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Contemplating Free Speech and Congressional Efforts to Constrain Legal Advice

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"Congress often forgets about the First Amendment, but lawyers don't."
– Justice Anthony Kennedy, Oral Argument in *Milavetz, Gallop & Milavetz v. United States*[1]

Introduction

This essay addresses an important intersection between attorney regulation and free speech that has received little attention by the legal academy — the question of whether the First Amendment protects the professional speech of lawyers when they give advice. Two cases heard by the United States Supreme Court during the 2009 Term raised this very issue. Both cases tested Congress's efforts to constrain the advice lawyers may provide to clients and the public. In *Milavetz, Gallop & Milavetz, P.A., et al. v. United States*, lawyers and their clients challenged a bankruptcy regulation that bans lawyers from offering advice about the accumulation of additional debt in contemplation of filing for bankruptcy. In *Holder v. Humanitarian Law Project*, a retired administrative law judge and others argued that a federal anti-terrorism statute unconstitutionally prohibits the offering of legal expertise and advocacy for nonviolent and lawful peacemaking activities. Read together, these cases serve as a wake-up call for scholars and practitioners alike to focus on the consequences of federal legislative interference in the attorney-client relationship and the free speech rights of attorneys and their clients.

The delivery of factual, full, and frank legal guidance is central to the attorney-client relationship.[2] Equally important is the lawyer's role as advisor for navigating and, when necessary,

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1 Milavetz, Gallop & Milavetz v. United States, Nos. 08-1119, 08-1225, Oral Arg. Tr. at 8.

2 *See, e.g.,* Fred Zacharias, *Lawyers as Gatekeepers,* 41 SAN DIEGO L. REV. 1387, 1391-92 (2004) ("At a minimum, lawyers owe clients information, including information that suggests that the clients' proposed or completed conduct is criminal (or wrongful in other respects). Especially when a client may initially be uninformed, lawyers owe it to the client to identify and explain all the ramifications of particular behavior . . . ."). *See also* notes 51-57, *infra* and accompanying text, discussing the ethical obligations of attorneys to advise their clients as required by professional conduct rules.

challenging the law.[3] As Justice O'Connor, writing for the majority in *Florida Bar v. Went For It, Inc.*, explained, "[t]here are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer."[4] It is difficult to imagine a matter of legal representation more vital than the advice a lawyer provides to a client. Given the importance of legal advice,[5] it may come as a surprise to learn that the constitutional protection afforded to this category of speech is unclear,[6] if it is even covered at all.[7]

The Supreme Court, however, may soon offer some direction in the wake of the *Milavetz* and *Humanitarian Law Project* cases. While the Court avoided the First Amendment question in upholding a narrowed construction of the bankruptcy statute in *Milavetz* and, at the time of this writing, had yet to rule on the anti-terrorism statute *in Humanitarian Law Project*, it is critical to understand how Congress increasingly has taken up limitations on legal advice as a mechanism for controlling the behavior of those most in need of a lawyer's assistance, as evidenced by these laws. Accordingly, this essay consists of two parts. Part I summarizes the two cases and explains how the federal statutes at issue in each run afoul of the First Amendment as well as compromise attorneys' ethical obligations to their clients. Part II concludes that regardless of the outcomes in these particular matters, scholars and practitioners should heed the warnings delivered by the cases about the consequences associated with Congress's efforts to limit legal advice.

Part I. Two Examples of Congressional Constraints on Legal Advice: A Summary of *Milavetz, Gallop & Milavetz, P.A., et al. v. United States* and *Holder v. Humanitarian Law Project*

A. *Milavetz, Gallop & Milavetz, P.A., et al. v. United States*

Milavetz, Gallop & Milavetz, P.A., et al. v. United States[8] involved the critical issue of an attorney's right to give advice unconstrained by government regulation and, correspondingly, a client's right to receive that advice. Two attorneys, their law firm, and two of their clients challenged

3 As Alexis de Tocqueville observed in his seminal DEMOCRACY IN AMERICA 348 (1870), attorneys are "are the most powerful existing security against the excesses of democracy" given "the authority . . . entrusted to members of the legal profession and the influence that these individuals exercise in the government." Though perhaps now "rather out of fashion," Professor Robert Gordon observes that the republican tradition or virtue "influenc[ing] Tocqueville's view of American lawyers," remains a concept that "in fact we cannot do without." Robert W. Gordon, *The Independence of Lawyers,* 68 B.U. L REV. 1, 16-17 (1988).

4 Florida Bar v. Went For It, Inc., 515 U.S. 618, 634 (1995) (*citing* Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 (1991); In re Primus, 436 U.S. 412 (1978)).

5 A comprehensive discussion of the First Amendment value in legal advice is beyond the scope of this essay. I take up this discussion in a forthcoming article, *Attorney Advice and the First Amendment*, in which I establish how Supreme Court precedent on lawyer speech and relevant constitutional theory support strong First Amendment protection for attorney advice.

6 *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions,* 147 U. PA. L. REV. 771, 772 (1999) ("Despite the century-old recognition of the regulation of professions, we still have... no paradigm for First Amendment rights of attorneys . . . when they communicate with their clients.").

7 *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones,* 90 CORNELL L. REV. 1277, 1284, 1343 (2005) (observing that the Supreme Court "has never squarely confronted" the First Amendment status of "professional advice to clients" and suggesting that at least some "advice by a lawyer . . . should be regulable").

8 541 F.3d 785 (8th Cir. 2008), *cert. granted* 129 S.Ct. 2766 (2009).

provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),[9] a statute enacted by Congress in response to abuse and fraud within the bankruptcy system, targeting both debtors and attorneys in order to thwart such practices.[10] Among the changes ushered in by the BAPCPA are regulations applicable to "debt relief agencies," a term construed by the majority of courts considering its meaning (and ultimately the Supreme Court) to include attorneys.[11] These regulations include a ban on legal guidance about incurring more debt before declaring bankruptcy.[12] The BAPCPA establishes significant penalties for attorneys who violate the ban on bankruptcy-related advice, including civil damages and enforcement actions by government officials.

The *Milavetz* plaintiffs argued that the BAPCPA ban prevents lawful advice, such as recommending the refinance of a home mortgage before filing for bankruptcy to take advantage of a lower interest rate or to extend the time period for paying off the loan. They maintained that the ban, as a content-based limitation on speech, should be struck down under First Amendment strict scrutiny review.[13] Moreover, they claimed that the congressional restriction undermines an attorney's responsibility to render competent, independent, and candid advice. In defense, the government suggested that Congress intended to ban only unlawful advice, for example counseling a client to take out new loans with the intent to abuse the process knowing that the debt soon will be wiped clean.[14] Furthermore, the government suggested that a different standard of First Amendment review should be applied to attorney advice, a more lenient standard applicable to ethical regulations on attorneys, as set forth in *Gentile v. State Bar of Nevada*.[15]

A divided panel of the Eighth Circuit found that under any level of First Amendment scrutiny the provision was "unconstitutionally overbroad"[16] because it prohibited unlawful advice

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9 Pub.L.No. 109-8, 119 Stat. 23 (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ008.109.pdf.

10 According to the legislative record, a primary purpose of the BAPCPA is to address "misconduct by attorneys and other professionals" and "abusive practices by consumer debtors who, for example, knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief." H.R.Rep. No. 109-31, pt. 1, at 5, 15 (2005) (internal quotation omitted), as reprinted in 2005 U.S.C.C.A.N. 88, 92, 101.

11 The BAPCPA defines the term "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration. . ." 11 U.S.C. § 101(12A) (2006), *available at* http://www.law.cornell.edu/uscode/html/uscode11/usc_sec_11_00000101----000-.html.

12 The BAPCPA provides in pertinent part that "[a] debt relief agency shall not—advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing [for bankruptcy]." 11 U.S.C. § 526 (a) (4) (2006), *available at* http://www.law.cornell.edu/uscode/uscode11/usc_sec_11_00000526----000-.html.

13 *See* Milavetz, 541 F.3d at 792 (citing Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622 (1994)). Strict scrutiny requires the government to demonstrate a compelling interest in regulating the speech at issue and that the least restrictive means possible are employed. *See id.*

14 The court observed: "According to the government, [this section] should be interpreted as merely preventing an attorney from advising [a debtor-client] to take on more debt in contemplation of bankruptcy when the incurrence of such debt is done with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge." *Id.* at 793.

15 *See id.* at 793 (citing Gentile v. State Bar of Nev., 501 U.S. 1030 (1991)). This standard "balance[s] the First Amendment rights of attorneys against the government's legitimate interest in regulating the activity in question—the provision of advising assisted persons to incur more debt in contemplation of bankruptcy—and then determine[s] whether the regulations impose 'only narrow and necessary limitations on lawyers' speech." *Id.* (quoting Gentile, 501 U.S. at 1075).

16 *See Milavetz*, 541 F.3d at 793.

(as the government maintained) as well as "advice constituting prudent prebankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws."[17] Furthermore, the Eighth Circuit declared that the advice prohibition "prevents attorneys from fulfilling their duty to clients to give them appropriate and beneficial advice."[18] The Supreme Court disagreed.

The Supreme Court upheld the Eighth Circuit's determination that lawyers are debt relief agencies, but reversed the finding of overbreadth on the advice ban.[19] Justice Sotomayor, writing the essentially unanimous majority opinion, explained:

> After reviewing these competing claims, we are persuaded that a narrower reading … is sounder, although we do not adopt precisely the view the Government advocates. The Government's sources show that the phrase "in contemplation of" bankruptcy has so commonly been associated with abusive conduct that it may readily be understood to prefigure abuse. …[W]e think the phrase refers to a specific type of misconduct designed to manipulate the protections of the bankruptcy system … [and] conclude that [it] prohibits a debt relief agency [or attorney] only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose.[20]

The Court explicitly declined, however, to "consider whether the statute so construed withstands First Amendment scrutiny,"[21] but did observe that "it is hard to see how a rule that narrowly prohibits an attorney from affirmatively advising a client to commit this type of abusive prefiling conduct could chill attorney speech or inhibit the attorney-client relationship."[22]

B. *Holder v. Humanitarian Law Project*

A second federal statute that limits the guidance that attorneys can give to their clients was challenged in *Holder v. Humanitarian Law Project*.[23] While this case touched on a range of concerns that are well beyond the delivery of legal advice, certain provisions at issue restricted the advice lawyers may deliver to clients. The Antiterrorism and Effective Death Penalty Act (AEDPA)[24] and its amendment, the Intelligence Reform and Terrorism Prevention Act (IRTPA),[25] criminalize "expert advice or assistance"[26] given to any group designated as "a foreign terrorist organization"[27]

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17 *Id.* As examples of such prudent (and lawful) planning, the court listed mortgage refinancing "to free up additional funds to pay off other debts," and the purchase of "a reliable automobile before filing for bankruptcy so that the debtor will have dependable transportation to travel to and from work." *Id.* at 794 (citing Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 579 (2005)).
18 *Milavetz*, 541 F.3d at 793.
19 Milavetz, Gallop & Milavetz, P.A. v. U.S., Nos. 08-1119, 08-1225, slip op. at 3 (U.S. Mar. 8, 2010). Justices Scalia and Thomas concurred in the judgment and concurred in part with the opinion of the Court.
20 *Id.* at 8.
21 *Id.* at 11.
22 *Id.*
23 Humanitarian Law Project v. Mukasey, 552 F.3d 916 (9th Cir. 2009), *cert. granted,* Holder v. Humanitarian Law Project, 130 S. Ct. 534 (2009), *consolidated with* Humanitarian Law Project v. Holder, 130 S. Ct. 534 (2009).
24 Antiterrorism and Effective Death Penalty Act (AEDPA), 8 U.S.C. § 1189 (2006).
25 Intelligence Reform and Terrorism Prevention Act (IRTPA), 18 U.S.C. § 2339A (2006).
26 *Id.* at § 2339A(b)(2)-(3).
27 *See* AEDPA, *supra* note 25, § 1189.

even if such support is for lawful, nonviolent activities or humanitarian efforts.[28] "Expert advice or assistance" is defined as "scientific, technical, or other specialized knowledge," which could include legal knowledge.[29]

The AEDPA prohibition on expert advice or assistance was attacked by the Humanitarian Law Project and a retired administrative law judge who, among others, sought to provide support to the Kurdistan Workers Party and the Liberation Tigers of Tamil Eelam for nonviolent and lawful peace-making activities. This support included "offer[ing] their legal expertise in negotiating peace agreements."[30] In addition, as the Ninth Circuit pointed out, "[a]t oral argument, the government stated that filing an *amicus* brief in support of a foreign terrorist organization would violate [the] prohibition against providing 'expert advice or assistance.'"[31] Accordingly, the Ninth Circuit held that the "other specialized knowledge" portion of the prohibition on "expert advice or assistance" language was void for vagueness as applied because it "cover[s] constitutionally protected advocacy."[32] The Ninth Circuit justified its position by reasoning that the "requirement for clarity is enhanced when criminal sanctions are at issue or when the statute abuts upon sensitive areas of basic First Amendment freedoms."[33]

On petition to the Supreme Court, Attorney General Holder made the case that the provisions are not vague and, "in any event . . . regulate[ ] conduct, not speech, and do[] not violate the First Amendment . . . ."[34] In opposition, the Humanitarian Law Project and others argued that the speech at issue is pure political speech—namely "to lobby Congress, to teach and advise on human rights, to promote peaceful resolution of political disputes, and to advocate for the human rights of minority populations"—deserving of "the First Amendment's highest protection."[35] Further, they countered that the "expert advice provisions criminalize speech on the basis of its content," and maintained that the Ninth Circuit's determination should be affirmed.[36]

C. Other Congressional Efforts to Constrain Legal Advice

The outcomes of *Milavetz* and *Humanitarian Law Project* will have significant consequences not only for individuals seeking guidance about bankruptcy or peace-making activities, but also for those desiring advice about a number of additional areas where Congress may decide to legislate away the

28 *See* IRTPA, *supra* note 26 at § 2339B(a).
29 *Id.* at § 2339A(b)(3).
30 *Mukasey*, 552 F.3d at 921 n.1.
31 *Id.* at 930. It should be noted that on brief to the Supreme Court the government switched its position. *See, e.g.*, Brief of Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues as Amicus Curiae Supporting of Petitioners at 26 n. 9, *Holder*, 130 S. Ct. 534 (Dec. 23, 2009) (Nos. 08-1498, 09-89) ("The government was incorrect in arguing below that submitting an *amicus* brief on a DFTO's behalf would be prohibited as 'expert advice or assistance' under the statute."). But at oral argument Solicitor General Elena Kagan maintained the government's position that the statute bars advocacy such as the filing of an *amicus* brief. *See* Tr. of Oral Argument at 46-47, *Holder*, 130 S. Ct. 534 (Dec. 23, 2009) (Nos. 08-1498, 09-89).
32 *Id.* at 930.
33 *Id.* at 928 (citation and internal punctuation omitted).
34 Petition for Writ of Certiorari at 10, *Holder*, Nos. 08-1498, 09-89, 130 S. Ct. 534 (June 4, 2009) (Nos. 08-1498, 09-89).
35 Opening Br. for Humanitarian Law Project, *Holder*, 130 S. Ct. 534, (Nov. 16, 2009) (Nos. 08-1498, 09-89).
36 Opposition to Petition for Writ of Certiorari, *Holder*, 130 S. Ct. 534 (June 6, 2009) (Nos. 08-1498, 09-89), at 26 (internal punctuation omitted).

lawyer's ability to advise her client.[37] Allowing the bans on attorney advice in the bankruptcy and anti-terrorism statues to stand increase the probability that Congress's interference in the attorney-client relationship will continue.[38] Even if the Court strikes down the legislative limit in *Humanitarian Law Project* as unconstitutional, given the ruling in *Milavetz*, it is likely that courts will continue to hear similar challenges given Congress's demonstrated commitment to controlling activity perceived as harmful or abusive by placing limits on the advice lawyers provide to clients.

Part II. The Consequences of Congressional Constraints on Legal Advice

Congressional interference with the advice-giving function of the attorney-client relationship presents serious concerns. As American Bar Association President Carolyn Lamm has explained:

> Unfortunately, the present system of regulation of lawyers [by the highest court of each state] is being eroded through multiple changes enacted at the federal level, without the needed study, thought and consensus and without central guiding principles. A series of piecemeal federal laws and regulations threatens to undermine state judicial branch regulation of lawyers and to erode several of the cornerstones on which is built the lawyer-client relationship that protects both clients and the public. [39]

Undermining state regulation of lawyers is not the only concern at stake. Another critical consequence resulting from Congress's regulation of attorney advice identified by Professor John Leubsdorf is that, "the lawyer increasingly becomes not just an advocate and advisor but a gatekeeper as well, so that not just the details of legal representation but its rationale and function are changing."[40]

Recognizing the importance of advice to the lawyer-client relationship and to our democratic form of government, it necessarily follows that congressional restraints on this category of speech be viewed with skepticism. This is not to say that Congress may never pass a statute containing a

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37 *See, e.g.,* Carolyn B. Lamm, *Memo to Washington: Hands Off Lawyers, Piecemeal Federal Laws and Rules Threaten to Undermine State Judicial Branch Regulation of the Profession,* 9/21/2009 NAT'L L. J. 62, (Col. 1) (discussing the consequences of Congressional involvement in lawyer regulation and criticizing federal laws that "incorrectly identify lawyers and other professionals" as "creditors" or "debt relief agencies" or "providers of financial products or services" as "interfere[ing] with the states' rights to regulate lawyers and protect consumers of legal services."). For another recent example of federal legislation hindering lawyers' advice, *see* the Wall Street and Consumer Protection Act of 2009, H.R. 4173 (111th Cong., passed Dec. 11, 2009). For an example of an earlier federal statutory constraint on legal advice, *see* J. Matthew Miller, *Note, Balancing the Budget on the Backs of America's Elderly—Section 4734 of the Balanced Budget Act: Criminalization of the Attorney's Role as Advisor and Counselor,* 29 U. MEM. L. REV. 165, 197 (1998), arguing that section 4734 of the Balanced Budget Act of 1997 unconstitutionally prohibited attorneys from counseling elderly clients about legal actions regarding Medicaid issues.

38 *See, e.g.,* David L. Hudson, Jr., *A Debt-Defying Act: Courts say part of embattled bankruptcy law violates First Amendment,* A.B.A.J. (Jan. 2009) (quoting Joseph R. Prochaska, immediate-past chair of the Consumer Bankruptcy Committee in the ABA Section of Business Law, as stating that cases like *Milavetz* "could have a spillover outside the bankruptcy context. . . . For example, Congress could apply the same rationale to the tax arena and start to regulate the content of advice that tax attorneys give to clients about lawful ways to minimize tax liabilities.").

39 Carolyn B. Lamm, *Memo to Washington: Hands Off Lawyers, Piecemeal Federal Laws and Rules Threaten to Undermine State Judicial Branch Regulation of the Profession,* 9/21/2009 NAT'L L. J. 62, (Col. 1).

40 John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 960 (2009).

restriction on legal advice. But any constraint ought to satisfy strict scrutiny; that is, be necessary to further a compelling government interest and narrowly tailored to do so using the least restrictive means possible.[41] This is especially true when the advice relates to a client's exercise of rights under a federal statute or work with controversial organizations through nonviolent, peaceful means. The advice bans found in the BAPCPA and the AEDPA fail the strict scrutiny test. Even if the government could demonstrate a compelling interest in regulating the advice rendered by attorneys in these contexts, because these bans cover lawful[42] as well as unlawful advice it is difficult to reach any conclusion other than that they are neither narrowly tailored nor the least restrictive means possible to further the government's interest.

The potential harm associated with statutes like those at issue in *Milavetz* and *Humanitarian Law Project* is that, as the Supreme Court has explained in a similar context, "[r]estricting … attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys."[43] In recognizing the importance of "an informed, independent bar,"[44] the Court further has observed that "[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge."[45] Congress's attempts to restrict lawyers' advice insulate the underlying federal statutes from meaningful or effective legal challenge.

Not only do Congressional constraints like the BAPCPA and AEDPA provisions present serious First Amendment concerns with regard to their limits on the delivery of legal advice, but they also contradict an attorney's established ethical duties. For example, the American Bar Association's Model Rules of Professional Conduct (Model Rules) require that an attorney "provide competent representation,"[46] "exercise independent professional judgment,"[47] "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,"[48] and "render candid advice."[49] To fulfill these responsibilities an attorney must explain to a client all potential alternatives and consequences associated with a particular situation. This may demand, in some cases, advice about a course of action designed to challenge a law.[50]

The Model Rules attempt to strike a balance in responding to this tension. For example, Model Rule 1.2(d) provides:

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41 *See supra* note 13.

42 Notwithstanding the narrowed construction required by the Court's holding in *Milavetz*, it seems that some otherwise lawful advice is now off limits for lawyers to provide. *See, e.g.,* Alas, Narrowed Bankruptcy Gag Lives, Wash Park Prophet Blog, Mar. 8, 2010, *available at* http://washparkprophet.blogspot.com/2010/03/narrowed-bankruptcy-gag-rule-lives.html (last visited Mar. 9, 2010) (listing concerns for attorneys offering bankruptcy advice in the wake of *Milavetz* such as the continued inability to offer full advice and the potential breach of attorney-client privilege should it become necessary to determine whether an attorney has violated the statute).

43 Legal Services Corp. v. Velazquez, 531 U.S. 533, 544 (2001).

44 *Id.* at 1050 (citations omitted).

45 *Id.* at 548.

46 MODEL RULES OF PROFESSIONAL CONDUCT 2009, R. 1.1 (2009).

47 MODEL RULES OF PROFESSIONAL CONDUCT 2009, R. 2.1 (2009).

48 MODEL RULES OF PROFESSIONAL CONDUCT 2009, R. 1.4 (b) (2009).

49 *Id.*

50 *See, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT 2009, Preamble [5] ("While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.").

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[51]

This rule satisfies the government's concern that an attorney not endorse or participate in a client's crime or fraud. At the same time, the rule allows an attorney to advise a client, when appropriate, about legal strategies for testing or challenging a law. The Comments to the rule recognize that "[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."[52] The BAPCPA and the AEDPA restrictions, on their face, neglect this distinction, with no accommodation for the complexities associated with a lawyer's duties as advisor and advocate, or the need for an independent legal profession.[53] The Supreme Court implicitly acknowledged as much in the *Milavetz* opinion, suggesting that the federal statute's validity hinged upon interpreting it narrowly in conformance with Model Rule 1.2(d).[54]

Conclusion

The cases of *Milavetz* and *Humanitarian Law Project* make clear the crucial First Amendment rights of lawyers and clients that are at stake when Congress endeavors to limit legal advice. Preservation of these rights must be addressed by legal scholars and practitioners in order to protect those in need of legal services and to maintain the democratic rule of law. The results of these cases have considerable repercussions for clients who need complete and accurate legal advice about bankruptcy or humanitarian aid efforts, and for their attorneys who are under ethical obligations to deliver that information. The Supreme Court's rulings in these cases also may adversely impact the ability of attorneys to offer advice in other areas of law. The Court's affirmation of the statutory restriction on legal advice in *Milavetz*, albeit a narrow reading of the restriction, potentially emboldens Congress to impose similar restraints elsewhere in areas such as financial regulation and beyond. Even if the Court strikes down the restriction at issue in *Humanitarian Law Project*, the issues associated with congressional involvement in the attorney-client relationship are unlikely to go away.

51 MODEL RULES OF PROFESSIONAL CONDUCT 2009, R. 1.2 (2009).
52 ABA MODEL RULES OF PROFESSIONAL CONDUCT 2009, R. 1.2, comment 9 (2009).
53 *See, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT 2009, Preamble [11] ("An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.").
54 Milavetz, Gallop & Milavetz, P.A. v. U.S., Nos. 08-1119, 08-1225, slip op. at 10 (Mar. 8, 2010).