

# Should We Stay or Should We Go: Lessons from the Trump Administration

KATHLEEN CLARK\*

## ABSTRACT

*After the 2016 election, commentators published a flurry of essays with advice on whether lawyers and federal officials should remain in government during the Trump administration. In this article, I review those essays, including Professor David Luban's stern advice about the risk of remaining. I also discuss three key concepts from Professor Luban's article for this symposium: desk perpetrators, desk mitigators, and operational maneuvering room, and explore how they apply to Trump administration officials who engaged in internal resistance or principled resignation. More than one hundred federal officials in the administration engaged in principled resignation, many acting in concert with each other. The power of concerted action is most evident when a group of powerful officials together threaten to resign as a way of deterring abusive conduct. Many of these officials wrote letters or op-eds explaining their decision to resign, often sounding in the language of morality, emphasizing their disagreement with Trump policies and rhetoric they found repugnant.*

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### INTRODUCTION

After Donald Trump won the 2016 presidential election, many commentators and scholars recognized the grave threat to democratic governance that his presidency posed. Within days, Masha Gessen's essay, *Autocracy: Rules for Survival*, went viral.<sup>1</sup> Classic dystopian novels, such as George Orwell's 1984 and Aldous Huxley's BRAVE NEW WORLD, became best sellers,<sup>2</sup> as did non-fiction books by historians and political scientists, such as ON TYRANNY and HOW DEMOCRACIES DIE.<sup>3</sup> The mood in the country veered toward the apocalyptic. There was a spate of articles and blog posts examining whether federal officials could responsibly

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1. Masha Gessen, *Autocracy: Rules for Survival*, N.Y. REV. BOOKS (Nov. 10, 2016), <https://www.nybooks.com/daily/2016/11/10/trump-election-autocracy-rules-for-survival/> [<https://perma.cc/CUC5-G2TV>]; Ezra Klein, *Masha Gessen on the frightening fragility of America's political institutions*, VOX (July 10, 2020, 7:30 AM), <https://www.vox.com/2020/7/10/21318625/donald-trump-surviving-autocracy-masha-gessen-the-ezra-klein-show> [<https://perma.cc/R58B-WHB3>] ("Within 48 hours of Trump's victory, their essay "Autocracy: Rules for Survival" had gone viral"); Masha Gessen, *One Year After Trump's Election, Revisiting "Autocracy: Rules for Survival,"* NEW YORKER (Nov. 8, 2017), <https://www.newyorker.com/news/our-columnists/one-year-after-trumps-election-revisiting-autocracy-rules-for-survival> [<https://perma.cc/JV4M-N2UQ>] (indicating that her earlier essay was "read by millions of people").

2. Kimiko de Freytas-Tamura, *George Orwell's '1984' Is Suddenly a Best-Seller*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/books/1984-george-orwell-donald-trump.html> [<https://perma.cc/77SA-MWJV>]; see also Sophie Gilbert, *'1984' Isn't the Only Book Enjoying a Revival Under a Trump Presidency*, THE ATLANTIC (Jan. 25, 2017), <https://www.theatlantic.com/entertainment/archive/2017/01/1984-george-orwell-alternative-facts-trump-kellyanne-conway/514259/> [<https://perma.cc/MR78-SPHF>] (indicating that in the third week of December, 2016, Hannah Arendt's THE ORIGINS OF TOTALITARIANISM (1951) was selling at sixteen times its normal rate).

3. See Hillel Italie, *Yale professor discusses best-selling book 'On Tyranny'*, SEATTLE TIMES (May 10, 2017), <https://www.seattletimes.com/nation-world/yale-professor-discusses-best-selling-book-on-tyranny/> [<https://perma.cc/Q9XF-K4TN>] (indicating that TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY (2017) "quickly reached high on Amazon.com's best-seller list"). STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018) spent five weeks on the New York Times best seller list. See *Hardcover Nonfiction*, N.Y. TIMES (Mar. 4, 2018), <https://www.nytimes.com/books/best-sellers/2018/03/04/hardcover-nonfiction/> [<https://perma.cc/CE6F-ZM2X>].

remain in their government jobs, and whether those offered political appointments or civil service positions in the Trump administration should accept them.

In anticipation that the government would turn toward lawlessness, some federal employees were asking themselves: should we stay or should we go? Their decisions would likely be influenced by concerns that were practical, e.g., the potential for professional advancement, ideological, e.g., disagreement with the incoming administration's policy agenda, and moral, e.g., potential involvement in repugnant government actions.<sup>4</sup> If they did stay, how should they respond to unlawful or awful government policies? What moral guidance could help these individuals navigate such a situation?

In this essay, I review some of the advice that was published after the 2016 election. A few commentators claimed that "responsible people" had a moral duty to serve in the government as a bulwark against potential abuses.<sup>5</sup> Others disclaimed a duty to serve, but nonetheless encouraged individuals to serve so they could prevent or mitigate abuse. Several writers focused not on the binary choice of *whether* one could morally serve the Trump administration, but instead on *how* to morally engage in such service. They catalogued practical options available to those who wanted to resist unlawful Trump initiatives from within the government.

I also examine Professor David Luban's evolving views on this subject: both a brief essay he published a week after the presidential election and his more extensive treatment of it in this symposium. In the latter piece, Luban identifies several concepts that are useful not just in this factual context, but in discussions of organizational ethics more generally. Building on the work of historians of the Nazi era, Luban describes the risk that a government official may become a "desk perpetrator," an official who "set[s] wrongdoing in motion by drafting documents and signing papers in the quiet of an office."<sup>6</sup> He then coins a new term, "desk mitigator," to describe a government official who uses his position to "temper awful policies."<sup>7</sup> Luban points out that an individual can serve as a "desk mitigator" only if their workplace provides room to maneuver.<sup>8</sup> This concept, which I call "operational maneuvering room," is one way to understand the catalog of options described in several of the post-2016-election essays.

With these concepts in mind, I discuss ways that federal officials resisted Trump administration abuses and how more than a hundred engaged in principled

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4. See Kathleen M. Doherty, David E. Lewis & Scott Limbocker, *Executive Control and Turnover in the Senior Executive Service*, 29 J. PUB. ADMIN. RES. & THEORY ADMIN. & SOC. 159, 163 (2019).

5. See, e.g., Ross Douthat, *You Must Serve Trump*, N.Y. TIMES (Nov. 11, 2016), <https://www.nytimes.com/2016/11/12/opinion/you-must-serve-trump.html> [<https://perma.cc/QHY6-RF98>].

6. David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 GEO. J. LEGAL ETHICS [Add page number after printer proofs] (2021).

7. *Id.*

8. *Id.* at 12. Luban labels this as "tolerance" and states that it refers "to an official's maneuvering room for protest, resistance, and pushback." *Id.*

resignation. The precise events triggering these resignations varied considerably, but the letters and op-eds these officials wrote to explain their resignations sound in the language of morality. They wanted to avoid participating in abuses, distance themselves from repugnant policies and rhetoric, or acknowledge the futility of continuing in government.

## I. ADVICE PUBLISHED IN THE WAKE OF THE 2016 ELECTION

After the 2016 election, several commentators discouraged individuals from joining the incoming Trump administration, either as political appointments or as civil servants. Ben Wittes noted that “accepting a political appointment is an act of affiliation” in a way that is not true for a career position.<sup>9</sup> Similarly, David Drezner explained that “agreeing to serve in a Trump administration will . . . be a legitimizing act for the administration[.]”<sup>10</sup> A former State Department official warned that service in the Trump administration “would carry a high risk of compromising one’s integrity and reputation,”<sup>11</sup> and identified the specific concern that an appointee “would probably have to make excuses for things that are inexcusable and defend people who are indefensible.”<sup>12</sup> A lawyer who served in the Civil Rights Division under President George W. Bush warned that attempting to pursue justice under Trump could prove futile, and suggested that “the places to

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9. Benjamin Wittes, *Reflections on Service in a Trump Administration*, LAWFARE (Nov. 22, 2016, 2:55 PM), <https://www.lawfareblog.com/reflections-service-trump-administration> [<https://perma.cc/4SB3-TQMG>] [hereinafter Wittes, *Reflections*]; see also Benjamin Wittes, *More on Donald Trump and the Justice Department*, LAWFARE (June 8, 2016, 4:25 PM), <https://www.lawfareblog.com/more-donald-trump-and-justice-department> [<https://perma.cc/98PP-5ZPD>] [hereinafter Wittes, *More on Donald Trump*] (distinguishing political appointments from civil service). Wittes asserted that “most decent people” would be precluded “from serving the Trump administration at the political level,” but he argued that such service could be justified for “a person of sufficient independent stature and public regard” who could “actually push back in a fashion that’s meaningful.” Wittes, *Reflections*, *supra* note 9. If the position is “in an area in which Trump has made commitments that are unconstitutional, illegal, or morally repugnant” then such a person should “secure a commitment that your department will not be asked to do anything horrible under your leadership” and should be prepared to resign in public. *Id.*

10. Daniel W. Drezner, *The dilemma of serving in a Trump administration*, WASH. POST (Nov. 14, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/11/14/the-dilemma-of-serving-in-a-trump-administration/> [<https://perma.cc/DZ52-9YAU>].

11. Eliot A. Cohen, *I told conservatives to work for Trump. One talk with his team changed my mind*, WASH. POST (Nov. 15, 2016), [https://www.washingtonpost.com/opinions/i-told-conservatives-to-work-for-trump-one-talk-with-his-team-changed-my-mind/2016/11/15/f02e1fac-ab7c-11e6-977a-1030f822fc35\\_story.html](https://www.washingtonpost.com/opinions/i-told-conservatives-to-work-for-trump-one-talk-with-his-team-changed-my-mind/2016/11/15/f02e1fac-ab7c-11e6-977a-1030f822fc35_story.html) [<https://perma.cc/N9DB-V49Z>].

12. *Id.* Cohen initially encouraged individuals to accept political appointments, so long as “they keep a signed but undated letter of resignation in their desk office” and not recant their beliefs. Eliot A. Cohen, *To An Anxious Friend* . . . , THE AMERICAN INTEREST (Nov. 10, 2016), <https://www.the-american-interest.com/2016/11/10/to-an-anxious-friend/> [<https://perma.cc/YK8J-GVJF>]. But five days later published an op-ed retracting his earlier advice. See Cohen, *supra* note 11 (“[A]fter the election, [I] made the case that young conservatives should volunteer to serve in the new administration, warily, their undated letters of resignation ready. That advice, I have concluded, was wrong.”).

fight during the next two-plus years are the ACLU and other advocacy organizations, law school clinics, public defenders offices, legal aid offices.”<sup>13</sup>

A few commentators took the opposite position: that “responsible”<sup>14</sup> or “rational, reasonable”<sup>15</sup> people actually had a duty to serve in the Trump administration. If Trump “is willing to make some responsible appointments, the good of the world requires that responsible people accept them.”<sup>16</sup> Susan Hennessey suggested that it would be a mistake to “stay home to satisfy ideals of personal integrity” because that “will not make our world safer.”<sup>17</sup>

A more moderate position contended that serving in the Trump administration was neither morally required nor morally forbidden, but instead was a moral option as long as certain criteria were met.<sup>18</sup> Wittes argued that civil service positions unrelated to Trump’s abuses would not be morally problematic at all,<sup>19</sup> and that it would be a mistake to resign preemptively in anticipation of potential abuses because a principled resignation of specific abuses would be more effective in marshaling public opinion against that abuse.<sup>20</sup>

In the weeks after the election, some argued that “Republicans of conscience,”<sup>21</sup> “good people,”<sup>22</sup> “principled individuals”<sup>23</sup> and “honest lawyers”<sup>24</sup>

13. *Alumni Reflect on Political Transitions*, HARV. L. SCH. (Nov. 22, 2016), <https://hls.harvard.edu/alumni-reflect-on-political-transitions/#tab1-9> [<https://perma.cc/L6L6-TQ29>] (“I arrived at DOJ as a Honors Program Attorney mid-way through the Bush administration purge of the Civil Rights Division . . . we couldn’t pursue our cases.”).

14. Douthat, *supra* note 5 (“[T]here is a moral responsibility” to serve “precisely because” there is fear about “how Trump might govern”); *see also* Richard H. Kohn, *Why GOP national security experts must agree to serve in a Trump administration*, WASH. POST (Nov. 9, 2016), [https://www.washingtonpost.com/opinions/why-gop-national-security-experts-must-agree-to-serve-in-a-trump-administration/2016/11/09/47b79b68-a6af-11e6-8fc0-7be8f848c492\\_story.html](https://www.washingtonpost.com/opinions/why-gop-national-security-experts-must-agree-to-serve-in-a-trump-administration/2016/11/09/47b79b68-a6af-11e6-8fc0-7be8f848c492_story.html) [<https://perma.cc/6AR2-H23X>] (“Dear Republican national security expert . . . you must serve in a Trump administration if given the opportunity.”).

15. Susan Hennessey, *The Duty To Serve in Trump’s America?*, LAWFARE (Nov. 9, 2016), <https://www.lawfareblog.com/duty-serve-trumps-america> [<https://perma.cc/T998-2M68>] (“I think it is the duty of rational, reasonable experts to serve their country in a Trump administration, even at the political level, if asked.”).

16. Douthat, *supra* note 5; *see also* Hennessey, *supra* note 15 (“If he will accept it, Trump must have wise and informed counsel.”).

17. Hennessey, *The Duty To Serve*, *supra* note 15. *Cf.* Hannah Arendt, *Personal Responsibility Under Dictatorship*, in HANNAH ARENDT, *RESPONSIBILITY AND JUDGMENT* 36 (Jerome Kohn ed., 2003) (“[T]hose who denounce the moral fallacy of [the “lesser evil”] argument are usually accused . . . of being unwilling to dirty their hands.”).

18. *See* Wittes, *Reflections*, *supra* note 9 (“Whatever the ethical imperative to fall on a grenade to protect the people around you may be, there is surely no ethical or moral imperative to seek out grenades on which to fall.”).

19. Wittes, *More on Donald Trump*, *supra* note 9 (“There will be a role for honorable service in areas unconnected to abuse even as abuses are taking place”); *see also* Wittes, *Reflections*, *supra* note 9 (“[T]he individual government worker should suffer no taint from work or action or policy to which he or she was not immediately party.”).

20. Wittes, *More on Donald Trump*, *supra* note 9 (“Resignations in response to illegal orders are far more powerful than preemptive resignations.”).

21. Dana Milbank, *To my daughter: You are going to be okay*, WASH. POST (Nov. 9, 2016), [https://www.washingtonpost.com/opinions/to-my-daughter-you-are-going-to-be-okay/2016/11/09/2508487e-a6af-11e6-ba59-a7d93165c6d4\\_story.html](https://www.washingtonpost.com/opinions/to-my-daughter-you-are-going-to-be-okay/2016/11/09/2508487e-a6af-11e6-ba59-a7d93165c6d4_story.html) [<https://perma.cc/R559-FQL8>] (“I urge Republicans of conscience to join his administration, to temper his worst instincts.”).

should serve in government positions connected to potential abuses so they could then push back against such abuse.<sup>25</sup> By fighting the good fight inside the government, individuals could become potential allies for those fighting that fight outside the government.<sup>26</sup> A related argument was that any “exodus of smart, experienced and civic-spirited people from federal service” would harm the nation, particularly because the people replacing them or remaining would be “less-experienced and less-principled.”<sup>27</sup>

Some recommendations were aimed at helping officials avoid participation in objectionable government actions. Individuals should identify ahead of time the “red lines” that they would refuse to cross;<sup>28</sup> “beg[] off matters [they] cannot in

22. Oona Hathaway, *Work for the Trump Administration? Yes, But Be Prepared*, JUST SEC. (Nov. 14, 2016), <https://www.justsecurity.org/34409/work-trump-administration-yes-prepared/> [<https://perma.cc/6KNS-VRYJ>] (“We need good people on the inside willing to do the hard work of governing responsibly in the face of immense challenges . . . such people can serve as a critical bulwark against ill-considered and dangerous policies.”).

23. See, e.g., Hennessey, *supra* note 15 (“Americans will be served by principled individuals in government defending our Constitution and role in the world.”).

24. David Kaye, *Anticipating Trump: Should Government Lawyers Stay or Go?*, JUST SEC. (Nov. 14, 2016), <https://www.justsecurity.org/34373/anticipating-trump-government-lawyers-stay-go/> [<https://perma.cc/S8BD-X4UH>] (“We will need honest lawyers within the system, those committed to the Constitution, our statutes, our treaties, our traditions.”).

25. See, e.g., Laura Rosenberger, *Career Officials: You Are the Last Line of Defense Against Trump*, FOREIGN POL’Y (Jan. 30, 2017), <https://foreignpolicy.com/2017/01/30/career-officials-you-are-the-last-line-of-defense-against-trump/> [<https://perma.cc/7HPN-3LRT>] (“[Y]ou are the last line of defense against illegal, unethical, or reckless actions . . . [I]mplementation of such policies depends on a compliant bureaucracy of obedient individuals who look the other way do as they are told.”); Wittes, *More on Donald Trump*, *supra* note 9 (“[T]he bureaucracy is the front line of defense against executive abuses.”); Douthat, *supra* note 5 (“[T]he most important check on what we’ve seen of Trump’s worst impulses . . . will come from the people charged with executing the basic responsibilities of government within his administration.”); Daniel Byman, *Don’t Let President Trump Keep You From Working for the Government*, SLATE (Nov. 11, 2016, 7:04 AM), <https://slate.com/news-and-politics/2016/11/young-people-are-rethinking-careers-in-government-service-they-shouldnt-be.html> [<https://perma.cc/X2NS-9HSL>] (A “strong civil service is . . . a means to correct the worst impulses of political appointees”); Editorial Board, *Consider the Civil Servants*, WASH. POST (Nov. 13, 2016) [hereinafter *Consider the Civil Servants*] (If “civil servants . . . are ordered to do something they feel is beyond the pale. If they stay with the government, they will be in a position to explain their concerns about what they have been asked to do”); Kaye, *supra* note 24 (“There are reasons to stay, if you can do it. The administration will need to know when its proposals are outside the law . . .”).

26. Maria J. Stephan, *Staying True to Yourself in the Age of Trump: A How-To Guide for Federal Employees*, WASH. POST (Feb. 10, 2017), <https://www.washingtonpost.com/news/democracy-post/wp/2017/02/10/staying-true-to-yourself-in-the-age-of-trump-a-how-to-guide-for-federal-employees/> [<https://perma.cc/9AMM-ULU5>] (“Civil liberties defenders and grass-roots organizers on the outside need ethical civil servants inside government to promote the public good and defend against policies that could harm the country.”).

27. *Consider the Civil Servants*, *supra* note 25; see also Wittes, *More on Donald Trump*, *supra* note 9 (the people “who will replace career lawyers whose scruples will not let them work for Trump” are “far less likely to ask themselves whether an order or an investigative step is lawful or ethical”); Hathaway, *supra* note 22 (“If the only ones left are those willing to carry out reprehensible policies uncritically, a Trump administration will have greater leeway.”); Douthat, *supra* note 5 (“[T]o the extent that Trump’s approach to governance threatens world peace, that threat can be mitigated by appointees with experience and knowledge, and magnified if their posts are filled by hacks and sycophants instead.”).

28. Wittes, *Reflections*, *supra* note 9 (“[I]f you go to work for the government . . . with your red lines clear to yourself and are prepared to resign publicly the moment you are asked to cross those red lines, you will be

good conscience work on;<sup>29</sup> refrain from publicly defending administration abuses;<sup>30</sup> and be prepared to resign.<sup>31</sup> Other recommendations were aimed at making resistance as effective as possible, including specific tactics for opposing abuses from the inside, such as developing relationships with civil society groups,<sup>32</sup> journalists and congressional staff;<sup>33</sup> seeking out potential allies within the executive branch; slow-rolling offensive policies;<sup>34</sup> contacting an agency's General Counsel's office; and reporting any wrongdoing to an Inspector General or the Office of Special Counsel.<sup>35</sup> One commentator specifically suggested that when “[m]emorializ[ing] your dissent . . . be savvy about doing so in the least classified format available to you.”<sup>36</sup>

## II. DAVID LUBAN'S EVOLVING VIEWS

Among those weighing in with advice after the 2016 election was Professor David Luban. In an essay published in SLATE, Luban took a prescriptive approach. He warned of a “nightmare scenario” in which Trump pursued “an

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doing the nation a great service, whether you end up having to resign or not.”); *see also* Rosenberger, *supra* note 25 (“Think now about the lines that you will not allowed to be crossed — write them down and remind yourself of them every day. And if you see them crossed, resign — and let it be known why.”); Kohn, *supra* note 14 (“Think through beforehand how you would handle being asked to do something illegal, immoral, unethical or just plain stupid.”).

29. Benjamin Wittes, *How to Serve in a Trump Administration*, LAWFARE (Dec. 16, 2016), <https://www.lawfareblog.com/how-serve-trump-administration> [<https://perma.cc/6QCK-K2D6>].

30. *See, e.g.*, Kohn, *supra* note 14 (“[I]t may be wise to find out the extent to which you would be expected to serve as a spokesperson or public defender of the administration’s positions, thinking and decisions.”).

31. *See, e.g.*, Wittes, *More on Donald Trump*, *supra* note 9 (“[S]tay put unless and until you are asked to do something legally or ethically improper—at which point you should resign publicly and as loudly as the law allows.”); Cohen, *supra* note 11 (advising Trump appointees to “keep a signed but undated letter of resignation in their desk office”); Douthat, *supra* note 5 (“If a Trump presidency lurches into naked authoritarianism — abusing executive authority in unprecedented ways, issuing immoral or illegal orders to the military — then there will be an obligation not to serve, but to resign.”); Kohn, *supra* note 14 (“Be prepared to resign or otherwise walk off the job . . .”); Rosenberger, *supra* note 25 (“[I]f you see [red lines] crossed, resign — and let it be known why.”).

32. *See, e.g.*, Maria Stephan, *An inside-outside strategy for defending the US Republic*, OPENDEMOCRACY (Jan. 27, 2017), <https://www.opendemocracy.net/en/inside-outside-strategy-for-defending-us-republic/> [<https://perma.cc/N58R-NHTQ>].

33. *See, e.g.*, Wittes, *supra* note 29.

34. *See, e.g.*, Jennifer Nou, *Bureaucratic Resistance from Below*, YALE J. ON REG. NOTICE & COMMENT (Nov. 16, 2016), <https://www.yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/> [<https://perma.cc/PR79-85CD>]; Rosenberger, *supra* note 25 (“[S]low-roll, obstruct, and constrain.”).

35. *See, e.g.*, Oona Hathaway & Sarah Weiner, *Dissenting from Within the Trump Administration*, JUST SECURITY (Jan. 17, 2017), <https://www.justsecurity.org/36420/dissenting-trump-administration/> [<https://perma.cc/RYW6-ATN6>]. This blog post provides perhaps the most comprehensive list of options, ranging from “elevat[ing] the issue” all the way up to resignation. Another post-election blog post described multiple “tactics that civil servants have historically used to defy their superiors,” but did specifically recommend that they use these tactics to oppose Trump abuses. Nou, *supra* note 34.

36. Wittes, *supra* note 29.

authoritarian Big Man presidency that actively targets political opponents,” abandoning any “commit[ment] to the rule of law.”<sup>37</sup> If that occurred, then individuals should not join the administration, and government employees—even those “who are not directly complicit in wrongdoing”—should exit if “they have a realistic, nonruinous” option to do so.<sup>38</sup>

Luban’s essay for this symposium, written near the end of the Trump administration, is not prescriptive. Instead, it conducts a deeply contextualized examination of the roles played by two lawyers who worked for the Nazi government. Both of these lawyers recognized that the government employing them was doing awful things, yet they believed they were nevertheless doing good. Luban’s critical examination of their professional records highlights both the possibility of doing good in a morally fraught situation and the risk of deluding oneself in such a situation.

#### A. 2016

In his 2016 essay, Luban touched on two themes that he would develop more fully in his article for this symposium: Hannah Arendt’s evisceration of the “lesser evil” justification put forward by some who worked in the Nazi government, and the career trajectory of Bernhard Lösener, a lawyer in the Nazi government’s Interior Ministry who helped draft the racist Nuremberg laws.<sup>39</sup> Based on Arendt’s analysis and Lösener’s record, Luban warned in stark terms that if the “nightmare scenario” comes to pass, you would be “deluding yourself” to think you can “tame the beast, because the beast will tame you.”<sup>40</sup>

On the other hand, if the “nightmare scenario” did not come to pass, then, according to Luban, “the argument for service becomes compelling.” Even so, “one-off nightmare issues might still crop up” in which government employees are directed to get involved in human rights violations. If that occurs, employees must refuse to participate, but would not necessarily have to resign.

Luban’s essay—and its exploration of the “nightmare scenario”—is a reminder of just how apocalyptic things looked in the wake of the 2016 election, and the clarity with which some anticipated President Trump’s repeated attacks on democracy and the rule of law.

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37. David Luban, *The Case Against Serving in the Trump Administration*, SLATE (Nov. 15, 2016), <https://slate.com/news-and-politics/2016/11/career-civil-servants-should-not-serve-in-the-trump-administration.html> [<https://perma.cc/GJ32-JC47>]. Luban also published a nearly identical version of this essay on JUST SECURITY. David Luban, *The Case Against Serving*, JUST SEC’Y (Nov. 14, 2016), <https://www.justsecurity.org/34404/case-serving-trump/> [<https://perma.cc/4ZYY-NNP7>].

38. *Id.*

39. *Id.* (quoting Arendt, *supra* note 17, at 35).

40. *Id.*



## B. 2020

In his article for this symposium, Professor Luban examines individual moral responsibility for an organization's wrongdoing, both as a theoretical and a practical matter. On a philosophical level, Luban discusses Hannah Arendt's criticism of those who worked in the Nazi government<sup>41</sup> and more recent scholarship on complicity.<sup>42</sup> On a practical level, he carefully describes the actions of two lawyers who served in the Nazi government: Bernhard Lösener and Helmuth James von Moltke.

Lösener was the Interior Ministry's legal specialist on Jews starting in 1933.<sup>43</sup> He used his skills as a lawyer to play a key role in the anti-Semitic Nazi enterprise: drafting the anti-Semitic Nuremberg Laws and the decrees implementing those laws. Lösener claimed that he mitigated the harm caused by the Nuremberg Laws by narrowing the definition of Jew to exclude those of mixed heritage. He protected some mixed-marriage families from being confined in ghettos and persuaded Himmler not to deport Jews in mixed marriages to death camps.<sup>44</sup> He was content to serve in this role until late 1941, when he learned that deported German Jews had been murdered en masse in Riga. He then requested a transfer to a different government position, a transfer that did not come through in 1943. Lösener was arrested in November 1944 for hiding a couple implicated in the failed bomb plot against Hitler.

Helmuth James von Moltke became a civilian adviser on international law for the military high command's intelligence service in 1939. On repeated occasions, he used his legal advocacy skills to persuade the military to comply with international law and avoid engaging in war crimes. Moltke was often a lone voice arguing that international law prohibited the horrendous actions that the military planned to take. He was "outvoted 25 to 1 on economic warfare, . . . 24 to 1 on the persecution of Jews; and he was the only objector to" Hitler's order that captured commandos be shot.<sup>45</sup> But on each of these issues, he persuaded his superiors.<sup>46</sup> He continued in this role until he was arrested in January 1944 for warning members of the anti-Nazi resistance that they were under surveillance, and he was executed.<sup>47</sup>

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41. See generally Arendt, *supra* note 17.

42. See, e.g., CHIARA LEPORA & ROBERT E. GOODIN, ON COMPLICITY AND COMPROMISE (2013).

43. Karl A. Schleunes, *The Enigma of Bernhard Loesener—Nazi Bureaucrat*, in LEGISLATING THE HOLOCAUST: THE BERNHARD LOESENER MEMOIRS AND SUPPORTING DOCUMENTS 3 (Karl A. Schleunes ed., 2001).

44. Luban, *supra* note 6, at [Add page number when we have printer proofs].

45. *Id.* at 39.

46. *Id.*

47. Freya Gräfin von Moltke, *Anti-Nazi Activist*, THE INDEPENDENT (Jan. 8, 2010), <https://www.independent.co.uk/news/obituaries/freya-gr-228-fin-von-moltke-anti-nazi-activist-1861136.html> [https://perma.cc/3J84-A7TA].

In his analysis of these divergent professional arcs, Luban identifies several concepts that are useful not just in this factual context, but in any discussion of organizational ethics. Two of these concepts can be understood in opposition to each other: “desk perpetrators” and “desk mitigators.” A “desk perpetrator” is an organizational employee who “set[s] wrongdoing in motion by drafting documents and signing papers in the quiet of an office.”<sup>48</sup> The term, “desk perpetrator” is derived from a German word, *Schreibtschätter*, that has been used extensively in describing the moral culpability of German government officials during the Third Reich.<sup>49</sup> Perpetrators of Third Reich crimes include those whose desk-based actions contributed to Nazi atrocities, whose hands were stained with ink rather than blood. “Desk mitigator,” a term coined by Luban, denotes an official who engages in those same tasks (such as drafting documents), but for the opposite purpose: “to temper awful policies.”<sup>50</sup>

Applying these concepts to the legal work performed by these two lawyers, Lösener arguably was both a “desk perpetrator” and “desk mitigator.” He drafted the anti-Semitic Nuremberg laws, but also limited the reach of those laws. Moltke, by contrast, unambiguously exemplifies a “desk mitigator.” He repeatedly mitigated or prevented harm by arguing that the military was bound by international law principles prohibiting war crimes. As Moltke explained in a letter he wrote in 1944 from a Gestapo jail: “Since National Socialism came to power, I have committed myself to softening its consequences for its victims.”<sup>51</sup>

A third concept, oppositional maneuvering room, describes the degree to which a potential “desk mitigator” can use her authority to resist, push back against, or protest harmful government actions.<sup>52</sup> Luban derives this concept from a German word, *Spielraum*, that means “space for play,” or “tolerance” in the engineering sense.<sup>53</sup> If the organizational controls are too tight, there is no oppositional maneuvering room. Under those circumstances, any resistance would be futile, and there is no way to mitigate harm.<sup>54</sup>

Luban asserts that there cannot be “oppositional maneuvering room” without “allies or at least silent sympathizers.”<sup>55</sup> Moltke’s narrative illustrates the importance of allies. He repeatedly argued to others within his organization, the military high command, that they must comply with international legal norms.

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48. Luban, *supra* note 6, at [Add page number when we have printer proofs].

49. *Id.* at n.1.

50. *Id.* at [Add page number when we have printer proofs].

51. Helmuth James Graf von Moltke, farewell letter to his sons, October 11, 1944, in HELMUTH JAMES GRAF VON MOLTKE: VÖLKERRECHT IM DIENSTE DER MENSCHEN 6 (G. van Roon ed., 1986), quoted in Scott Horton, *Moltke—The Duty of Conscience*, HARPER’S (Jan. 11, 2009), <https://harpers.org/2009/01/moltke-the-duty-of-conscience/> [<https://perma.cc/EGT5-S6DU>].

52. Luban, *supra* note 6, at [Add page number when we have printer proofs].

53. *Id.* at 12, n.37 (It could also be called “leeway.”).

54. *Id.* at 51.

55. *Id.*

Luban's concept of "oppositional maneuvering room" could also be helpful in understanding more generally the plight of internal whistleblowers—individuals who blow the whistle within an organization on illegal or improper conduct.<sup>56</sup> If a potential whistleblower is unable to find an internal ally or sympathizer, internal whistleblowing will likely be ineffective in addressing wrongdoing.<sup>57</sup>

### III. RESISTANCE AND RESIGNATION UNDER TRUMP

How did federal officials respond when President Trump made statements or took action undermining the government's commitment to truth, the rule of law, human rights and our allies? Some officials engaged in internal resistance. Many resigned in protest.

#### A. INTERNAL RESISTANCE

While a comprehensive review of internal resistance during the Trump era is beyond the scope of this essay, in this section, I describe two examples of such resistance: first, an intelligence official whose whistleblower complaint triggered Trump's first impeachment; and second, a Justice Department lawyer who tried to resist from within, but later came to view her own actions as enabling, rather than preventing, harm.

One of the most significant acts of internal resistance during the Trump administration was the whistleblower complaint that led to Trump's first impeachment. An anonymous intelligence agency official reported that Trump had engaged in a corrupt phone call with a foreign leader and the White House hid the call transcript on a classified server.<sup>58</sup> This whistleblower's actions are a textbook example of how to effectively engage in resistance, and he may have taken to heart the post-2016 advice about tactics for serving ethically in the Trump administration.<sup>59</sup> After learning of Trump's corrupt phone call, the whistleblower initially reported his allegations to a CIA lawyer.<sup>60</sup> In order to investigate the matter, the CIA General Counsel reached out to White House lawyers, who then interviewed

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56. See Kathleen Clark, *White Paper on the Law of Whistleblowing* (2013), <https://papers.ssrn.com/sol3/papers.cfm?abstractid=2176293> [<https://perma.cc/R6B7-EX49>].

57. Moltke was not an internal whistleblower in that he was not calling attention to past illegal conduct. Instead, he repeatedly (and successfully) argued that the German military must conform its future conduct to international law.

58. See REPORT OF EVIDENCE IN THE DEMOCRATS' IMPEACHMENT INQUIRY IN THE HOUSE OF REPRESENTATIVES iii (Dec. 2, 2019), available at <https://republicans-oversight.house.gov/wp-content/uploads/2019/12/2019-12-02-Report-of-Evidence-in-the-Democrats-Impeachment-Inquiry-in-the-House-of-Representatives.pdf> [<https://perma.cc/EUT7-4B98>] (referring to "the anonymous whistleblower complaint that sparked this inquiry").

59. See, e.g., Wittes, *supra* note 29; Hathaway & Weiner, *supra* note 35.

60. See Ken Dilanian & Julia Ainsley, *CIA's Top Lawyer Made 'Criminal Referral' On Complaint About Trump Ukraine Call*, NBC NEWS (Oct. 4, 2019, 4:31 PM), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/cia-s-top-lawyer-made-criminal-referral-whistleblower-s-complaint-n1062481> [<https://perma.cc/A8K2-7NPW>] (the whistleblower "first complained at his own agency, sending word through a colleague to a CIA lawyer. The complaint eventually reached the spy agency's top lawyer"); Hathaway & Weiner, *supra* note 35 ("[A] federal employee . . . can seek advice from . . . the agency's General Counsel (GC) Office.").

White House staff. Among the lawyers conducting those interviews was the lawyer who had hidden the call transcript.<sup>61</sup> When the whistleblower learned that someone who participated in the alleged wrongdoing was conducting the investigation, he feared a cover-up, and reached out to a Congressional staffer.<sup>62</sup> The staffer advised him to consult a lawyer and contact an inspector general.<sup>63</sup> He sought advice from an outside lawyer;<sup>64</sup> wrote a seven-page summary of the facts, segregating the most sensitive information in a two-page classified appendix;<sup>65</sup> and delivered the memo to the Intelligence Community's Inspector General (ICIG), using the "urgent concern" statutory process so that the information would ultimately get to Congress.<sup>66</sup> This whistleblower was able to identify and exploit "operational maneuvering room" that Congress had created: the Congressional intelligence committees that conduct oversight; inspectors general that investigate alleged wrongdoing and report on their investigations; and the "urgent concern" mechanism allowing intelligence community whistleblowers to inform Congress of alleged wrongdoing indirectly by going through an inspector

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61. Michael Barbaro & Julian Barnes, *The Daily: How the Whistle-Blower Complaint Almost Didn't Happen* (Transcript), N.Y. TIMES (Sept. 30, 2019), <https://www.nytimes.com/2019/09/30/podcasts/the-daily/whistleblower-complaint-cia.html?showTranscript=1> [<https://perma.cc/ZZ39-CZTJ>] [hereinafter *The Daily: How the Whistle-Blower Complaint Almost Didn't Happen*].

62. Julian E. Barnes, Michael S. Schmidt, Adam Goldman & Katie Benner, *White House Knew of Whistle-Blower's Allegations Soon After Trump's Call With Ukraine Leader*, N.Y. TIMES (Sept. 26, 2019, updated Nov. 26, 2019), [https://www.nytimes.com/2019/09/26/us/politics/who-is-whistleblower.html?campaign\\_id=60&instance\\_id=0&segment\\_id=17384&user\\_id=3154de4756231a971cc896fe10ac5461&regi\\_id=73626606ing-news](https://www.nytimes.com/2019/09/26/us/politics/who-is-whistleblower.html?campaign_id=60&instance_id=0&segment_id=17384&user_id=3154de4756231a971cc896fe10ac5461&regi_id=73626606ing-news) [<https://perma.cc/42CQ-6V26>] (the whistleblower "grew concerned after learning that [CIA General Counsel] had contacted the White House," and "decided to file a whistle-blower complaint to" the ICIG "about two weeks after first submitting his anonymous accusations"); *The Daily: How the Whistle-Blower Complaint Almost Didn't Happen*, *supra* note 61 ("In his mind, the fox — and the people around the fox — are suddenly investigating who broke into the henhouse."); Julian E. Barnes, Michael S. Schmidt & Matthew Rosenberg, *Schiff Got Early Account of Accusations as Whistle-Blower's Concerns Grew*, N.Y. TIMES (Oct. 2, 2019, updated Nov. 18, 2019), <https://www.nytimes.com/2019/10/02/us/politics/adam-schiff-whistleblower.html> [<https://perma.cc/TY77-2663>] [hereinafter Barnes, *Schiff Got Early Account of Accusations*] ("Concerned about how that initial avenue for airing his allegations through the C.I.A. was unfolding, the officer then approached the House aide . . . The C.I.A. officer became nervous . . . [when] he learned that John Eisenberg, a deputy White House counsel and the legal adviser to the national security adviser, was among those scrutinizing his initial allegation."); *see* Wittes, *supra* note 29 ("[D]evelop relationships with journalists and congressional staff . . .").

63. Barnes, *Schiff Got Early Account of Accusations*, *supra* note 62 ("[T]he House aide . . . suggested the officer find a lawyer to advise him and meet with an inspector general, with whom he could file a whistle-blower complaint.").

64. Benjamin Siegel & James Gordon Meek, *Whistleblower's Attorney Says They Drafted Complaint 'Entirely On Their Own.'* ABC NEWS (Oct. 2, 2019), <https://abcnews.go.com/Politics/whistleblower-contacted-house-intelligence-committee-filing-complaint/story?id=66013379> [<https://perma.cc/DR4K-B5Z8>]; Wittes, *supra* note 29 ("Know your rights as a federal employee . . . Talk to counsel before you do anything rash.").

65. Letter to Richard Burr, Chairman, Select Committee on Intelligence, to Adam Schiff, Chairman, Permanent Select Committee on Intelligence, at 2, n.1 (Aug. 12, 2019), <https://assets.documentcloud.org/documents/6430359/Whistleblower-Complaint.pdf> [<https://perma.cc/LY8N-8FL8>]; Wittes, *supra* note 29 ("[B]e savvy about [making a record] in the least classified format available").

66. *See* 50 U.S.C. § 3033(k)(5).

general. While this whistleblower experienced retaliation from President Trump and Congressional Republicans, he was effective in triggering an investigation that resulted in the third impeachment of an American President.

Another (lower profile) example of internal resistance involved Erica Newland, a junior lawyer in the Justice Department's Office of Legal Counsel. She recognized that Trump's "agenda was to disassemble our democracy," but nonetheless believed she "could better serve our country by pushing back from within."<sup>67</sup> Her "job was to tailor the administration's executive actions to make them lawful," working on "matters targeting noncitizens, dismantling the Civil Service and camouflaging the president's corruption."<sup>68</sup> In describing her work, Newland did not use the term "desk mitigator," but that is apparently how she saw her role. By "narrowing" Trump's executive actions, she "could . . . make them less destructive" and "diminish[] the[ir] immediate harmful impacts."<sup>69</sup>

But over time, Newland began to "fear that [she] was doing more harm than good."<sup>70</sup> By "attempt[ing] to remove the most basic inaccuracies from the face of a presidential order," it seemed that she was "using the law to legitimize lies."<sup>71</sup> She left the government a few months after the Supreme Court upheld the third iteration of Trump's Muslim ban, and eventually came to believe that she and other lawyers should have withheld their services entirely.<sup>72</sup> By narrowing Trump's Muslim ban, for example, Justice Department lawyers "made them more palatable to the courts."<sup>73</sup> In Luban's terminology, while Newland initially thought she had been a "desk mitigator," she later realized that she and her colleagues were "desk perpetrators."

The intelligence whistleblower's narrative demonstrates that a federal employee was able to proactively find and exploit "operational maneuvering room" in order to seek accountability for Trump abuses. Erica Newland's experience, on the other hand, illustrates the risk that even a person of good will who is committed to "pushing back" against abuses may actually assist in those abuses. In contrast to the initiative shown by the intelligence whistleblower, Newland seems to have been in a defensive crouch, nibbling at the edges of Trump's executive orders. While not perfectly analogous, her somewhat legalistic approach seems to

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67. Erica Newland, *I'm Haunted by What I Did as a Lawyer in the Trump Justice Department*, N.Y. TIMES (Dec. 20, 2020), <https://www.nytimes.com/2020/12/20/opinion/trump-justice-department-lawyer.html> [<https://perma.cc/3V6Y-99K2>].

68. *Id.*

69. *Id.*

70. *Id.*

71. Erica Newland, Opinion, *I Worked in the Justice Department. I Hope Its Lawyers Won't Give Trump an Alibi*, WASH. POST (Jan. 10, 2019), [https://www.washingtonpost.com/opinions/i-worked-in-the-justice-department-i-hope-its-lawyers-wont-give-trump-an-alibi/2019/01/10/9b53c662-1501-11e9-b6ad-9cfd62dbb0a8\\_story.html](https://www.washingtonpost.com/opinions/i-worked-in-the-justice-department-i-hope-its-lawyers-wont-give-trump-an-alibi/2019/01/10/9b53c662-1501-11e9-b6ad-9cfd62dbb0a8_story.html) [<https://perma.cc/Y2AV-J6JC>].

72. Newland, *supra* note 67.

73. *Id.* ("The successive discriminatory bans benefited from more time and attention from the department's lawyers, who narrowed them but also made them more technocratic and therefore harder for the courts to block.").

echo Lösener's approach to his work when he narrowed the definition of "Jew" under the Nuremberg laws.<sup>74</sup>

The following section discusses the Trump-era officials who resigned in protest, including the degree to which they acted individually or in concert with each other, what triggered their resignations, and what their letters of resignation reveal about their motivations.

## B. PRINCIPLED RESIGNATIONS

From the day before President Trump's inauguration until his last month in office, more than a hundred federal officials engaged in principled resignation.<sup>75</sup> Fifty-five of these officials had been full-time federal employees (twenty-one civil servants, seven Obama appointees and twenty-seven Trump appointees),<sup>76</sup>

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74. See George Packer, *How to Destroy a Government*, THE ATLANTIC (Apr. 2020), <https://www.theatlantic.com/magazine/archive/2020/04/how-to-destroy-a-government/606793/> (Newland "thinks she would have been the kind of official who pushed for carve-outs in the Nuremberg Race Laws, preserving citizenship rights for Germans with only partial Jewish ancestry. She would have felt that this was better than nothing—that it justified having worked in the regime at the beginning.").

75. For the purposes of this article, I define "principled resignation" broadly to include any resignation accompanied by an indication that the resignation was motivated by disagreement with a Trump administration action or Trump statement. To identify principled resignations, I reviewed several compilations of departing Trump administration officials. Truth to Power, *The Most Comprehensive List of Trump Administration Departures on the Internet*. PERIOD., MEDIUM (Jan. 12, 2018), [https://medium.com/@truth\\_to\\_power/the-most-comprehensive-list-of-trump-administration-departures-resignations-and-firings-on-the-2718c31d5511](https://medium.com/@truth_to_power/the-most-comprehensive-list-of-trump-administration-departures-resignations-and-firings-on-the-2718c31d5511) [<https://perma.cc/HD7F-XJ5K>]; Debbie Lord & Cox Media Group National Content Desk, *Who Has Left the Trump Administration? Here Is a List of 55 Major Departures*, BOSTON25NEWS (Sept. 10, 2019), <https://www.boston25news.com/news/explainers/who-has-left-the-trump-administration-here-is-a-list-of-55-major-departures/984836125/> [<https://perma.cc/T9J9-FNYL>]; Denise Lu & Karen Yourish, *The Turnover at the Top of the Trump Administration*, N.Y. TIMES (April 10, 2020), <https://www.nytimes.com/interactive/2018/03/16/us/politics/all-the-major-firings-and-resignations-in-trump-administration.html> [<https://perma.cc/4P9T-2CVV>]. I focused on the resignations, and looked for information about whether the officials had resigned in protest. News coverage of some of these resignations revealed additional resignations in protest. I also used Google and Twitter to find resignations in protest after the January 6, 2021 insurrection. Earlier administrations also experienced principled resignations. See, e.g., EDWARD WEISBAND AND THOMAS M. FRANCK, RESIGNATION IN PROTEST: POLITICAL AND ETHICAL CHOICES BETWEEN LOYALTY TO TEAM AND LOYALTY TO CONSCIENCE IN AMERICAN PUBLIC LIFE 13-17 (1975) (Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned rather than comply with President Nixon's direction to fire Special Counsel Archibald Cox); Bruce Weber, *J.F. terHorst, Ford Press Secretary, Dies at 87*, N.Y. TIMES (April 1, 2010) (White House press secretary resigned in response to President Ford's pardon of former President Nixon). While principled resignations are not an entirely new phenomenon, the number of such resignations during the Trump administration seems much higher than before. On the other hand, I am not aware of any compilation of principled resignations for earlier administrations.

76. I am compiling tables detailing the different categories of resignations within the administration in a forthcoming publication. Kathleen Clark, Tables, *Principled Resignations: Tables I and II* (forthcoming). For a list of full-time employee resignations, see Kathryn Dunn Tenpas, *Tracking Turnover in the Trump Administration*, BROOKINGS (Jan. 2021), <https://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/> [<https://perma.cc/H3GZ-EYQP>]; Jan Diehm, Sam Petulla & Zachary B. Wolf, *Who Has Left Trump's Administration and Orbit?*, CNN (Oct. 21, 2019), <https://www.cnn.com/interactive/2017/08/politics/trump-admin-departures-trnd/> [<https://perma.cc/NK6W-FBX4>]; Kevin Schaul, Reuben Fischer-Baum & Kevin Uhrmacher, *The High-Profile Departures from a Turbulent Trump Administration*, WASH. POST (Jan. 11, 2021), <https://www.washingtonpost.com/graphics/2018/politics/trump-turnover/> [<https://perma.cc/W7QD-APJX>]; *The Trump Administration Officials Who Resigned Over Capitol Violence*, N.Y. TIMES (Jan. 17, 2021),

and eight-seven held part-time positions. Most of the part-timers served on advisory boards or committees, with fifty-nine appointed by Obama or an Obama appointee and twenty-five appointed by Trump or by a Trump appointee.<sup>77</sup>

### 1. CONCERTED ACTION

A quick glance of the resignations reveals that many of them were taken in concert with each other. One of the first examples of such concerted action occurred in June of 2017, when six of the twenty members of the Presidential Advisory Council on HIV/AIDS (PACHA) announced they were resigning.<sup>78</sup> Two months later, Trump's comments equating white supremacists in Charlottesville with anti-racist counter-protesters triggered dozens of resignations, including twelve members of Trump's Manufacturing Council.<sup>79</sup> At first, individual members announced their decisions, but after a couple of days, a group

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<https://www.nytimes.com/article/trump-resignations.html> [<https://perma.cc/QSM6-77QD>] (providing a list of resignations following the January 6 Capitol riot).

77. *Id.* Earlier administrations also experienced principled resignations. *See, e.g.,* EDWARD WEISBAND & THOMAS M. FRANCK, RESIGNATION IN PROTEST: POLITICAL AND ETHICAL CHOICES BETWEEN LOYALTY TO TEAM AND LOYALTY TO CONSCIENCE IN AMERICAN PUBLIC LIFE 13–17 (1975) (Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned rather than comply with President Nixon's direction to fire Special Counsel Archibald Cox); Bruce Weber, *J.F. terHorst, Ford Press Secretary, Dies at 87*, N.Y. TIMES (April 1, 2010) (White House press secretary resigned in response to President Ford's pardon of former President Nixon). While principled resignations are not an entirely new phenomenon, the number of such resignations during the Trump administration seems much higher than before. On the other hand, I am not aware of any comprehensive compilation of principled resignations for earlier administrations.

78. *See* Scott A. Schoettes, *Trump Doesn't Care About HIV. We're Outta Here*, NEWSWEEK (June 16, 2017), <https://www.newsweek.com/trump-doesnt-care-about-hiv-were-outta-here-626285> [<https://perma.cc/RPD5-LBJN>]. Six months later, Trump fired *en masse* the remaining members. Ben Guarino, *Trump Administration Fires All Members of HIV/AIDS Advisory Council*, WASH. POST (Dec. 29, 2017), [https://www.washingtonpost.com/news/to-your-health/wp/2017/12/29/trump-administration-fires-all-members-of-hiv-aids-advisory-council/?hpid=hp\\_hp-more-top-stories\\_aids-council-445pm%3Ahomepage%2Fstory](https://www.washingtonpost.com/news/to-your-health/wp/2017/12/29/trump-administration-fires-all-members-of-hiv-aids-advisory-council/?hpid=hp_hp-more-top-stories_aids-council-445pm%3Ahomepage%2Fstory) [<https://perma.cc/73NS-Z62N>].

79. At an August 12, 2017 press conference, President Trump stated, “[W]e’re closely following the terrible events unfolding in Charlottesville, Virginia. We condemn in the strongest possible terms this egregious display of hatred, bigotry and violence on many sides, on many sides.” Carly Sitrin, *Read: President Trump's Remarks Condemning Violence "On Many Sides" in Charlottesville*, VOX (Aug. 12, 2017), <https://www.vox.com/2017/8/12/16138906/president-trump-remarks-condemning-violence-on-many-sides-charlottesville-rally> [<https://perma.cc/92LA-LVU8>] (emphasis added). During another press conference three days later, he stated:

You had a group on one side and you had a group on the other and they came at each other with clubs and it was vicious and it was horrible and it was a horrible thing to watch, but there is another side. There was a group on this side — you can call them the left, you’ve just called them the left — that came violently attacking the other group . . . I do think there’s blame- Yes. I do think there’s blame on both sides. You look at both sides. I think there’s blame on both sides . . . You have some very bad people in that group, but you also had people that were very fine people on both sides.

Christine Wang & Kevin Breuninger, *Read the Transcript of Donald Trump's Jaw-dropping Press Conference*, CNBC (Aug. 15, 2017), <https://www.cnbc.com/2017/08/15/read-the-transcript-of-donald-trumps-jaw-dropping-press-conference.html>. [<https://perma.cc/L52P-JHQ4>].

“decided a united withdrawal would make the most significant impact.”<sup>80</sup> Members of a different advisory council, the Strategic and Policy Forum, convened by conference call, and decided to disband the Forum entirely.<sup>81</sup> One member explained, “it was important to do it as a group, as a panel, not as individuals because it would have more significant impact.”<sup>82</sup> That same week, all seventeen members of the President’s Committee on Arts and the Humanities<sup>83</sup> and eight of the twenty eight members of the National Infrastructure Advisory Council (NIAC)<sup>84</sup> announced their principled resignation.

In January of 2018, ten of the twelve members of National Park System Advisory Board announced their resignation to protest the Interior Department’s refusal to meet with Board.<sup>85</sup> On February 11, 2020, four career prosecutors withdrew from the same criminal case (and one of them also resigned from the government) to protest the Justice Department’s overruling their sentencing recommendation in order to give favorable treatment to a Trump ally, Roger Stone.<sup>86</sup> Finally, in response to the January 6, 2021 Capitol Hill insurrection, twenty-three Trump appointees resigned, including two cabinet secretaries and ten White House employees.<sup>87</sup>

The power of concerted action can be seen not just when resignations occur simultaneously, but also when groups of officials threaten to resign in order to deter abuses. Up until recently, the most famous example of a threatened group resignation occurred in March of 2004, when the Justice Department’s political leadership threatened to resign if President Bush re-authorized a warrantless

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80. Alex Gorsky, *Responding to Divisions without Divisiveness*, JOHNSON & JOHNSON (Aug. 16, 2017), <https://www.jnj.com/leadership/responding-to-divisions-without-divisiveness> [https://perma.cc/G86Y-AQZ3].

81. Patti Domm & Dominic Chu, *Inside the Dramatic Decision By Corporate Giants to Rebuke Trump*, CNBC (Aug. 16, 2017), <https://www.cnbc.com/2017/08/16/inside-the-dramatic-decision-by-corporate-giants-to-rebuke-trump.html> [https://perma.cc/UNJ5-MYPW]; David Gelles, Landon Thomas Jr., Andrew Ross Sorkin & Kate Kelly, *Inside the C.E.O. Rebellion Against Trump’s Advisory Councils*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/business/trumps-council-ceos.html> [https://perma.cc/AV8F-KYY9]; Emily Glazer, Sarah Krouse & Elena Cherney, *Trump’s Business Councils Disband After CEOs Defect*, WALL ST. J. (Aug. 16, 2017), <https://www.wsj.com/articles/trump-business-advisory-council-to-disband-1502904005>. [https://perma.cc/YR5M-7B47].

82. Domm, *supra* note 81.

83. Letter from the President’s Committee on Arts & Humanities to the President (Aug. 18, 2018), <https://www.politico.com/f/?id=0000015d-f5c6-d965-a55d-fde6aef80002> [https://perma.cc/34LJ-C3NP] [hereinafter *Letter from the President’s Committee on Arts & Humanities*].

84. Kevin Townsend, *Is the Trump Administration Serious About Cybersecurity?*, SECURITYWEEK (Sept. 7, 2017), <https://www.securityweek.com/trump-administration-serious-about-cybersecurity> [https://perma.cc/X3GY-Q2FN] (seven resigned “en masse” on Aug. 21, 2017, and an eighth resigned “at the end of the same week”).

85. Letter from Tony Knowles, Governor of Alaska, Chair of the NPSAB, to Secretary of Interior Ryan Zinke (Jan. 15, 2018), <https://assets.documentcloud.org/documents/4351748/Letter-of-resignation-from-members-of-the.pdf> [https://perma.cc/S7NW-Q8PR] [hereinafter *Letter from Tony Knowles*].

86. Chris Strohm & Erik Larson, *Prosecutors Quit Amid Uproar Over Trump Ally Stone’s Prison Time*, BLOOMBERG (Feb. 11, 2020), <https://www.bloomberg.com/news/articles/2020-02-11/doj-to-propose-shorter-roger-stone-sentence-after-trump-tweet> [https://perma.cc/YBZ6-XJH4].

87. *See supra* note 76.



surveillance program that the Department had concluded was illegal.<sup>88</sup> Faced with the prospect of mass resignations, President Bush made changes in the program to comply with the law.<sup>89</sup> Similarly, after Justice Department political appointees threatened to resign en masse, President Trump backed down from his plan to fire Acting Attorney General Jeffrey Rosen and commandeer the Department to overturn the presidential election he had lost.<sup>90</sup>

A resignation, by definition, permits an individual to escape an uncomfortable or objectionable situation. A group resignation can draw attention to that situation, sending a public message of disapproval. A group *threat* of resignation—at least if issued by a large number of high-profile officials—may actually create “operational maneuvering room” that might not otherwise exist, enabling that group to exert pressure for change.

## 2. LETTERS AND OP-EDS EXPLAINING DECISION TO RESIGN

Many of the Trump era resignations were accompanied by letters describing what triggered the resignation, and dozens of officials actually published op-eds explaining their reasons. By closely examining these letters and op-eds, certain recurring themes become clear: officials’ purpose in resigning, the areas of sharpest disagreement with President Trump, and the degree to which they framed their decision as one of personal morality.

### a. Purpose in Resigning

#### *i. Avoid Participation*

Several officials felt compelled to resign in order to avoid personally *participating* in objectionable government policies or actions. In Professor Luban’s words, these individuals in effect recognized that continuing in their positions would make them desk perpetrators. The chargé d’affaires at the U.S. embassy in Beijing, for example, resigned days after the withdrawal from the Paris climate accords. It was his responsibility as the senior diplomat at the embassy “to deliver a formal notification of the U.S. intention to withdraw from the climate pact.”<sup>91</sup> But he told his staff that delivering the demarche was, “something which ‘as a

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88. See David Johnston, *Bush Intervened in Dispute Over N.S.A. Eavesdropping*, N.Y. TIMES (May 16, 2007), <https://www.nytimes.com/2007/05/16/washington/16nsa.html> [<https://perma.cc/84KY-NYLL>].

89. *Id.*

90. Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html> [<https://perma.cc/7C6J-ZDJS>].

91. Carol Morello, *Senior Diplomat in Beijing Embassy Resigns Over Trump’s Climate Change Decision*, WASH. POST (June 5, 2017), [https://www.washingtonpost.com/world/national-security/senior-diplomat-in-beijing-embassy-resigns-over-trumps-climate-change-decision/2017/06/05/3537ff8c-4a2e-11e7-a186-60c031eab644\\_story.html](https://www.washingtonpost.com/world/national-security/senior-diplomat-in-beijing-embassy-resigns-over-trumps-climate-change-decision/2017/06/05/3537ff8c-4a2e-11e7-a186-60c031eab644_story.html) [<https://perma.cc/KP7R-49ZP>].

parent, patriot and Christian, I simply cannot do.”<sup>92</sup> Our ambassador to Vietnam resigned because he “was asked to press the government in Hanoi” to accept more than 8,000 deportees, most of whom were war refugees who had never reconciled with the Vietnamese government and “whose loyalty was to . . . a nation that no longer exists.”<sup>93</sup> He “feared many would become human rights cases, and our government would be culpable.”<sup>94</sup> A Special Presidential Envoy resigned days after President Trump announced the withdrawal of U.S. troops from Syria, explaining to his colleagues, “I could not carry out these new instructions and maintain my integrity.”<sup>95</sup> The Ambassador to Panama explained his resignation in a similar fashion, writing that he “could no longer represent [President Trump] personally and remain faithful to my beliefs about what makes America truly great.”<sup>96</sup> An Assistant Associate Administrator for Environmental Justice at the EPA said he “just couldn’t be a part of” the rolling back of regulations that had protected “our most vulnerable communities.”<sup>97</sup> An unwillingness to participate in objectionable policy appears to explain why four career prosecutors withdrew from the Roger Stone case after the Justice Department overruled them to give Stone, a Trump ally, favorable treatment.<sup>98</sup> Similarly, the Department’s chief voter fraud prosecutor stepped down from that position after Attorney General William Barr abrogated a forty-year policy prohibiting prosecutors from overt investigative steps before elections become certified and uncontested.<sup>99</sup>

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92. Elise Labott, Zachary Cohen & Michelle Kosinski, *Sources: Acting US Ambassador to China Quit Over Trump Climate Decision*, CNN (June 6, 2016), <https://www.cnn.com/2017/06/05/politics/acting-ambassador-to-china-david-rank-resigns/index.html> [<https://perma.cc/XW9Q-4RM2>] (Rank “told the embassy staff he couldn’t in good conscience do anything that would contribute to the implementation of the decision to withdraw from the climate agreement”); see also David Rank, *Why I Resigned From the Foreign Service After 27 Years*, WASH. POST (Jun. 23, 2017), [https://www.washingtonpost.com/opinions/why-i-resigned-from-the-foreign-service-after-27-years/2017/06/23/6abee224-55ff-11e7-ba90-f5875b7d1876\\_story.html](https://www.washingtonpost.com/opinions/why-i-resigned-from-the-foreign-service-after-27-years/2017/06/23/6abee224-55ff-11e7-ba90-f5875b7d1876_story.html) [<https://perma.cc/66EP-Z467>].

93. Ted Osius, *Respect, Trust and Partnership: Keeping Diplomacy on Course in Troubling Times*, FOREIGN SERV. J. (April 2018), available at <https://www.afsa.org/respect-trust-and-partnership-keeping-diplomacy-course-troubling-times> [<https://perma.cc/Y9NS-55VS>].

94. *Id.*

95. Rukmini Callimachi & Eric Schmitt, *Splitting With Trump Over Syria, American Leading ISIS Fight Steps Down*, N.Y. TIMES (Dec. 22, 2018), <https://www.nytimes.com/2018/12/22/world/brett-mcgurk-isis-resign.html> [<https://perma.cc/J98Z-QBG6>].

96. John D. Feeley, *Why I Could No Longer Serve This President*, WASH. POST (Mar. 9, 2018), [https://www.washingtonpost.com/opinions/why-i-could-no-longer-serve-this-president/2018/03/08/f444f086-225c-11e8-86f6-54bfff693d2b\\_story.html](https://www.washingtonpost.com/opinions/why-i-could-no-longer-serve-this-president/2018/03/08/f444f086-225c-11e8-86f6-54bfff693d2b_story.html) [<https://perma.cc/48RT-KKDA>].

97. Democracy Now!, *Meet the Top EPA Official Who Quit After 24 Years to Protest Pruitt and Trump*, ECOWATCH (Mar. 13, 2017), <https://www.ecowatch.com/mustafa-ali-quit-epa-2312947032.html> [<https://perma.cc/VNIG7-97SV>].

98. See Letter from Tony Knowles, *supra* note 85; Jonathan Kravis, *I Left the Justice Department After It Made a Disastrous Mistake. It Just Happened Again*, WASH. POST (May 11, 2020), <https://www.washingtonpost.com/opinions/2020/05/11/i-left-justice-department-after-it-made-disastrous-mistake-it-just-happened-again/> [<https://perma.cc/9LTM-UYLZ>] (“I resigned because I was not willing to serve a department that would so easily abdicate its responsibility to dispense impartial justice.”).

99. Katie Benner & Michael S. Schmidt, *Barr Hands Prosecutors the Authority to Investigate Voter Fraud Claims*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2020/11/09/us/politics/barr-elections.html>

One of the concerns identified in the post-2016 commentary was the prospect of being required to publicly defend Trump policies with which one disagreed,<sup>100</sup> and that is precisely what motivated several principled resignations. A spokesman for Immigration and Customs Enforcement (ICE) resigned after the acting agency head and the Attorney General made misleading and inaccurate statements about ICE raids.<sup>101</sup> He told agency officials “that the information was wrong, [and] they asked [him] to deflect.”<sup>102</sup> He decided to quit because he “couldn’t bear the burden—continuing on as a representative of the agency and charged with upholding integrity, knowing that information was false.”<sup>103</sup> The former Ambassador to Estonia explained that an ambassador acts as “the personal representative of the president.” He found himself “in an untenable position” because he could not “support President Trump’s policies and rhetoric,” and therefore resigned.<sup>104</sup> Similarly, the former Ambassador to Mexico confessed, “I cannot pretend anything less than relief at no longer having to defend the indefensible.”<sup>105</sup>

### ii. Disassociate

Some resignations stemmed not from a need to avoid participating in objectionable policy, but instead from a desire to disassociate (or distance oneself)

[<https://perma.cc/J7LC-RGPF>]; Vanita Gupta (@vanitaguptaCR), TWITTER (Nov. 9, 2020), <https://twitter.com/vanitaguptaCR/status/1326001089997631488>) [<https://perma.cc/J2V2-69XC>] (reproducing an email from Richard C. Pilger). The Justice Department rescinded that change soon after President Biden was inaugurated. See Memorandum from Acting Attorney General, Rescission of Attorney General Memoranda on Post-Voting Election Irregularity Inquiries and Safe-Harbor Enforcement Policy for State and Local Voting Procedures (Feb. 3, 2021), <https://www.justice.gov/ag/page/file/1364261/download> [<https://perma.cc/L5RF-Y6JG>].

100. See Richard H. Kohn, *Why GOP National Security Experts Must Agree to Serve*, WASH. POST (Nov. 9, 2016), [https://www.washingtonpost.com/opinions/why-gop-national-security-experts-must-agree-to-serve-in-a-trump-administration/2016/11/09/47b79b68-a6af-11e6-8fc0-7be8f848c492\\_story.html](https://www.washingtonpost.com/opinions/why-gop-national-security-experts-must-agree-to-serve-in-a-trump-administration/2016/11/09/47b79b68-a6af-11e6-8fc0-7be8f848c492_story.html) [<https://perma.cc/XQ55-5VGR>].

101. Dan Simon, *ICE Spokesman in SF Resigns and Slams Trump Administration Officials*, CNN POLITICS (March 13, 2018), <https://www.cnn.com/2018/03/12/politics/ice-spokesman-resigns-san-francisco/index.html> [<https://perma.cc/23QM-9C2N>].

102. Hamed Aleaziz, *San Francisco’s ICE Spokesman Quits, Disputes Agency’s Claim That 800 Eluded Arrest*, S.F. CHRON. (Mar. 13, 2018), <https://www.sfchronicle.com/bayarea/article/ICE-spokesman-said-to-quit-over-officials-12748022.php>. [<https://perma.cc/UW3N-BY3F>].

103. Simon, *supra* note 101.

104. James D. Melville, Jr., *I Stepped Down As U.S. Ambassador To Estonia. Here’s Why*, WASH. POST (Oct. 3, 2018), [https://www.washingtonpost.com/opinions/i-stepped-down-as-us-ambassador-to-estonia-heres-why/2018/10/03/f579c7a4-c5c4-11e8-9b1c-a90f1daae309\\_story.html](https://www.washingtonpost.com/opinions/i-stepped-down-as-us-ambassador-to-estonia-heres-why/2018/10/03/f579c7a4-c5c4-11e8-9b1c-a90f1daae309_story.html) [<https://perma.cc/C66K-UJ5H>].

105. Roberta S. Jacobson, *My Year As a Trump Ambassador*, N.Y. TIMES (Oct. 20, 2018), <https://www.nytimes.com/2018/10/20/opinion/sunday/nafta-mexico-trump-ambassador.html> [<https://perma.cc/6YCU-YAF3>]; see also Edward Price, *I Didn’t Think I’d Ever Leave the CIA, But Because of Trump, I Quit*, WASH. POST (Feb. 20, 2017), [https://www.washingtonpost.com/opinions/i-didnt-think-id-ever-leave-the-cia-but-because-of-trump-i-quit/2017/02/20/fd7aac3e-f456-11e6-b9c9-e83fce42fb61\\_story.html](https://www.washingtonpost.com/opinions/i-didnt-think-id-ever-leave-the-cia-but-because-of-trump-i-quit/2017/02/20/fd7aac3e-f456-11e6-b9c9-e83fce42fb61_story.html) [<https://perma.cc/3VHM-9JF3>] (discussing National Security Council (NSC) spokesperson resigning after Trump appointed Steve Bannon to the NSC Principals Committee while omitting the CIA Director and Director of National Intelligence).

from objectionable policies or rhetoric. Even though these officials would not have participated in an objectionable policy, they nevertheless felt compelled to demonstrate their objection by resigning. Professor Luban describes the risk of remaining on the job in this situation as “consorting with wrongdoers.”<sup>106</sup> It “looks like condoning or approving their actions,” and other people could be influenced by such consorting.<sup>107</sup> Most of Trump-era principled resignations arguably fall into this category.

The very first principled resignation after Trump took office was of this type. On February 3, 2017, Kara Goldin, the CEO of a flavored water company, resigned from the National Advisory Council on Innovation and Entrepreneurship “to distance [her]self from the sexism, racism, protectionism and hate that has defined the Trump administration’s first days in office.”<sup>108</sup> She told her employees that the “last thing that I want to do is have you think that I would be supporting an administration that is working against the values that I believe as an American that are the key to entrepreneurship.”<sup>109</sup>

The dozens of resignations triggered by Trump’s Charlottesville comments were similarly based on the need to disassociate from Trump’s racism.<sup>110</sup> Merck CEO Kenneth Frazier was the first member of the American Manufacturing Council to resign, explaining that he felt “a responsibility to take a stand against intolerance and extremism.”<sup>111</sup> Within a few days, eleven other members also resigned. Johnson & Johnson’s CEO said, “the president’s remarks . . . equating those who are motivated by race-based hate with those who stand up against hatred—were unacceptable,”<sup>112</sup> and Campbell’s Soup CEO wrote that “[f]ollowing [the] remarks from the President, I cannot remain on the Manufacturing Jobs Initiative.”<sup>113</sup> General Electric’s CEO wrote that “GE has no tolerance for hate,

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106. Luban, *supra* note 6, at 7.

107. *Id.*

108. Kara Goldin, *I Did Something Really Hard This Afternoon*, MEDIUM (Feb. 3, 2017), <https://medium.com/@karagoldin/i-did-something-really-hard-this-afternoon-f27e71d67e50#bhqwqcae8> [<https://perma.cc/57BQ-ZNZB>].

109. *Id.*

110. *See* Gorsky, *supra* note 80.

111. *See* Merck (@Merck), *Statement From Kenneth C. Frazier, Chairman and Chief Executive Officer, Merck*, TWITTER (Aug. 14, 2017), <https://twitter.com/Merck/status/897065338566791169> [<https://perma.cc/62L5-KJCM>] [hereinafter Frazier statement].

112. Gorsky, *supra* note 80.

113. Denise Morrison, *A Statement From Denise Morrison, President and CEO, CAMPBELL SOUP CO.* (Aug. 16, 2017), <https://www.campbellsoupcompany.com/newsroom/news/2017/08/16/statement-denise-morrison-president-ceo-campbell-soup-company/> [<https://perma.cc/M6M7-V5SX>]; *see also* Wendell P. Weeks, *A Message From the CEO*, CORNING, [https://www.corning.com/worldwide/en/about-us/news-events/a-message-from-our-ceo.html?utm\\_source=twitter&utm\\_medium=social&utm\\_campaign=management](https://www.corning.com/worldwide/en/about-us/news-events/a-message-from-our-ceo.html?utm_source=twitter&utm_medium=social&utm_campaign=management) [<https://perma.cc/JC7L-EDAS>] (last visited Apr. 30, 2021) (explaining that while participation on the Council “was not . . . an endorsement of the Administration[] . . . , the events of the last few days [created] a perception of political support for the Administration and its statements . . . [which] is inconsistent with Corning’s Values”).

bigotry, racism, and . . . white supremacist extremism,”<sup>114</sup> and two union officials who resigned explained that, “We cannot sit on a council for a President who tolerates bigotry and domestic terrorism.”<sup>115</sup>

For some, Trump’s Charlottesville remarks were illustrative of a broader problem. A member of Trump’s Evangelical Executive Advisory Board resigned, explaining that, “it became obvious that there was a deepening conflict in values between myself and the administration.”<sup>116</sup> Similarly, the State Department’s Science Envoy resigned because Trump’s “response to Charlottesville was consistent with a broader pattern of behavior that enables sexism and racism.”

Other examples of distancing resignations came in response to Trump policies on climate, the civil service, and human rights. Trump’s withdrawal from the Paris climate accords prompted Tesla CEO Elon Musk and Disney CEO Bob Iger to resign from Trump’s business councils.<sup>117</sup> Unlike the chargé d’affaires in Beijing, neither Musk nor Iger would have been involved in implementing this policy. But they resigned in order to express their strong disagreement.<sup>118</sup> Similarly, the Chair of the Federal Salary Council objected to a Trump executive order that would have gut civil service protections. Even though he would not have played any role in implementing that executive order, he wrote, “*I simply cannot be part of an Administration that seeks to . . . replace apolitical expertise with political obeisance.*”<sup>119</sup> A foreign service officer who resigned in 2019 listed a wide range of Trump policies that he found objectionable, including the “mass

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114. BostonomiX (@BostonomiX), *Jeff Immelt resignation announcement*, TWITTER (Aug. 16, 2017), <https://twitter.com/BostonomiX/status/897880778918567936> [<https://perma.cc/L28V-NMDE>]; see also United Technologies (@UTC), TWITTER (Aug. 16, 2017), [https://twitter.com/UTC/status/897870327547645952?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E897870327547645952%7Ctwgr%5E%7Ctwcon%5Es1\\_c10&ref\\_url=https%3A%2F%2Fwww.wnpr.org%2Fpost%7C4SLA-CGGB](https://twitter.com/UTC/status/897870327547645952?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E897870327547645952%7Ctwgr%5E%7Ctwcon%5Es1_c10&ref_url=https%3A%2F%2Fwww.wnpr.org%2Fpost%7C4SLA-CGGB)] (statement by United Technologies CEO Greg Hayes) (explaining that he resigned because “we need to collectively stand together and denounce the politics of hate, intolerance and racism”).

115. Richard Trumka (@RichardTrumka), *AFL-CIO Representatives Resign from Presidential Council on Manufacturing*, TWITTER (Aug. 15, 2017), <https://twitter.com/RichardTrumka/status/897575417430896645> [<https://perma.cc/B8TT-A7KN>]; see also Richard Trumka, *Why I Quit Trump’s Business Council*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/opinion/richard-trumka-trump-business-council.html> [<https://perma.cc/ER7M-GT59>] (Trump’s “actions and rhetoric threaten to leave America worse off and more divided”).

116. A.R. Bernard (@ARBernard), TWITTER (Aug. 18, 2017), <https://twitter.com/ARBernard/status/898661983146397700> [<https://perma.cc/TLN9-26RV>].

117. David Shepardson, *Musk, Iger to Quit Trump Advisory Councils After Paris Accord Decision*, REUTERS (June 1, 2017), <https://www.reuters.com/article/us-usa-climatechange-musk/musk-iger-to-quit-trump-advisory-councils-after-paris-accord-decision-idUSKBN18S6EO> [<https://perma.cc/AH5F-387T>].

118. Alex Stedman & Ted Johnson, *Disney CEO Bob Iger Resigns From Trump’s Advisory Council Over Paris Accord Decision*, VARIETY (June 1, 2017), <https://variety.com/2017/film/news/disney-ceo-bob-iger-resigns-from-trumps-advisory-council-over-paris-accord-decision-1202451184/> [<https://perma.cc/8BLR-Q5TE>] (statement of Bob Iger) (“I deeply disagree with the decision to withdraw from the Paris Agreement and, as a matter of principle, I’ve resigned from the President’s advisory council.”).

119. Letter from Ronald Sanders, Chair, Federal Salary Council, to John McEntee, Director, Presidential Personnel (Oct. 26, 2020) (emphasis added), available at [https://cdn.govexec.com/media/gbc/docs/pdfs\\_edit/102720ew1.pdf](https://cdn.govexec.com/media/gbc/docs/pdfs_edit/102720ew1.pdf) [<https://perma.cc/62J9-4NDJ>] [hereinafter Sanders resignation letter].

deportations of “dreamers,” “separat[ing] children from their parents at the border,” blocking “travel by Muslim immigrants,” “children in detention camps,” and Trump’s defense of “Saudi Crown Prince Mohammed bin Salman.”<sup>120</sup> His duties as a trade representative would not seem to have required him to participate in any of these policies,<sup>121</sup> but in an op-ed explaining his resignation, he declared, “I can no longer justify . . . my *complicity* in the actions of this administration.”<sup>122</sup>

### *iii. Acknowledge Futility*

Some resignations occurred after officials recognized that remaining in government would be an exercise in futility or that they could accomplish more outside of government. Ten of the twelve members of a National Park System Advisory Board resigned in January of 2018 because Interior Department officials refused to convene the Board, despite such meetings being “prescribed by law.”<sup>123</sup> The Student Loan Ombudsman at the Consumer Financial Protection Bureau resigned because “the Bureau has abandoned the very consumers it is tasked by Congress with protecting.”<sup>124</sup> Rick Bright, who had been Director of the Biomedical Advanced Research & Development Authority, resigned after being “shunted” aside, being “given no work. . . in effect [preventing him] from working to fight the pandemic.”<sup>125</sup> The six members of PACHA who resigned in June of 2017 had a long list of complaints about the Trump administration’s HIV/AIDS policy, including their contention that the administration “has no strategy to address the on-going HIV/AIDS epidemic, . . . pushes legislation that will harm people living with HIV[,] . . . took down the Office of National AIDS Policy website . . . [and] has not appointed anyone to lead the White House Office of National AIDS Policy.”<sup>126</sup> More generally, “we do not believe the Trump Administration is

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120. Chuck Park, Opinion, *I Can No Longer Justify Being a Part of Trump’s ‘Complacent State.’ So I’m Resigning*, WASH. POST (Aug. 8, 2019), [https://www.washingtonpost.com/opinions/i-can-no-longer-justify-being-a-part-of-trumps-complacent-state-so-im-resigning/2019/08/08/fed849e4-af14-11e9-8e77-03b30bc29f64\\_story.html](https://www.washingtonpost.com/opinions/i-can-no-longer-justify-being-a-part-of-trumps-complacent-state-so-im-resigning/2019/08/08/fed849e4-af14-11e9-8e77-03b30bc29f64_story.html) [https://perma.cc/7HMB-JY2J].

121. See Hayley Miller, *U.S. Foreign Service Officer Resigns Over Donald Trump’s ‘Toxic Agenda,’* HUFF. POST (Aug. 8, 2019), [https://www.huffpost.com/entry/chuck-park-resigns-trump\\_n\\_5d44c437ae4b01e44e476e591](https://www.huffpost.com/entry/chuck-park-resigns-trump_n_5d44c437ae4b01e44e476e591) [https://perma.cc/5WGN-4MWC].

122. *Id.* (emphasis added).

123. Letter from Tony Knowles, *supra* note 85 (recognizing that “the matters on which we wanted to brief the new Department team are clearly not part of its agenda”).

124. Letter from Seth Frotman, Assistant & Student Loan Ombudsman, CFPB, to Mick Mulvaney, Acting Director, CFPB (Aug. 27, 2018), *available at* <https://assets.documentcloud.org/documents/4784891/Frotman-Letter.pdf> [https://perma.cc/2SJV-R3WC].

125. Rick Bright, *I Couldn’t Sit Idly and Watch People Die From Trump’s Chaotic, Politicized Pandemic Response, so I Resigned*, WASH. POST (Oct. 7, 2020), [https://www.washingtonpost.com/opinions/rick-bright-trump-coronavirus-response-nih/2020/10/07/3ed36cb4-08c3-11eb-859b-f9c27abe638d\\_story.html](https://www.washingtonpost.com/opinions/rick-bright-trump-coronavirus-response-nih/2020/10/07/3ed36cb4-08c3-11eb-859b-f9c27abe638d_story.html) [https://perma.cc/AF8D-A2MX] (explaining that Bright’s experience being “shunted” aside was apparently retaliation for his objecting to “two potentially dangerous drugs recklessly promoted by President Trump as a covid-19 cure”).

126. Schoettes, *supra* note 78.

listening to—or cares—about the communities we serve,” and we decided to resign because “[w]e will be more effective from the outside.”<sup>127</sup> The Director of the Office of Government Ethics resigned in July of 2017, after several rhetorical and bureaucratic run-ins with Trump, explaining that he would “have more freedom to push for reform” outside of government.<sup>128</sup>

#### b. Language of Morality

One of the striking features about these resignation letters and op-eds is the degree to which they sound in the language of morality.<sup>129</sup> The writers invoke conscience,<sup>130</sup> convictions,<sup>131</sup> integrity,<sup>132</sup> core beliefs,<sup>133</sup> good faith,<sup>134</sup> and even their religion.<sup>135</sup>

127. *Id.*

128. Letter from Walter M. Shaub, Director, OGE to the President (July 6, 2017), available at <https://assets.documentcloud.org/documents/3889595/Walter-Shaub-Resignation-Letter.pdf> [<https://perma.cc/U5D7-VFD9>]; see also Nick Timiraos, Peter Nicholas & Liz Hoffman, *Gary Cohn Resigns as White House Economic Adviser After Losing Tariffs Fight*, WALL ST. J. (March 6, 2018), <https://www.wsj.com/articles/gary-cohn-to-resign-as-president-trumps-economic-adviser-1520376157> [<https://perma.cc/5EZK-46SG>].

129. On the other hand, some resignations stemmed from market pressure rather than moral considerations. See, e.g., Mike Isaac, *Uber C.E.O. to Leave Trump Advisory Council After Criticism*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/technology/uber-ceo-travis-kalanick-trump-advisory-council.html> [<https://perma.cc/6GFS-8J7H>] (discussing the fact that Uber CEO Travis Kalanick had been a “vocal proponent among tech chiefs of engaging with the president,” but resigned from Trump’s Strategic and Policy Forum after 200,000 Uber customers deleted the app from their phones in the wake of the Muslim travel ban).

130. See, e.g., Frazier statement, *supra* note 111 (“As CEO of Merck and as a matter of personal conscience, I feel a responsibility to take a stand against intolerance and extremism.”).

131. In the wake of the George Floyd protests, the Assistant Secretary of State for Legislative Affairs (a Trump appointee) wrote, “The President’s comments and actions surrounding racial injustice and Black Americans cut sharply against my core values and convictions. I must follow the dictates of my conscience and resign.” Letter from Mary Elizabeth Taylor, Assistant Secretary of State, Legislative Affairs to Mike Pompeo, Secretary of State (June 16, 2020), [https://www.washingtonpost.com/context/resignation-letter-of-mary-elizabeth-taylor/299bb85a-9e92-4a65-957f-a9c044232ec7/?itid=hp\\_rhp\\_hp-top-table-high\\_trumpofficial-550pm%3Ahomepage%2Fstory-ans&itid=lk\\_inline\\_manual\\_5](https://www.washingtonpost.com/context/resignation-letter-of-mary-elizabeth-taylor/299bb85a-9e92-4a65-957f-a9c044232ec7/?itid=hp_rhp_hp-top-table-high_trumpofficial-550pm%3Ahomepage%2Fstory-ans&itid=lk_inline_manual_5) [<https://perma.cc/7F6F-AJKV>].

132. See, e.g., Callimachi & Schmitt, *supra* note 95 (Special Presidential Envoy for the Global Coalition to Counter ISIL Brett McGurk said he needed to resign in order to “maintain [his] integrity”).

133. See, e.g., READ: *James Mattis’ Resignation Letter*, CNN (Dec. 21, 2018, 9:32 AM), <https://www.cnn.com/2018/12/20/politics/james-mattis-resignation-letter-doc/index.html> [<https://perma.cc/ZTA2-RYTQ>] [hereinafter Mattis resignation letter] (“One core belief I have always held is that our strength as a nation is inextricably linked to the strength of our unique and comprehensive system of alliances and partnerships.”). See, e.g., Letter from James N. Mattis, Secretary of Defense (December 20, 2018), available at <https://assets.documentcloud.org/documents/5656045/Letter-From-Secretary-James-N-Mattis.pdf> [<https://perma.cc/3M3X-JVY6>] (“One core belief I have always held is that our strength as a nation is inextricably linked to the strength of our unique and comprehensive system of alliances and partnerships.”).

134. Price, *supra* note 105 (“I cannot in good faith serve this administration as an intelligence professional.”); Democracy Now!, *supra* note 97 (“I could no longer represent him personally and remain faithful to my beliefs about what makes America truly great.”).

135. David Rank, *Why I Resigned From the Foreign Service After 27 Years*, WASH. POST (June 23, 2017), [https://www.washingtonpost.com/opinions/why-i-resigned-from-the-foreign-service-after-27-years/2017/06/23/6abee224-55ff-11e7-ba90-f5875b7d1876\\_story.html](https://www.washingtonpost.com/opinions/why-i-resigned-from-the-foreign-service-after-27-years/2017/06/23/6abee224-55ff-11e7-ba90-f5875b7d1876_story.html) [<https://perma.cc/W3R2-YQF3>] (“[A]s a parent, patriot and Christian, I could not in good conscience be involved in any way, no matter how small, with the implementation of” withdrawing from the Paris climate accord).

In using such terms, some individuals are referring to their own personal sense of right and wrong, as when an EPA official explained that he resigned because “the values and priorities of our new administration did not line up with mine.”<sup>136</sup> Other writers are invoking something akin to a civic religion: the principles they believe underlie American democracy. For example, when the State Department’s Science Envoy resigned after Trump’s Charlottesville comments, he explained that his “decision to resign [was] in response to [Trump’s] attacks on core values of the United States.”<sup>137</sup> Similarly, the Ambassador to Panama resigned “because the traditional core values of the United States . . . have been warped and betrayed.”<sup>138</sup>

Several resignations invoked oaths: contending that a previously sworn oath now compelled the writer to resign or that President Trump (or a Trump appointee) had violated their oaths.<sup>139</sup> A State Department official who resigned the day before Trump’s inauguration wrote that “honest adherence to my oath dictates that I withhold support” from Trump because he is “a threat to our constitutional order. . . . [D]efending the Constitution and performing the duties of my office in an Executive Branch under Mr. Trump are incompatible.”<sup>140</sup> In a joint resignation letter, members of the National Infrastructure Advisory Council (NIAC) wrote that, “[we each] took an oath to support and defend the Constitution of the United States . . . Today, that oath compels me to resign.”<sup>141</sup>

Several of the resignations prompted by the Trump administration’s militarized response to the George Floyd protests also alluded to oaths. Defense Science

136. Democracy Now!, *supra* note 97.

137. Letter from Daniel M. Kammen to the President (Aug. 23, 2017), Daniel M. Kammen (@dan\_kammen), TWITTER (Aug. 23, 2017, 10:15 AM), [https://twitter.com/dan\\_kammen/status/900360794231013376](https://twitter.com/dan_kammen/status/900360794231013376) [<https://perma.cc/VNV2-DR6E>].

138. Rank, *supra* note 135; *see also* Letter from Elizabeth Shackelford, Diplomat, to Mike Pompeo, Secretary of State (Nov. 7, 2017), *available at* <https://assets.documentcloud.org/documents/4325020/Shackelford.pdf> [<https://perma.cc/M2KH-UYHE>] [hereinafter Shackelford resignation letter] (explaining that she joined the government “in order to promote U.S. interests and values overseas” and knows “the potential of the State Department to protect U.S. citizens’ interests and advance our core values”).

139. A former Office of Legal Counsel lawyer made both assertions. Newland, *supra* note 71 (“Eventually, I decided that the responsibilities entailed in my oath were incompatible with the expectations of my job.”); Newland, *supra* note 67 (“I remained committed to trying to uphold my oath even as the president refused to uphold his.”).

140. Letter from Diplomatic Security Service Supervisory Special Agent T.J. Lunardi to Secretary of State John F. Kerry (Jan. 19, 2019), reproduced in *Diplomatic Security Agent With 17-Year Service Resigns Over Trump*, DIPLOPUNDIT (March 7, 2017, 12:36 AM), <https://diplopundit.net/2017/03/07/diplomatic-security-agent-with-17-year-service-resigns-over-trump/> [hereinafter Lunardi resignation letter]. When Science Envoy Daniel Kammen resigned, he wrote that, “continu[ing] in my role under your administration would be inconsistent with the principles of the United States Oath of Allegiance to which I adhere.” Kammen Letter, *supra* note 137. The Oath of Allegiance is required of newly naturalized citizens, 8 C.F.R. § 337.1(a), while Kammen appears to be a natural born citizen, in that his C.V. indicates that he was born in Cambridge, Mass. Daniel Kammen CV, <http://dialogoaa.com.ar/cvkammene.doc> [<https://perma.cc/7TLK-HFUE>].

141. NIAC Resignation Letter (Aug. 21, 2017), *available at* [https://www.nextgov.com/media/gbc/docs/pdfs\\_edit/082417jm1.pdf](https://www.nextgov.com/media/gbc/docs/pdfs_edit/082417jm1.pdf) [<https://perma.cc/KFG3-MS6Z>] [hereinafter NIAC Resignation Letter]; *see also* Letter from the President’s Committee on Arts & Humanities, *supra* note 83 (we “took a patriotic oath to support and defend the Constitution of the United States against all enemies, foreign and domestic”).



Board member James Miller argued that Secretary of Defense Mark Esper violated his oath of office and President Trump “violated his oath to ‘take care that the laws be faithfully executed’” when the administration dispersed law-abiding protesters near Lafayette Square “using tear gas and rubber bullets—not for the sake of safety, but to clear a path for a presidential photo op.”<sup>142</sup> Speaking directly to Esper, Miller wrote:

You may not have been able to stop President Trump from directing this appalling use of force, but you could have chosen to oppose it. Instead, you visibly supported it. . . . I hope this letter of resignation will encourage you to again contemplate the obligations you undertook in your oath of office.<sup>143</sup>

Another Defense Department employee explained that after the Lafayette Square incident, he resigned “because I lost faith in the courage of the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to refuse unlawful orders from the President.”<sup>144</sup>

### c. Areas of Sharpest Disagreement

As is clear from coverage of administration resignations, several issues repeatedly prompted federal officials to resign in protest. One of the most prominent themes was Trump’s policies and rhetoric undermining human rights, democracy, and our democratic allies.

An NSC official whose resignation was prompted by Trump’s first Muslim ban explained that “the administration was attacking the basic tenets of democracy.”<sup>145</sup> A foreign service officer who resigned in November of 2017 complained of the administration’s “failure to promot[e] and defend[] human rights and democracy,”<sup>146</sup> and a Defense Intelligence Agency analyst who resigned after the administration’s militarized response to the George Floyd protests wrote that he had “seen up close the president’s disdain for democratic values . . . [and] was appalled by the ways [Trump] actively undermined . . . democratic principles.”<sup>147</sup>

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142. James N. Miller, *A Letter to Defense Secretary Mark Esper*, WASH. POST (June 2, 2020), <https://www.washingtonpost.com/opinions/2020/06/02/secretary-esper-you-violated-your-oath-aiding-trumps-photo-op-thats-why-im-resigning/> [<https://perma.cc/UFY8-WHJK>].

143. *Id.*

144. Kyle Murphy, *I Resigned from U.S. Government After My Own Leaders Began to Act Like the Autocrats*, JUST SEC. (Aug. 13, 2020), <https://www.justsecurity.org/72008/i-resigned-from-u-s-government-after-my-own-leaders-began-to-act-like-the-autocrats-i-analyzed/> [<https://perma.cc/UP7T-ZPFT>].

145. Rumana Ahmed, *I Was a Muslim in the Trump White House—and I Lasted Eight Days*, THE ATLANTIC (Feb. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/02/rumana-ahmed-trump/517521/> [<https://perma.cc/DCV5-4XUJ>].

146. Shackelford resignation letter, *supra* note 138.

147. Murphy, *supra* note 144; *see also* Letter from Steve Blank, Member, Defense Business Board to Christopher Miller, Acting Secretary of Defense (Dec. 7, 2020), <https://steveblank.com/2020/12/07/the-rapture-happened-but-i-wasnt-called/> [<https://perma.cc/NGR4-6LYW>] [hereinafter Blank resignation letter] (Defense Business Board Member Steve Blank invoked “values” when he resigned, writing, “For the last century the U.S. was a global power that . . . stood for a set of values that set us apart”).

When Secretary of Defense James Mattis resigned in protest of President Trump's decision to withdraw U.S. troops from Syria, he devoted three paragraphs of his resignation letter to explaining his "core belief[s]" about "treating allies with respect" and "being clear-eyed about . . . malign actors," such as China and Russia.<sup>148</sup>

A State Department official who resigned in protest the day before Trump's inauguration provided one of the most thorough explanations of these concerns.<sup>149</sup> He listed more than half a dozen of Trump's civic sins, finding that "[t]hey point the way to authoritarianism."<sup>150</sup> Acknowledging the argument that "people of conscience" should remain in order "to blunt [Trump's] excesses [and] . . . resist his agenda," he nonetheless concludes that "accommodation of Mr. Trump's administration [would] make me complicit in his assault on our Republic." Echoing the risk of Luban's "nightmare scenario," he notes that "the graveyard of failed democracies is littered with the epitaphs of those who believed collaboration could moderate the evil of authoritarianism."<sup>151</sup>

Another recurring theme in these resignations was the Trump administration's interference with or discounting of science, expertise, and even truth. A State Department official who resigned after Trump withdrew from the Paris climate accords explained that he "worr[ies] about the denigration of expertise at a time when a complex world demands it more than ever. . . . [W]e muzzle science as the world wonders if we value empirical evidence at all."<sup>152</sup> The former Director of the Biomedical Advanced Research & Development Authority complained about the administration's "hostility to the truth" and disregard for science.<sup>153</sup> The members who resigned from NIAC explained that the Administration is not "responsive to sound advice received from experts and advisors on these matters."<sup>154</sup> Similarly, when Daniel Kammen resigned as State Department Science

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148. Mattis resignation letter, *supra* note 133. Mattis added that President Trump has a "right to have a Secretary of Defense whose views are better aligned with yours," implying, of course, that Trump did not share these "core beliefs." *Id.*

149. Lunardi resignation letter, *supra* note 140.

150. *See id.*

"In his words and his deeds, Mr. Trump has demonstrated repeatedly that he little understands and less respects these tenets of our civic creed. He has threatened the independent media. He has called for the imposition of religious tests and the commission of war crimes. He has incited hatred and violence. He has mocked and bullied the most vulnerable among us. He has empowered racists and emboldened bigots. He has made open league with a despot who seeks to harm our national interests. He disregards and distorts the truth for no other apparent purpose than to maintain his followers in a frenzy of confusion and anger."

151. *Id.*

152. Rank, *supra* note 135.

153. Bright, *supra* note 125 ("Public health guidance . . . drafted by career scientists . . . has been repeatedly overruled by political staff . . . Federal agencies, staffed with some of the best scientists in the world, continue to be . . . ignored.").

154. NIAC Resignation Letter, *supra* note 141.

Envoy, he complained that Trump had “undermine[d] energy and environmental research.”<sup>155</sup> An op-ed announcing why six members of PACHA resigned stated that the “Trump Administration . . . seeks zero input from experts to formulate HIV policy.”<sup>156</sup> In late 2020, two Trump appointees resigned because Trump prioritized loyalty over expertise. A member of the Defense Business Board resigned after the Trump administration “abrupt[ly] terminat[ed] . . . more than half of the . . . Board and . . . replace[d them] with political partisans,”<sup>157</sup> while a member of another board quit because the administration issued a plan that would “replace apolitical expertise with political obeisance.”<sup>158</sup>

### CONCLUSION

Professor Luban’s symposium article gives us a detailed description and nuanced analysis of how two lawyers in the Nazi government participated in and resisted Nazi horrors, and it develops several concepts—“desk mitigator,” “desk perpetrator” and “operational maneuvering room” to help us understand the morality of their situation. While it is important not to overstate the parallels between Nazi government horrors and Trump administration abuses, the concepts that Luban developed in this symposium can also help us analyze and understand how federal officials responded to the moral challenges of serving in the Trump administration.

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155. Kammen Letter, *supra* note 137.

156. Schoettes, *supra* note 78.

157. Blank resignation letter, *supra* note 147. This was not an isolated incident. “Over the last year the administration began replacing members of every defense advisory board with party loyalists.” *Id.*

158. Sanders resignation letter, *supra* note 119.