-orthodox Jews and Muslims, have begun to wear burqas or shalim, that's long head to toe attire, with nearly full face covering, while at the beach.

Michael A. Cardozo:

Other residents were complaining to the mayor that this attire made them uncomfortable, and wasn't appropriate for the beach. The mayor tells you that she wants to ban the practice. She wants to issue an executive order that burqas and shalim are inappropriate attire for the beach, and the beach will be closed, in the public interest, to any woman who wears it. You advise the mayor that such an order would be invalid, because New York State law prohibits discrimination on the basis of sex or religion. You tell her that such an order would be plainly unlawful and immoral.

Michael A. Cardozo:

The next day, Mayor Loser tells you that she has drafted an order, banning burqas and shalim, and plans to read it at a press conference later in the day. She says that she has done her homework, reminds you that your conversations with her are confidential and subject to the attorney-client privilege, which you cannot waive. She says that if you reveal what you told her, that such an order would be unlawful, she will not only fire you, but will report you to the disciplinary committee for breaching your duty of confidentiality.

Michael A. Cardozo:

A few hours later, the mayor holds a press conference and announces her beach burqa ban. She says that she's been told by you, her lawyer, that the ban is lawful, and she releases your memorandum that

describes her power under state law to close the beach in the public interest, and to require the wearing of appropriate beach attire. Her order specifically prohibits women from wearing burqas and shalim on the beach, and goes one step further, requiring that all women over the age of 10 must wear two-piece bikini bathing suits on the beach. You're the general counsel of the town. What, if anything, should you do after hearing the mayor's comments at the press conference? Let me talk to Attorney General Lynch first. Miss Lynch, what would you do?

Loretta E. Lynch:

So part of me wants to say that the first thing I would do is show up at the mayor's office for a private confidential discussion, wearing a burqa.

Michael A. Cardozo:

And after that?

Loretta E. Lynch:

So I think you have to... If you're the general counsel of the town, the main issue here, obviously, is what to do about two things. The mayor has issued an executive order that is clearly unlawful and unconstitutional under both federal and state laws, and has also made a material misstatement in describing your advice to her. Certainly, you're going to be concerned about the material misstatement that she has ascribed to you, but that really can't be your consideration. You can't think of yourself in that moment. It's not about protecting your reputation, it really is about giving this mayor the best advice that you can to get her out of this situation.

Loretta E. Lynch:

Which, just by the way this hypo was going, is likely not to be taken. But you need to advise the mayor that, in fact, she made a misrepresentation, she should correct it; she likely won't, and that this particular law is going to be struck down almost as soon as the papers are filed. And just advise her of that. You may end up having to go forward with it. But I think most people are also probably wondering, is there any way that you can, in fact, reveal the fact that you didn't say that to the mayor, you didn't tell her that this was lawful, that this was okay? What can you say?

Loretta E. Lynch:

And then you get into the issue of, can you reveal a client confidence? Who is your client? Is the mayor correct when she says that she herself is the client and she's not. But discussions of legal matters about the town are still subject to privilege. So the discussion is privileged, but the privilege doesn't belong to the mayor, it belongs to the town. So one thing that I would consider doing is going to the city council and saying, "We have a real problem here, and we, as a city, through this mayor, have issued an order that's clearly unlawful." And you want to do this behind the scenes, if you can, but you want to make sure that your client, the actual city, knows the legal peril that the mayor has just put you in.

Michael A. Cardozo:

Either Steve or Rebecca, you want to add to that in any way?

Steven Banks:

I would add to that. In my dual role of formally bringing lawsuits against government, and now being in the government, that one of the issues here is, ultimately, going to be city liability, when someone sues. So communicating to the mayor one last time, aside from what you want to do, you have to understand that it's going to cost the city money. And then I like Loretta's suggestion of pointing out, as you do, Michael, in your article, that there are multiple elements of what the city is, and you're the lawyer for that city. And so making it clear to the council, that there's going to be additional city costs from this losing litigation is another avenue that might bring people to their senses, because nobody wants to have extra financial liability for the city or the town.

Michael A. Cardozo:

Becky, you want to add anything to that?

Rebecca Roiphe:

Sure. I'll just say, I would have, at the start, when she hired me... I think it's a little bit of a red flag, the way that she suggested that the privilege was entirely hers and with her. It made it sound like I was representing the mayor in her personal capacity, or even the mayor in her official capacity. And if that was the case, I'd like to make that very clear, that it was in representation in which it didn't create a conflict of interest, because... Most cases, you probably could represent the mayor and also the town, but it's somewhat odd that she framed it that way.

Rebecca Roiphe:

I would make clear, well, I'm certainly representing your interest, in so far as we are both fiduciaries for the town. But my client is the town here, and you are the representative of the town, whom I will be dealing with, and, of course, our conversations are privileged, but they're... It's a really complicated question, how that privilege runs. I think in this situation, I agree that you want to be able to reveal this information, but I'm not so sure that you have the power to reveal it.

Rebecca Roiphe:

Even though your client is the town, you have to think about whether your client has, in effect, waived the privilege. If so, then you can go forward. But who's the representative of your client at this point? Normally, it would be the mayor, and you would have to look to see if there's any way in which you can go to a different representative of the client and get some other kind of waiver from that person, if it's not already in some kinds of whistleblower laws or something like that. My guess is, it's a little bit problematic.

Rebecca Roiphe:

I also would say it almost sounds like you might have the exception, in the rule of confidentiality, to defend yourself, and you might be... Under 1.6b5, you can reveal information to the extent necessary, that somebody... if somebody has brought a claim or controversy. This does not rise to that, because it's not actually a claim or controversy, but it is one of those things when lawyers have an inclination that they want to protect their reputation, they often go to that rule, and, unfortunately, find that it's actually much more limited than most lawyers think.

Loretta E. Lynch:

One question you might have is that... just to add on what Rebecca said is, by the mayor turning over your memo... You gave her a memo of law that said, here's a construct of law, as to what is in... what the mayor can do about beaches, and the public necessity and all, and appropriate attire in that regard. And has the mayor, on behalf of the town, by releasing what, essentially, is a privileged memo... has the mayor waved, on behalf of the town, the confidentiality around all the discussions around that issue? That's one of the things, I think, that you... a question you'd have, and, certainly, I think it's a question that the average listener might have.

Loretta E. Lynch:

Because someone listening to the mayor delivered this, no doubt, rather puzzling press conference, would say, here's a memo from a lawyer. There's the lawyer standing over there, perhaps doing the face that... I don't know, I forget the doctor who was on stage during the last administration's COVID press conferences used to do. We used hear about bleach, and light, and all. Someone's going to ask, is that all that there is, basically? And so one question to explore is, by the mayor releasing this memo, has she released the underlying discussions around it?

Loretta E. Lynch:

I think that the law, generally, is that she has not, because there's still a deliberative privilege that belongs to the town about discussions and advice that you as counsel give the town about whether something is a good idea or not, which is definitely the type of discussion that was had here. And so I think that you still may be stuck with only having the memo out there.

Rebecca Roiphe:

I would say also just... Sorry, to add just... I think I used the language of privilege, as well. But really, this is a question about confidentiality, since it hasn't been... there's been no court order or request for the information, and confidentiality really is so broad, that... What I should have said is, instead of waivers, client consent. Has the client consented, in some way, to the revelation of this material? Because if there isn't any implicit consent, or consent that you can find in any other structure of the laws, then I think you're stuck, as well. I don't think that there was a way in which you can reveal this information, even though it may, in fact, be damaging to the town and to your reputation. So I go back to Loretta's original position, which is, you've tried to go back to the mayor and see if you can get her to agree to change her mind on this, which is unlikely, but that, probably, is the best course.

Steven Banks:

Going back to the memo, though, it just raised the issue, and you've all... I'm a recovering lawyer, not serving as a lawyer in government. But various of you have been lawyers in the government. Do you need to think, in writing the memo, yes, the mayor has this authority, but is there anything else that circumscribes that authority? So therefore, you've got, as we like to say, a piece of parol evidence. You don't have to look beyond the memo of what the advice was. And if the mayor is going to reveal the advice, the mayor has got to reveal the advice in its entirety, not simply the part that the mayor might like.

Michael A. Cardozo:

Well, let me go back to something that Loretta said at the beginning, saying it's clear that the client was not just the mayor, the client was the town. Now, why is that so clear? If when he was hired, she said to him, "You are my lawyer, and I'm expecting you to keep attorney-client privilege," and didn't allude to

the fact that he was also representing the town. Is it as a matter of law, or is there a question as to whether, in fact, he was the attorney for the town?

Loretta E. Lynch:

I think that the mayor's words, upon the hiring, are what we, in the legal field, colloquially call wrong. But leaving that aside, the fact that the lawyer is paid directly by the town, and their title is the general counsel of the town, I think, are indicative of the position. As general counsel, it wouldn't be unusual to be hired by one particular city representative. Then the issue is, when the mayor makes those statements, that I view you as my lawyer, and what you and I talk about is confidential and privileged, and can only be waived by, presumably, me, and is whether or not you have a duty to correct her then and there, which I think you do, because you don't want a representative of the client having a misunderstanding of the position.

Loretta E. Lynch:

We've certainly have seen litigation over this issue. It typically is more, obviously, in internal investigations, when you're interviewing employees of the client company, clarifying that you represent the company, and not them individually. And these Upjohn warnings are the result of litigation, because individuals had the perception that a lawyer talking to them about their work was, in fact, representing them individually. And so there's no legal requirement for an Upjohn warning when you're hired by a municipality, when someone clearly has a misapprehension of role. Certainly, as a lawyer representing an entity, when you're faced with someone who so clearly has a misunderstanding of your role, it would be wise to correct them right away. But even their misapprehension, I don't think would change the actual rules of confidentiality surrounding your engagement by the town.

Michael A. Cardozo:

And let's assume now that she said what she said, and you go try to persuade her. What should you do? We've established what the ground rules, the principles are, but what should you as the lawyer do, other than saying to her, "You really should withdraw this statement"?

Loretta E. Lynch:

I'd do another memo, because I think that the verbal discussions that you have are the most difficult to disclose. But I would do a memo, expanding upon the first one, saying that here are the limitations, as Rebecca was mentioning, in the legal limitations, not to mention the common sense limitations, but the pure legal implications of the action. I would do a memo, because at some point that may be FOIA'd. And it may or may not come out, but I think you want to have your advice to the client down in writing, so that they can consider it fully. And that in case you do have to expand it to the city council that your reasoning and thinking are clear.

Michael A. Cardozo:

So let's take it to the next step. You write the memo, and she ignores it, and the ban is about to go into effect. What do you do, then?

Rebecca Roiphe:

One choice is to quit. At a certain point, if your hands are tied, and you're in a situation where you're representing a client, and it's putting you in a complicated position, you can withdraw from that

position. Now, the question is, if you suddenly withdraw right after her press conference, is that itself a violation of the obligation of confidentiality that you owe to the town? Because by doing that, you're signaling, as we were just talking about in the analogy in the corporate world, is that a noisy withdrawal, such that you're now signaling to town members or to council members something has happened? And if so, is that okay?

Rebecca Roiphe:

Again, I really think that that's a complicated question, and goes to this... goes to the fact, is there anything in the laws where you can find some kind of consent to withdrawing this information? And I think with regard to privilege and... sorry, more importantly, with confidentiality, and a government client, you really have to look in a detailed way at these kinds of laws to see if there's any suggestion that you have permission to reveal that information. But, certainly, at a later point, if you think you're going to be asked to be involved in a more active way, and you are uncomfortable with that, you certainly have the power to step out. And to me, that seems like a good idea, you have a complicated situation with a complicated client.

Catherine O'Hagan Wolfe:

I'm going to interrupt for a moment, because we have a question from one of our attendees, that might be relevant here. She inquires about the value of reducing your counsel to your clients to writing, and how, by that writing, the client may have cause as to whether they should proceed against your best advice. She also notes that maybe the writing covers the attorney in the event there are allegations of misconduct against the attorney, ultimately. If you have any comments on that, I'm sure the attendee would appreciate that.

Michael A. Cardozo:

You want to jump in?

Loretta E. Lynch:

Well, I certainly think that in a number of contexts, probably more so in private practice, but even in government practice, people will do a memo to the file. They'll do a memo to the client and say, here's what we're thinking about, and here's the answer to your question. But if you have a client who's specifically going against your advice, a memo to the file can be a helpful thing, depending upon what you think your liability here would be. I think a lawsuit, in this case, would be against the town and the mayor in her capacity as mayor, maybe the city council, but it wouldn't necessarily be against the general counsel. Your question, we're probably anticipating Michael's question, is, do you defend this stupid law? And how do you do that consistent with the bounds of ethics and confidentiality? But I do think that doing a memo to file, particularly where there might be, at some point, a break between you and the client, and particularly where you know that your client is misrepresenting your advice. Because at some point, there could be some ethical considerations for you there.

Loretta E. Lynch:

Now, I think the issue that that's going to raise is, if you really feel that you and the client have such a break, that they misrepresent what you say for their agenda, and you have to protect yourself to that degree, is there now a conflict of interest between you and the client, such that you are not able to continue in this representation? If your focus is now going to shift from protecting the client's interests

to protecting your own, validly so, I think you really have to think about whether that conflict has ripened to the point whether or not you can stay on.

Michael A. Cardozo:

But is your first interest to protect your own rear end, or is the first interest to say the city, the town is, obviously, going to face a lawsuit and going to pay substantial damages, and what should I do to prevent that from happening?

Rebecca Roiphe:

I think the question, in part is, has the mayor breached her fiduciary duty to her... You have a fiduciary duty as a lawyer, but the mayor, also, has a fiduciary duty to the town, and has the mayor breached her fiduciary duty, or has she just done something, in your mind, that's dumb? Because mayors may frequently do things that are dumb, and you as a lawyer cannot really second guess that decision, because this is the elected official. Really dumb decision, but what can you do about it if you disagree with it? Or is this a breach of fiduciary duty?

Rebecca Roiphe:

Now, this seems so egregious, because it's so obvious. You don't even have to have gone through a first year of law school to understand that this is bad and wrong, that maybe it constitutes that kind of breach of fiduciary duty. And if it does, then I think there is a question of whether or not... You have to do what's in the best interest of your client here, the town, and how you figure out what that is, because the person who's supposed to be representing the town is no longer doing so in a competent way. I just got an interesting email from one of the participants saying, can you just go out and give a press conference saying this law is clearly unconstitutional? Not saying anything about what you said to your client, or what... But could you give that particular press conference, just in direct conflict?

Rebecca Roiphe:

Now, I personally think that would be problematic from the same perspective, which is, as long as this mayor is still the representative of your client, it's harmful to your client to go out and give contrary advice. Not only do you have a duty of confidentiality, but you also have a duty of loyalty. And so at this point, I don't think... Well, that's, I think, a clever... really clever suggestion. I don't think that that really gets you out of this, because it would, to me, as long as the mayor is still the fiduciary, be in, somewhat, a breach of obligation to them. If you really think the mayor has breached their fiduciary duty, maybe that's a possibility.

Steven Banks:

Right, isn't it that we've moved from like dumb policy, which we do all the time, to unlawful policy? And so isn't it all really going to come to a head, because somebody like I used to be is going to file this lawsuit to enjoin the city and seek damages on behalf of somebody that couldn't use the beach because of any of the various aspects of this? So it's all going to come to a head pretty quickly. And then you're going to be confronted with a choice of are you going to represent the city and litigate, and who is the city? The mayor, or the council, or the fiduciary duty to the people of the city who are now going to pay money for a dumb lawsuit or an avoidable lawsuit?

Michael A. Cardozo:

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Under Rule 1.13, if you're representing the organization, and you know that this is going to impose major harm on the organization, don't you have an obligation to take steps, under the rule, to try to prevent this from happening, to get to your own personal interest here? Shouldn't we be looking at Rule 1.13 to see whether that would give us the ability to take some other steps?

Rebecca Roiphe:

I think that's right, but I think there's a question of... So that's how I think that we get to Loretta's first suggestion, which was to go to the city council. Would have to be somewhat under that, whereby you've decided that there is an individual who is engaged in unlawful conduct, that will end up hurting your client, and you're going over that person's head, essentially, going up the ladder. But it's just a question, to me, of whether or not the council really is over the... I just don't know how this town is organized, but is the council really reporting up over the mayor is, or is there a... What is the structure of government? And if there is somebody higher up than the mayor, then, absolutely, 1.13 or analogy to 1.13 would allow you to do that under these circumstances, if you really felt like this was illegal conduct that was going to hurt your client, the town.

Michael A. Cardozo:

Well, if the town board didn't do anything, is that it, or is there some other further obligation or step you could take to prevent this from happening?

Rebecca Roiphe:

Under one 1.13, if the town board doesn't act, or if the entity with authority, under the bylaws of the company or the organization, you raise it to them and they don't act, then you are permitted to reveal information pursuant to what 1.13, to the extent necessary, to prevent the harm. So being very careful to do it in such a way as limiting the amount of information that you reveal. Perhaps you could give that press conference or a similar press conference to protect your client.

Loretta E. Lynch:

What's the harm that you're revealing that's going to prevent future harm? If that's your on-ramp, to giving that press conference and saying, actually, as a matter of law, this is actually unconstitutional, and illegal, and it violates a few other New York State human rights laws, you still aren't preventing the harm, you're actually inviting the lawsuit. And in fact, you've now made yourself a witness in a lawsuit that you are likely going to be constrained to defend. So I don't think that gets you to the steps of the separate... of the appellate division to have your press conference. As a lawyer, I think it just deepens your issue. I don't think that...

Loretta E. Lynch:

Again, if the rule allows disclosure to prevent the kind of harm, honestly, in this situation, I don't see a way to prevent this harm. Because the reality is, the mayor does have a certain discretion in terms of crafting executive orders. And mayors craft executive orders that are either clearly unlawful, or found to be unlawful, all the time. So I don't think that that particular rule is the on-ramp to preventing the harm to the institution, which is the town. If the mayor has the authority to issue the order, just by virtue of being the mayor, the order's out there.

Loretta E. Lynch:

I think what throws you in this hypo is that... No lawyer likes the fact that the mayor has misrepresented their advice, and is essentially saying, "Oh, well, my esteemed General Counsel, Michael Cardozo said, I could do this. And if Mike says it's true, look at this reputation, and therefore, it must be so." No one wants that, when it's so clearly false. So the real issue is... I think, that we're grappling with is, because the mayor has lied about you, does that give you the ability to correct that record? And the sad reality is, certainly not many politicians that we know. But politicians do lie all the time, and their counsel are usually constrained from saying so publicly.

Michael A. Cardozo:

Steve, did you want to add to that?

Steven Banks:

I was smiling at everything that Loretta said. [

Michael A. Cardozo:

Go ahead.

Steven Banks:

I was smiling at everything that Loretta said. But I hate to beat a dead horse. I think it does come back to the... Rebecca talked about it, and Loretta talked about it, it comes back to the very beginning of the relationship. And although you're peppering us with, yeah, but what do you do at this point, it's a good lesson about what to do at the beginning points here. And there were two points that seemed to be important flashing lights, who do you work for, and what do I put in the memo? Do I just put the memo narrow on the powers of the mayor, or do I point out that there are some limitations? You can keep the beaches safe, or whatever the language was, but you can't do it if you violate these other things.

Steven Banks:

So I think it's sort of like a drive defensively lesson for all of us about when you get hired and when you're writing something for an elected, or anybody who in government. I get memos from our general counsel, and I know why it's being laid out. It's so that I can focus on it and make sure that I understand what all the challenges are. And so I do believe that encouraging people to put their advice in writing is an important takeaway from this wonderful hypothetical.

Michael A. Cardozo:

Just one thing that I'm not sure we've exhausted here is, if you... under Rule 1.13, if you start reporting up and nothing happens, you can keep going up, and you can, ultimately, I think, go public. So I suspect that the town board in a small town is not necessarily going to move quickly, but this order may be going into effect the next day. Couldn't you go to the attorney general of the State of New York, for example, if it's in New York, and say, you got to start a proceeding right away to prevent lots of damage, et cetera? Wouldn't that be a possibility, rather than just worrying about your reputation?

Rebecca Roiphe:

I think that goes back to Loretta's earlier point, which is damage. You can say to prevent a lot of damage, but damage to who and whom? Are you really preventing damage to your client, which is this particular

town? Or are you bringing on more damage by going forward? And I think that that's a real question. Because unless you're preventing that harm, if you read 1.13 carefully, I don't think you're permitted... Even if we view government lawyers as required to or allowed to follow those rules, to what extent are you preventing harm, and what extent are you just going out there and bringing on these lawsuits that are ultimately going to hurt your client?

Rebecca Roiphe:

I think that it would be different if hate it... I hate when my students fight the hypothetical. But if you had had an option to do something before this came out, it would be a different story, because that's preventing harm that is going to come from this going public. But you didn't have that heads-up in our hypothetical, you just... the whole thing happened, and now you're trying to figure out how to clean it up, and there just may not be a particularly good way to clean it up.

Loretta E. Lynch:

One potential way to clean it up, which is, again, more of a practical issue than anything else, is after you've gone to see the mayor that afternoon, wearing your beautiful new burqa, the next day, you put on a beautiful shalim, and you go see the town police chief and you say, "Just so you know, enforcement of this order is unconstitutional."

Michael A. Cardozo:

Okay.

Loretta E. Lynch:

Again, I know you're not supposed to fight the hypothetical, and this is all a little bit tongue-in-cheek, but there's also a real enforcement issue here, as well, because you're going to have to use town resources to enforce this. Presumably, the mayor wants someone in a public safety or law enforcement capacity to go onto the beach and pick up, not just women wearing burqas and shalims, but women wearing one-piece bathing suits, at this point, based upon this order, and either fine them, issue them a ticket, or arrest them. It's a little unclear as to what the remedy is that the mayor is requesting, but there'll be some sort of government recourse against people. I could see the police chief reading this, and turning to the general counsel of the town and saying, "Michael Cardozo, say it isn't so." You also are the legal adviser for other town representatives.

Michael A. Cardozo:

Okay. Let's change this a little bit. Well, first of all, let me ask, she told him about... that she was going to issue this order before she issued it, and he didn't do anything. Should he have done something at that stage, rather than waiting till after she read the misleading order? Because she originally just told him she was going to issue an order on this, that would have banned these things. Didn't say it was going to be ascribed to his memo. So should he have spoken up earlier, rather than waiting for the order to actually be issued?

Steven Banks:

Would have helped. Going back to, I think, one of the questions earlier, now you know, as the lawyer, that your client's about to do something that you told them not to do. They've given you a little bit of leeway, maybe it's a good moment to say, could you just pause on that and let me get back to you on

whether that's permissible for you to do? With this mayor, maybe that doesn't help you, but at least you're trying.

Michael A. Cardozo:

Well, let's make it a little bit more interesting. While this is all going on, you learned that the mayor's cousin owns the only bikini store in the town, where the bathing suits mandated by this order could be purchased. How does that change the facts? What would you do, then?

Loretta E. Lynch:

Well, now I'm calling the Public Corruption Unit of the US Attorney's Office. I'm sorry.

Michael A. Cardozo:

Make it easier?

Steven Banks:

It makes it easier to stop this, it gives you places to go to. Public corruption the AG, public corruption in the US Attorney's Office. Lots of places to go to. They might even be a local public corruption unit.

Michael A. Cardozo:

Does it give you more leeway to go completely public on this?

Loretta E. Lynch:

I don't know that it does, actually. Because the issue there is, now you have... what you have is regardless of what this ordinance is or says, or what the mayor said or didn't say about you, and falsely representing your opinion, what you have now is a mayor who's engaged in self-dealing, who has set up a system to require that public enforcement funds be used to set up some way to funnel money to a family-related business. So now what you've got is official misconduct. So I think the issue just shifts to, what do you do when you see that the person who is the face of the town, the mayor, is engaged in some kind of misconduct?

Loretta E. Lynch:

And then I think you certainly have an obligation to raise it with the city council in that vein not just, she's past this, she's issued this executive order that's going to cause significant liability to us. But now we have someone who may, themselves, be involved directly in public corruption. And so I think what you would want to do is consider, would you advise someone else, who represents the town, to make a report to a law enforcement authority upon the advice of counsel, meaning you? Or you could also consider getting separate white collar counsel for the town to advise, probably, the city council separately and say, you all need to look at this, maybe even do an investigation yourselves, and then consider some sort of referral to a law enforcement agency. But I don't think it means that you can go public with it.

Rebecca Roiphe:

I was just going to say I think it makes the question a little bit easier, about whether or not... If you take the analogy of a corporation, you're working for, a corporation, generally, you defer to the CEO of that corporation, because the CEO is the representative of that organization in all ways. But at a certain

point, if it becomes clear that that CEO is not acting in the best interest of this organization, and it's not a judgment call, because they have actually betrayed their fiduciary obligation to the organization, then you do have an obligation to serve your client.

Rebecca Roiphe:

And so now you have gotten us with this additional wrinkle in the story closer to that in my mind, where it's... this is no longer just a stupid decision made by an elected official, really stupid decision, in which you still have to defer to this person, because they're still the elected official, but rather, a situation in which this person has breached their obligation to your client. And so therefore, you do then become... in a certain way, have an obligation to decide what is in the best interest of your client. You can no longer defer to this person who has a conflict.

Michael A. Cardozo:

Steve or Loretta, you want to add to that?

Steven Banks:

I totally agree with what Rebecca said.

Michael A. Cardozo:

Okay. Does the fact that-

Catherine O'Hagan Wolfe:

I'm just going to interrupt one more time, Michael, to tell you this is your 10-minute warning.

Michael A. Cardozo:

Thank you. Does the fact that the FOIA laws, and other laws, Freedom of Information Act laws, which want to shed light on alleged wrongdoing, do they play any role in the analysis of how we'd handle this problem, distinct from what you might do in the private sector?

Rebecca Roiphe:

So I would say that the FOIA laws are, in some ways... or at least some scholars believe that the FOIA laws are an expression of the... can be an expression of the client's desires when it comes to transparency in government. And so essentially, can be consent to the revelation of what would otherwise, clearly, be confidential information. And so there is at least an argument that if the information would be subject to a FOIA request, that would be discoverable that way, that that is an indication that perhaps the duty of confidentiality ends there. There are other people who say evidence of wrongdoing is never subject to government confidentiality. I'm not sure I'm in agreement with those people, but there are certainly people who argue that if there's clear evidence of wrongdoing, it's never confidential information.

Michael A. Cardozo:

Well, if a FOIA request had been served here on... If his original opinion had not been released by the mayor, and a FOIA request was served, would she have to disclose it under under... even though it's privileged, otherwise privileged? In other words, would the FOIA law have overruled the attorney client privilege?

Transcript of Panel 3 at the October 14, 2021 Convocation:
Watchdogs or Lap Dogs? The Ethical Challenges Facing Government Lawyers

Loretta E. Lynch:

Typically, it doesn't.

Rebecca Roiphe:

Yeah.

Steven Banks:

Yeah, I don't think so.

Loretta E. Lynch:

It doesn't overrule privilege, it doesn't apply to something that might be an open or an ongoing investigation. If you, as general counsel, have decided that you need to get maybe... have the auditors look into this, you may have commissioned, or had the city council commissioned the auditors to look into this financial issue, that would not be FOIA-able until it was resolved. So I don't think the FOIA is going to get your original memo out, assuming the original memo is clear and is helpful in this situation.

Loretta E. Lynch:

I think the sentiment that FOIA certainly stands for the principle that government wrongdoing should not be concealed is an admirable one, and it is, in fact, the basis for FOIA and many other disclosure obligations, both civil and criminal. But there is a FOIA process, and that principle and policy, no matter how laudatory, doesn't overrule the process that somebody would need to go through. Certainly, as as counsel to the town, I don't think you're in a position to say, "Well, if someone were to FOIA this, they would likely get it. So let me go ahead and turn it over anyway." Because you are making a number of assumptions about a number of actions and conclusions that have yet to come to fruition.

Michael A. Cardozo:

So, let me ask you a question that really pervades all the panels. Should we have different ethical rules or supplemental ethical rules for government lawyers, when they're faced with these kinds of issues, as distinct from lawyers in private practice?

Rebecca Roiphe:

I wouldn't be in favor of something more... I think standards are better, because... I think it would be very hard to reduce these things which are so complicated, and really depend on government structure, and the particulars of each government entity, and the laws of that jurisdiction. I think it would be very hard to reduce these things to rules in any way that would ultimately be helpful for lawyers in this situation, perhaps greater standards. I also think that, as we've been saying, and I think as Neal Katyal began the whole program with, procedures are really important. That, in other words, following procedures are a very good way of assuring that you're following your ethical obligations in these situations.

Rebecca Roiphe:

Procedures are better, in my mind, than ethical rules in terms of assuring that that government lawyers are actually abiding by their ethical obligations. Otherwise, we really need to just elect and choose people with really good judgment, because it's extremely complicated. Like yourself and all three of you,

who have been in these positions, I think it's just very important that people have good judgment, because all these questions are so hard.

Loretta E. Lynch:

Yeah. And judgment's the one thing that is hard to teach, and that's... If you ask anyone who runs a government office, what's the most challenging issue they face, they'll tell you, it's personnel. And what's the most important thing you can do? It's whom you hire to fill the seats around you, because they do have to come to the position, understanding the gravity and the power that they have. I would say that I agree with Rebecca. I don't know that more rules are necessary. In fact, government lawyers have a great deal... have a huge number of rules, governing their conduct, in so many ways.

Loretta E. Lynch:

Certainly, it would, obviously, come from the federal system, but federal lawyers are some of the most highly regulated lawyers on the planet, already. So I think making sure that those principles are clear is what's really key. But there's a variety of government practices, such that it's hard to have a one size-fits-all rule. But certainly, having a clear set of processes laid out, having clear principles laid out, is always helpful. And look, these things are also always changing, as different scenarios come up.

Loretta E. Lynch:

The background reading, I thought, was excellent in positing the various scenarios that do come up when government lawyers are working very hard to protect the public fisc and to protect all of us, and the fact that these rules require interpretation. So I would say more along the lines of standards, as well. But I don't know that more specific rules are necessary.

Steven Banks:

I would agree with that. Michael, in the days when we were adversaries, you might remember that government argued that there should be different rules for contempt with government officials, and-

Michael A. Cardozo:

I have no recollection of that rule.

Steven Banks:

I didn't think you do. But must have been a rare loss, we prevailed on the point that government officials are held to the same standards, when it comes to contempt, that a private party would be held to. So I think it's the wrong route to go to create a different rule for government lawyers, but I think guardrails, in terms of standards, are always good for lawyers, no matter what role they are in; private, public lawyers, guardrails for particular kinds of lawyering help in terms of giving people a pathway forward.

Michael A. Cardozo:

Great.

Catherine O'Hagan Wolfe:

Michael, do you want to invite folks to wrap up in a couple of minutes?

Michael A. Cardozo:

Yes. Well, I was just about to say, because I run out of my hypotheticals, I don't know if any of the three of you have any overall additional thoughts you wanted to add before we wrap up on this very interesting subject.

Loretta E. Lynch:

I thought you were going to make it really hard for us by throwing in... I knew you were going to throw in something at the end, and the public corruption angle, I think, is a great one. I thought you were going to say, what if two towns, over at a beach, someone who was neither Jewish nor Muslim had used a burkqa or a shalim and hidden a weapon underneath it, and had harmed people? How would you view the mayor's order in that regard? How would you handle the issues in that regard? Suppose a White supremacist trying to, in fact, throw blame on various groups, used the coverings of religion to disguise hateful or violent activity, how would you then view the mayor's executive order?

Loretta E. Lynch:

I still think it's incredibly problematic, because way over broad in terms of preventing that sort of harm, but it's the type of thing that people do as almost a knee-jerk reaction, when there's some sort of public safety threat. And it really is the more dangerous type of executive order, one that might have this veneer of necessity, but is but it's still going to be just as unconstitutional.

Michael A. Cardozo:

That's an excellent point. Next time we do this, we'll add that hypothetical, too.

Loretta E. Lynch:

Well, everyone knows it now, Michael.

Rebecca Roiphe:

Yeah. I thought you were going to add the wrinkle of, what if you were asked, instead of something that was so clearly unconstitutional, to give advice to write a memo supporting government action that was a little bit more borderline, but you, personally, thought was unconstitutional, and that's a whole other panel, so I won't go there. But I did think that that was where we were going next. There are endless number of permutations we could have-

Michael A. Cardozo:

I'm sure we can. Unfortunately, we've run out of time. So I want to thank very much our three panelists for spending their valuable time with us and for sharing things...