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The Joint Staff Report makes many assertions and contains many factual allegations, which may or may not be contested. However, only one issue is described as ethical. It is this issue that the Democratic Staff memo mainly addresses. Stated most favorably from the Joint Staff perspective, the issue is:

Assuming that Assistant Attorney General Tomas E. Perez (Civil Rights Division) was mainly responsible for reaching the agreement with the City of St. Paul described below – even assuming that the agreement would not have happened without his intervention -- but assuming, too, that Assistant Attorney General Tony West (Civil Division), who had ultimate authority to decide whether or not to intervene in *Newell* and *Ellis*, chose not to do so after considering their merits, the United States interest in preserving the disparate impact test under the Fair Housing Act, and the U.S. interest in ensuring (so far as possible) that a Supreme Court ruling on the proper test be based on favorable facts, did Perez violate any rule of professional conduct (ethics rule) governing him as a lawyer by encouraging others at DOJ or HUD (or elsewhere) to refrain from intervention in *Newell* and *Ellis* in exchange for St. Paul's agreement to withdraw the *Magner* appeal?

The Joint Staff Report argues that linking the two cases – withdrawal of the *Magner* appeal and U.S. non-intervention in the two Qui Tam actions, *Newell* and *Ellis* (hereafter *Newell*) – was unethical. However, it cites no professional conduct rule, no court decision, no bar ethics opinion, and no secondary authority that supports this argument. In fact, no authority supports it.

The duty of lawyers for the United States is no different from the duty of lawyers generally, namely to pursue the goals of their client within the bounds of law and ethics. Clients generally identify those goals, but when the client is the government, its lawyers often do so, sometimes in conjunction with agencies, elected officials, or other representatives of the government who are authorized to speak for the client.

The United States had interests in *Magner* and also in *Newell*. Qui Tam actions are brought to vindicate interests of the sovereign, here the U.S. The U.S. interest was to recover money assuming, of course, that *Newell* had merit. The U.S. interest in *Magner* was to avoid Supreme Court review of a legal issue in *Magner*, whose facts were seen as unfavorable to a decision that would sustain a disparate impact test for violations of the Fair Housing Act. Perez believed that preserving the disparate impact test was important to his client and more important than intervention in *Newell*.

I assume that Perez persuaded others with decision-making authority, and in particular West, that withdrawing the *Magner* appeal was more important to U.S. interests than intervention in *Newell*. I also assume, though it is contested, that *Newell* was meritorious and that but for the agreement with St. Paul, the United States would have intervened in *Newell* and perhaps prevailed.

Of course, it is legitimate to argue that Perez, West, and others made the wrong choice and that pursuing *Newell* was more important to U.S. interests than how the Supreme Court would ultimately resolve the issue in *Magner*. I have no view on that question. It is not an ethical question. The question I can answer is whether Perez could ethically make the decision he did and which he encouraged others to accept. Could he ethically decide, when faced with a situation where only one of two possible choices could be made, and where each choice offered a benefit to his client, to choose option A over option B?

The answer is unequivocally yes. Perez was not choosing to advantage one client over another client. There was no conflict here between the interests of two clients because there was only one client. That client, we are assuming, had two interests – withdrawal of *Magner* or intervention in *Newell* -- but under the circumstances, it could pursue only one. Perez made a choice between these options and encouraged others to agree. His conduct violates no ethical rule that governs lawyers. He was acting in what he believed to be the best interests of his client, which is what lawyers are required to do.

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