

Winter 1990

Defending the Government: Justice and the Civil Division, 23 J. Marshall L. Rev. 181 (1990)

Barbara Allen Babcock

Follow this and additional works at: <http://repository.jmls.edu/lawreview>

 Part of the [Agency Commons](#), [Civil Law Commons](#), [Legal History Commons](#), [Legal Profession Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Barbara Allen Babcock, *Defending the Government: Justice and the Civil Division*, 23 J. Marshall L. Rev. 181 (1990)

<http://repository.jmls.edu/lawreview/vol23/iss2/3>

This Article is brought to you for free and open access by The John Marshall Institutional Repository. It has been accepted for inclusion in The John Marshall Law Review by an authorized administrator of The John Marshall Institutional Repository.

DEFENDING THE GOVERNMENT: JUSTICE AND THE CIVIL DIVISION

BARBARA ALLEN BABCOCK*

INTRODUCTION

A decade has passed since I was Assistant Attorney General in the Department of Justice. Thinking it a ripe, round-yearred time to reflect on my experiences, I readily agreed to join this symposium. I began by dragging out the old files that I had planned to use for many a scholarly article —untouched for the ten years.

As I read once more about pernicious government contractors, treacherous client agencies and territory-grabbing officials, I recalled the wrath beneath the bureaucratic locutions of my memos and letters: “it is with deepest regret;” “under the circumstances,” and “we have no choice but to. . .” Through the remembered rage, I saw the motives of my opponents more benignly and noticed, too, that the landscape of their arguments looked different from a distance.

I also did some reading in the literature on the office and role of the Attorney General, much of which appears in the form of biographies and autobiographies. Here my surprise was at how cyclical the problems are, how much their resolution depends on leadership and character, and how little on institutions. But there is little analytical scholarship on either the office of the Attorney General or the men who have held it; and even less on the Department of Justice and its lawyers.

After providing some background on the Civil Division and a short account of my particular experience there, I address the question of the government lawyer’s role. In my view, the government lawyer plays three parts: representative of the client agency or Congress; representative of the government as a whole; and representative of the public interest. I close with an example of how attention to process can serve to ease, though not eradicate, the occasional conflicts in this tri-partite role.

* Ernest W. McFarland Professor of Law, Stanford University. Professor Babcock was Assistant Attorney General for the Civil Division from 1977-1979.

THE CIVIL DIVISION

The Civil Division is the oldest of the litigating arms of the Department of Justice. It was established in 1868 to handle claims against the government — which in a broad sense it still does. The division represents the United States in its civil litigation. It has no specialty like tax or lands and natural resources, and no program like antitrust or civil rights. Unlike the criminal division, its primary litigating lawyers are mostly located in Washington rather than in the U.S. Attorneys' offices throughout the country.

The breadth of the Civil Division's responsibilities makes it easiest to describe as I just have — in terms of what it is not.¹ The Division's lack of a program or specialty, as well as its broad jurisdiction, afford it some protection from partisan political influence and indeed, on most occasions, from much attention at all. On the other hand, that same breadth makes the division always vulnerable to criticism on some front and forever difficult to control.

One of my first observations about daily life in the Civil Division was that people had an air of being on to a good, but little known, thing. No matter what the Attorney General did or how many officials were indicted or fired, a lawyer in the Civil Division could continue giving sound advice to clients and litigating interesting cases. "We're not a glamour division," the career attorneys told me, but with the powerful implication that this was not a bad thing.

Nevertheless, when I arrived I sensed some lack of collective self-esteem in the division. Only later did I realize that my arrival might have been a contributing factor. Although the hiring practices had changed from the times when the Assistant Attorney General would "visit the Harvard or Yale or Columbia Law School each year to pick out top honor *men* for his needs,"² the numbers of women in the ranks were very low. The Department of Justice has always reflected the maleness of the legal profession, and historically, the Civil Division has been headed by white men from distinguished practices.³

1. I like the rather breathless description of the division in L. HUSTON, *THE DEPARTMENT OF JUSTICE* 120 (1967): "The duties and responsibilities of the Civil Division of the Department of Justice are heavy. The laws it administers are multitudinous; its activities are kaleidoscopic; its impact upon the affairs of citizens is incalculable."

2. See F. BIDDLE, *IN BRIEF AUTHORITY*, 262 (1962) (Biddle was Franklin Roosevelt's Attorney General); and Jost, *The Women at Justice*, 75 A.B.A. J. 54 (Aug. 1989). This latter source, subtitled "Meese was part of the problem. Is Thornburgh the solution?", is an excellent account of the history of women in high positions in Justice. Jost concludes that the department is still a very male institution.

3. The only woman Chief of the Civil Division before my tenure was Carla Hills, who was Assistant Attorney for almost a year before she became Secretary at HUD in the Ford administration. Her practice background was very much like that of her

My background as a litigator, an administrator with experience in Washington (albeit heading the Public Defender), a teacher and scholar of civil procedure at Stanford, qualified me too— but it had not been the usual route to the job. I came to head the Civil Division because President Carter sought to appoint women to high-level positions. When I first arrived, journalists often asked: “How do you feel about getting your job because you are a woman.” I developed a stock answer: “It’s far better than *not* getting it because I’m a woman.” I now see that my insouciance may have been unsettling to many of the lawyers in the division.

I probably added to their distress by calling the division together soon after I took the job so that I could tell them who I was and what I expected. I mentioned in passing that I was a feminist. I intended this as shorthand for a view of life and used it as I would use other applicable descriptions—a liberal, a Democrat, a workaholic, a litigator, a procedure buff. But I could not have struck more horror into the people I was trying to inspire. My one word was translated into a plan to fire all the men, hire and promote only women, and default in defending all sex discrimination suits against the government.

As the Civil Division and I came to know each other, however, I realized that the low morale sprang from sources deeper than the personality and gender of the Assistant Attorney General. The division was not suffering any shark-like attacks, but rather a steady nibbling away of its authority; it lacked adequate resources and organization to protect its far-flung domain.

At the suggestion, and with the support of the top career lawyers, I decided to undertake a major reorganization of this old institution. One of the side benefits of this brand of reform was that it effectively insulated me from the press. The difficulties and delights of reorganization do not make good copy. When I told reporters my reorganization stories, their eyes glazed over and soon they stopped calling altogether.

Ten years later, I remember the creative pleasures of bringing some order to the Division, making it comprehensible to the outsider, efficient for those within, and shaping it so that it could better use and attract funds and thus resist efforts to strip it of central litigating authority. But reorganization has no more widespread fascination now than it did then, so I will move on after offering the barest outline of what we accomplished.

The Division had never really been organized at all, but rather had just grown as Congress passed legislation that gave rise to new

areas of litigation. Defending or enforcing the new legislation in court often fell to the Civil Division and a special section to handle the work would be established with new lawyers and support staff. The section then became a line item in the Division's budget which seldom grew, but also could virtually never be abolished. Thus, I found a Division with fourteen major sections and several other mini-subdivisions—each with its own hierarchy, training and advancement program, management style and reputation. Different sections were often doing similar work and often unwilling to share resources or expertise.

We re-organized into three large functional programs. Although from the beginning the reorganization seemed to work, I felt considerable unease about doing it. On the other hand, except for the few times I argued in court for the government, I was usually uneasy as Assistant Attorney General. Ultimately, however, two realizations sustained me. First, I was on leave from Stanford where I had a very good job. I did not have to worry about moving onward or upward in this or the next administration. And both ambitions for immortality and fear of disgrace fell away as I realized that being Assistant Attorney General for the Civil Division was such an enormous responsibility that no one would ever be able to tell whether I succeeded or failed.

I have some sense, however, that the reorganization allowed the Civil Division's lawyers to play their multiple roles better. For this reason, and perhaps also because it served as a diversionary tactic, the reorganization helped slow the assault on the litigation authority of Justice—which was also a good thing for the Civil Division. Finally, though not conclusive evidence of success, the reorganization survives today—long after my other orders and priorities have been remanded and superseded.

THE TRI-PARTITE ROLE

Because of my years as a public defender, I have often had to answer the question that criminal defense lawyers always meet: "How can you defend someone you know is guilty?"⁴ Though no such question dogs Civil Division lawyers, defending the government is sometimes more difficult than defending the guilty.⁵

The criminal defense lawyer has little role confusion — she

4. I summarize the answers I have developed over the years in Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983-4).

5. There is some authorial licence involved in this title because the Civil Division enforces statutes and regulations and contracts as well as defending them, yet even enforcement work often has an element of defending the agency's right to regulate.

owes unswerving duty to a single client whose interests are crystal-line. Within the balance of advocacy and ethics, the client's best interest dictates all choices about what defenses to raise, what witnesses to call, and whether to go to trial. The defense lawyer takes care of her client, and leaves the public good to the rest of the system, which is uniformly massed in opposition to her very vulnerable client.

The government lawyer, in contrast, must play multiple roles and serve many interests. She has an actual client, often demanding the same total devotion as does the criminally accused client. She also represents "the United States" as a litigant in the courts. Finally, partly because her client is great and powerful, she should take explicit account of the public good in her litigation practices and policies.⁶

A. *The Client Agencies*

An exasperated lawyer from private practice summed up the worst image of the government lawyer:

Without a client, favoring their roles as advocates over their roles as advisors, uncircumscribed by the demands of time, money or available lawyers, the government's trial attorneys press on⁷

The Civil Division lawyers, however, almost always *do* have an identifiable client, and sometimes more than one: an agency whose programs are at issue in litigation; the Congress whose legislation is under attack. Like private clients, they require soothing and hand-holding, expect miracles from their lawyers, and are often totally selfish in their outlook.

Civil Division clients differ from individual and corporate clients, however, because they are captives. They can neither appear in court on their own behalf, nor change lawyers. Central litigating authority for the government resides in the Attorney General by statute.⁸ Naturally this is a point of stress in the relationship between the Civil Division's lawyers and its client agencies.

The client agencies may not have litigating authority but they

6. William Simon argues persuasively that all lawyers should take into account interests beyond those of their immediate clients, including the public interest. His reasoning for a wider ethical responsibility for private lawyers cuts even more strongly when the lawyer represents the government. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

7. Pendley, *No Clients, No Responsibility*, THE LEGAL TIMES, Feb. 15, 1988, at 17.

8. See 28 U.S.C. §§ 515-519, 547 (1966) (reposing in the Attorney General and his designates authority to appear in court in all cases in which the United States has an interest); 2 U.S.C. § 118 (1875) (authorizing the Attorney General to represent members of both houses of congress).

do have lawyers. Every agency has a general counsel's office that goes between its policy makers and the Department of Justice. Of course no lawyer ever finds the work of another lawyer to be beyond criticism. One of the letters in my files describes an appellate argument in which an agency lawyer stood up from the audience in the midst of the Civil Division lawyer's exchange with the court and offered a different version of the point. Seldom did professional relations become that strained, but there was often dispute about expertise—and even competence—on both sides of this indissoluble lawyer-client, client-lawyer relationship.

Agency lawyers charged that Justice Department lawyers did not understand the programs and needs of the clients. Justice Department lawyers accused agency lawyers of narrow parochialism, and urged that the skill of a litigator is litigation. I found myself often arguing that litigators are better at translating the technical concerns of the agencies to the fact-finders precisely because they are *not* experts in the programs. A fresh eye, independent look, the ability to ask and answer the basic questions—these are the skills of the Department of Justice ("DOJ") litigator.⁹

Of course the theoretical arguments can break down in specific cases—in any one of which the agency lawyer might be superior to the DOJ attorney in litigation and other related skills. This is especially possible when new agencies are created with appropriations to hire experienced lawyers and support them adequately—while the Civil Division slogs on with its ever-expanding responsibilities and incremental budget increases.

The warfare over litigation authority never ends, however clearly the general statutes place it in the Attorney General. Over the years, many independent regulatory agencies have been granted special litigating authority at their inception; other agencies have obtained it through favorable congressional committees that carve out an exception for them.¹⁰ Sometimes the Justice Department has

9. Another argument for Department Of Justice litigators focuses on their familiarity with jurisdictional attacks, procedural arguments such as the statute of limitations, and defenses peculiar to the government such as sovereign immunity. *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 142-44 (Dec. 1975, Feb. 1976) [hereinafter *1975-76 Hearings*] (answering the subcommittee's questions about the expertise the Civil Division had brought to specified cases.)

Because I was not convinced that these arguments were always deployed consistently with the government lawyer's role as model litigator, I did not rely so much on this type of expertise in defending DOJ's control of litigation.

10. For a list of agencies with their own litigating authority, which is still the best compilation, see *id.* at 145-47. Former Attorney General Griffin Bell traces the history of the agencies seeking their own litigating authority in his memoir, *TAKING CARE OF THE LAW*, 173-78 (1982) (with Ostrow) [hereinafter *MEMOIRS*] and in Bell,

contracted with agencies to divide litigating responsibility according to types of cases. The results of these contracts are as predictable as they are ironic: the lawyers on each side litigate with each other over the meaning of the contract.

The chipping becomes a chopping away of the centralized litigating authority whenever the Department of Justice is weak politically—which it was at the beginning of the Carter administration. The Justice Department was still reeling from the Watergate scandals, and in the year preceding Carter's election, the Senate Judiciary Committee had held some extraordinary hearings on who should represent the interests of the United States in court.¹¹ President Carter had promised, moreover, to reform the Department of Justice, and was a man who generally believed in taking a fresh look at the Department. As I learned on a small scale in the Civil Division, however, the prospect of reorganization can temporarily undermine an institution as uncertainty and the natural tendency to defend the familiar system prevail.

Thus, from almost the first day, I found myself fending off restive clients who were either demanding their own litigating authority from a sympathetic Congress, or seeking the same result by contract with the Civil Division. One of their main arguments was that the division did not give the same zealous representation that lawyers in private practice afford their clients.

This was not an ideal situation in which to urge the idea that the government lawyer should represent interests beyond the immediate goals of the client agency. Rather, the much more appealing response was that the Justice Department would raise every "tenable," "respectable," "reasonable" argument on behalf of a client agency—at least at the trial level.¹² Such a response enhances client

The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator or One Among Many?, 46 *FORDHAM L. REV.* 1049 (1978).

11. 1975-76 *Hearings*, *supra* note 9. These hearings dealt with the possibility of establishing a counsel to represent Congress in the courts so that many of the arguments about the role of Justice were the same as those made when an agency seeks independent litigating authority. Assistant Attorney General Rex Lee of the Civil Division and his career deputies were the main witnesses from the Justice Department.

Although the scholarliness and integrity of Edward Levi, Attorney General in the Ford Administration, had helped repair the Department of Justice internally, his time in office was short and urgent matters such as re-chartering the FBI had consumed much of the time he had to restore the Department politically.

12. I have not found it written anywhere that the Department of Justice must raise every tenable, or reasonable, or respectable argument on a client's behalf at least at the trial level. But I heard it spoken often enough, and it is implicit in the testimony of some of the Civil Division lawyers at the 1975-76 *Hearings*, *supra* note 9 at 81-86. See also the exchange of letters among Robert Stern (an expert in Supreme Court procedure), Simon Lazarus (a Washington lawyer) and Robert Bork, Solicitor General on the question whether the Justice Department was unreasonably refusing to defend the constitutionality of the Federal Election Campaign statute in Buckley

relations, removing pressure from the lawyer-client relationship, and often improving morale so appreciably that the client is more cooperative and amenable to other advice. Taking this position also makes the government litigator's job simpler: "tenable" arguments are easier to discern than what is just in the circumstances.

Here is another of the paradoxes that abound in government service. The Department of Justice has central litigating authority in order that the government may look beyond the narrow concerns of ordinary adversariness, be consistent in its positions, and reflect the democratic desire for just results in court. This sometimes means that in the name of larger goals, the government lawyer will not raise every procedural or even substantive point in a client-agency's favor. If the Justice Department fails to raise all reasonable arguments for an agency's programs, those arguments will not be heard in court. What will be heard is the agency in Congress demanding its own litigating authority. Yet soon after coming to the Justice Department, I realized that its capacity to make independent judgments in furtherance of its tri-partite role was the reason for its centralized litigating authority. So while taking due account of the government lawyer's obligation to represent the self-defined goals of client agencies, let me now move on to consider the other two elements in her complex mission.

B. The Whole Government as Client

This aspect of the tri-partite role can be rendered with a slogan-like transparency.

The Attorney General must control Government litigation to insure that Government agencies do not take inconsistent legal positions in the Federal courts and that litigation is presented to appellate courts with the best possible case as a vehicle.¹³

Everyone readily agrees that the government should speak with a single voice on matters that cut across concerns of all agencies. Easy examples are policies of disclosure under the Freedom of Information Act, or positions taken in litigation on the interpretation of the Federal Rules of Civil Procedure. The hard cases are the ones in which agencies are in conflict over issues in which each has authority and expertise, or in which Justice lawyers disagree with an administrative body (often purporting to speak for Congress) on the interpretation or constitutionality of a statute. Even, or especially, with hard cases, one of the major responsibilities of the Justice Department lawyer is to resolve such disputes. In my view, whenever the

v. Valeo, 424 U.S. 1 (1976). *Id.* at 498-502.

13. *Id.* at 146-47 (prepared answers in the testimony of AAG Rex Lee).

United States appears before any court without a unified government position there has been some lawyer failure.

This is partly a matter of the government lawyer's duty to the courts. Courts assume that when a lawyer speaks for the United States, competing interests and conflicting policies within the government have been resolved outside the courtroom. In a sense, it is partly in return for the successful performance of this harmonizing role that the government traditionally enjoys preferred litigator status in the courts.¹⁴

Moreover, one of the main arguments for central litigating authority is that it assures the extra-judicial or even "quasi-judicial" resolution of disputes within the government.¹⁵ This is another reason why the Department of Justice should always attempt to resolve conflicts rather than to display the full range of respectable arguments to the court.

In my files, I found a good example of how diffused litigating authority can prevent the government from speaking with one voice. Organizations representing the handicapped and senior citizens sued the Department of Transportation to prevent a threatened elimination of porter services on Amtrak. The Civil Division was working toward a settlement that would provide alternatives to porters to aid travellers who needed help with their luggage when the Interstate Commerce Commission, empowered by Congress to appear in court, disrupted the settlement efforts by intervening to argue to the court that they, and not the Department of Transportation, were responsible for the provision of the services in question.

The point here is not about who was right between the Interstate Commerce Commission and the Department of Transportation, but that this intra-governmental jurisdictional dispute did not belong in court. An Interstate Commerce Commission without litigating authority would have had to settle the issue in a different way.

C. *The Public Interest*

The government lawyer has cases that raise issues beyond the identifiable client's immediate interest and even beyond the litigation concerns of the government as a whole. These are the cases in which legal decisions "simply cannot be separated from ideas of economic, social, or political—in the higher sense of the

14. See *e.g.* FED. R. CIV. P. 55 (default judgments shall not be entered against the United States); SUP. CT. R. 36 (4) (Solicitor General may file an amicus brief without specific leave of Court or the affected parties).

15. See *infra* note 21 and accompanying text discussing the term "quasi-judicial."

word—philosophy.” The words are those of Archibald Cox speaking at the 1974 congressional hearings on legislation that would have reconstituted the Department of Justice as an “independent establishment”.¹⁶

Cox was one of a remarkable group of former government lawyers to testify on the bill whose purpose was to “remove politics from the Justice Department” and to assure that decisions were *purely* legal ones. Despite the obvious distress these former Justice lawyers felt about the effects of the Watergate scandals on the department,¹⁷ most of them stated strongly that it was not only impossible but unwise to remove politics/policy-making from the Department of Justice. In one form of words or another, all of the witnesses with prior Justice experience agreed with Cox that in some cases “the decision of what legal theory to press on a court, what interpretation of the statute to urge, what settlement . . . to adopt is just as much dependent upon one’s policy preferences as it is upon one’s judgment as to the facts and law books . . .”¹⁸

The concept that a government lawyer has a duty to the public interest equal to his other responsibilities is an easy target: “It is commonplace that there are as many ideas of the ‘public interest’ as there are people who think about the subject.”¹⁹ But my argument does not depend on the government lawyer’s individual assessment of the public interest in each case. Nor, on the other hand, does it imply some transcendent hierarchy of values from which the public interest is developed or divined.

16. *Removing Politics from the Administration of Justice: Hearing on S.2803 and S.2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 202 (1974) [hereinafter *1974 Hearings*] (Cox testimony).

Basically the bills provided that the Attorney General, Deputy Attorney General and Solicitor General would be appointed by the President with the advice and consent of the Senate for respective six year terms. They could not be removed at the pleasure of the President, but only for neglect of duty or malfeasance in office. Other high officials of justice, such as the Assistant Attorney Generals would be appointed by the Attorney General without a stated term.

17.

Except, perhaps, for the presidency itself, no government institution suffered greater dishonor from Watergate revelations than did the Justice Department. The criminal conduct of incumbent and former Attorneys General, the early mishandling of the Watergate investigation. . . produced a widespread perception that politics and Justice had become intolerably intertwined.

Note, *Removing Politics from the Justice Department: Constitutional Problems with Institutional Reform*, 50 N.Y.U. L. REV. 366 (1975) (quoted in D. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 25 (1980)).

18. *1974 Hearings*, *supra* note 16 (testimony of Ramsey Clark, Archibald Cox, Alan Cranston, Lloyd N. Cutler, Robert G. Dixon, Jr., Arthur J. Goldberg, Charles E. Goodell, Nicholas deB. Katsenbach, Richard J. Kleindienst, Burke Marshall, J. Lee Rankin, Mitchell Rogovin, Whitney North Seymour, Jr., Theodore C. Sorensen).

19. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294-5 (1987).

I believe that the government lawyer should take her definition of the public interest from the presidential administration in which she serves. This sometimes means that the Attorney General should seek guidance on overall litigation policy, or even on the handling of a specific case, from the White House. It means also that there are occasions when litigation policy will change with the election returns.

The line is faint between openly assuring that government litigation reflects the administration's policies and bringing to bear covert partisan influence on Justice. Because the line had been badly scuffed in the Watergate scandals, an issue in the next presidential election was the role of the Justice Department. Jimmy Carter promised an "independent" department and his Attorney General, Griffin Bell, tried at first to implement this promise by cutting off communication about litigation with the White House. Before very long it became clear that cases as well as orders, memoranda, and public statements could implicate administration policies, leading to an attempt to re-draw the line between policy consultation and political control.

During the period of "total independence," the Civil Division dealt with one of the few notorious cases of my tenure as Assistant Attorney General. It provides an interesting, if somewhat negative example of the interaction of the public interest with litigation decisions. Frank Snepp, a former CIA employee, published a book charging high government officials with extreme negligence toward Vietnamese employees of the CIA in the evacuation of Saigon. He did not submit the book to the Agency to review it for matters that might still be classified, or the release of which might endanger lives, although his original contract of employment required that he do so.

The issue was whether to bring a civil action against Snepp. One of the problems in suing such employees is that either their defense, or the government's proof of damages, might reveal secrets, even though the book itself had not. The Civil Division lawyers devised a theory to avoid this pitfall. They suggested that if we were to sue Snepp, we should proceed on breach of contract and breach of fiduciary duty theories with damages measured by the unjust enrichment of the wrongdoer rather than loss to the government.

Although development of the theory was excellent lawyering and greatly reduced the government's litigation risk, I did not think it completely answered the question of whether we should bring an action against Snepp. Judge Bell has related in his memoirs that he "virtually had to order the Justice Department's Civil Division to file the suit. Its lawyers kept warning that the press would attack me on grounds that I was eroding the First Amendment's guarantee of a

free press."²⁰

But my concern was less that they would attack him, or me for that matter, than that the media and the electorate it informs and reflects, would find this suit inconsistent with President Carter's policies on open, honest government, on protecting whistle-blowers, as well as on defending first amendment values. I thought that this was the kind of case in which we should at least inform the President of the arguments against bringing suit. As I described, however, we were in the period in which there was no communication with the White House about cases at the Justice Department.

The case is a good example of how hard it is to define the public interest except in terms of the current administration's policies. My political opinion was that however we framed the *Snepp* case, it would implicate and potentially undermine first amendment rights and that this was not in the public interest. My litigator's judgment was that the case would serve only to increase the book's sales and publicize its message. If we did not sue, the book would soon be gathering dust on the remainder shelves. If my own judgment of the public interest were controlling, I would have said we should not use the Civil Division's limited resources on this case.

The Attorney General, on the other hand, was most concerned about the intelligence agencies; their morale was very low and they saw the *Snepp* case as an important symbol of their position. His concern was that we do for these clients what they felt they strongly needed and could not do themselves. The President might well have agreed. He also might not have agreed, however, and this seemed to me a case where he should have had the chance to make the decision.²¹

Of course there are many cases, probably most cases, in which the government's course is reasonably clear to well-trained lawyers. These are generally the cases in which the client agency's needs and interpretation of its statutory authority and regulations are the firm and exclusive foundation of the government's litigation posture in court. But for the other cases, there must be a method for identifying and weighing the varying interests—a method that affords some satisfaction to those whose position will not be offered in court. I

20. MEMOIRS, *supra* note 10, at 128-29.

21. One of the problems in consulting on policy with "the White House" is the size and variety of the President's staff, which includes non-lawyers, as well as the Counsel to the President and his associates. How to work through these staff members to present the issues to the President, or to gain his direction without taking his personal time is a complex issue. It arose constantly in the Conference on The President, The Attorney General and the Department of Justice, based on the Meador paper. D. MEADOR, *supra* note 17. Griffin Bell also returns to the difficulties of dealing with the White House staff and the Vice-president's staff in Chapter One, "What Went Wrong." MEMOIRS, *supra* note 10.

know no better method than procedural due process: notice and the opportunity to be heard.

In the early days of the office of Attorney General, a special internal dispute resolution function was recognized and even denominated "quasi-judicial." In an 1854 opinion, Attorney General Cushing wrote that he was not only "a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation."²²

A modern illustration of the importance of the due process tradition at the department is recalled by Richard Kleindienst in his memoirs. He described his reaction to a Presidential order to him as Deputy Attorney General—the order was to drop the anti-trust cases against ITT. Kleindienst says he would have resigned rather than carry out this order, essentially because it was given without due process:

Granted, the president heads the Department of Justice, and we are to effect *his* policies. But how these policies are arrived at in the first place, and how they are thereafter changed are essential matters . . . change should be the result only of thoughtful policy discussions at the highest level . . .²³

A DUE PROCESS EXAMPLE

I will conclude with an example of how internal due process can work. On April 14, 1978, I issued guidelines to all general counsels and United States Attorneys limiting motions for costs when the government prevailed as a defendant in discrimination suits. Essentially, the guidelines announced that costs motions would not be made unless the case was brought in bad faith, pursued in a harassing or vexatious manner, or was patently groundless or frivolous.

I believed that people with creditable claims would be discouraged from seeking their rights by the prospect of paying the government's costs should they fail to convince the fact-finder at trial. The effect would be especially chilling for those whose claims involved

22. 6 Ops. Att'y Gen. 326, 344, 352 (1854) (cited and discussed in Association of the Bar of New York, *The Department of Justice As an Independent Establishment*, 5 (1974)).

Professor Norman Redlich, speaking from his experience as Corporation Counsel of New York City pointed out that an Attorney General always wears two hats, as a lawyer and as a public official. When he wears his second hat ". . . he has to recognize that he is but one of many voices in the formulation of [public] policy. There are no rules that one can draft which will resolve the question of who determines the policy of the government in a lawsuit. The concentration of authority in one legal department forces the policy to be made." *1975-76 Hearings, supra* note 9, at 174.

23. R. KLEINDIENST, *JUSTICE* 95 (1985).

new, untested theories.²⁴

My costs memorandum did not follow solely from my opinion, however, considerable due process preceded it. First were several months of meetings between the Civil Rights and the Civil Divisions, which culminated in a directive signed by the Attorney General. It provided that all government lawyers should take litigation positions "supportive of and consistent with the department's broader obligations to enforce equal opportunity laws." This order, so simple to the eye of the layperson, is wrenching to the trained litigator, who can no longer oppose to the utmost in a politically defined class of cases.

Before the Attorney General's memorandum, the Civil Division in defending suits against the government had been raising issues and pursuing strategies opposed by the Civil Rights Division when it sued private employees and state and local governments under Title VII. The Attorney General's memorandum did not refer to costs though the policy behind it cut against moving for them. The Civil Rights Division took the position that costs should never be awarded against plaintiffs in discrimination cases.

But I did not issue the directive solely as a follow-up to the Attorney General's memorandum. The issue came to my attention because a district court judge had raised doubts about awarding costs to the government and I then discovered that the Civil Division lawyers were taking varying positions on the point. It was necessary to give some clear direction.

The Civil Rights Division reiterated its opposition to seeking costs in all cases. But over the months since I had been Assistant Attorney General, I met with lawyers defending Title VII suits and also some of the defendant agency officers. As a result, I learned for the first time of the anger and pain a charge of discrimination creates in the accused. I could understand how a person who prevailed would want costs assessed precisely for the purpose of preventing further charges. Thus, I was unwilling to make an absolute rule—though for ease of dissemination and discernment absolute rules are best.

In formulating the memorandum, I consulted other concerned government agencies: the EEOC, the Civil Rights Commission, as well as representatives of the United States Attorney's offices. Finally, I met also with outside groups such as the Lawyer's Committee on Civil Rights Under Law and the Legal Defense Fund.

24. I was influenced by many of the same considerations the Court found persuasive in holding that only in rare circumstances could attorney's fees be awarded to a prevailing defendant in a Title VII case. *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978).

From these consultations (and their associated memos, letters and drafts), my short directive finally emerged and I issued it with the peculiar pleasure of a due process enthusiast. That was the last I heard of it until 1985, when a letter came from an attorney in a case in which the government had moved for costs. He informed me that for many years the Civil Division lawyers had followed my memorandum, but that on April 1, 1983 the Assistant Attorney General had issued an order revoking it and directing instead that costs should be sought where appropriate in civil rights cases as well as others.²⁵

Between these two orders from two duly appointed chiefs of the Civil Division, a new administration had been elected. That is enough reason, in my view, for the change in policy. I would like to think the second order involved as much due process in its issuance as the first did, but even if it did not, the order probably reflects accurately the approach of the Reagan administration to Title VII litigation.

I picked this example not because of its great importance, or exceptional interest, but because it shows the range of people and institutions that needed consultation even when the general outcome, given the Attorney General's memorandum and my own predilections, was predictable. All of the consultation about both the Attorney General's memorandum and mine prepared the ground for the acceptance of the order, so that it never fell into desuetude, but required specific repeal from a new administration.

Through meetings and memoranda—internal due process—the roles of the government lawyer are reconciled. The result of due process was a memorandum that allowed client agencies some leeway for retaliation against egregiously careless or baseless claims, centralized the government's litigation position, served the development of Title VII law, and expressed the equal opportunity policy of the Carter administration.

Of course it is impossible to accord this level of internal due process in every case. But this much consultation is not necessary in every case, or even in most cases. Usually the government's position is clear enough and the multiple roles coalesce nicely around appropriate litigating postures. Also, due process actually has its own efficiencies; when some decisions are made in an area after full internal due process, and future related matters require fewer meetings and

25. The 1983 memorandum says that the "United States like any other litigant is entitled to recover the costs of litigation." It adds that there may be some times, "for example when the plaintiff's financial situation at the time the litigation was initiated, or as a result of the litigation, warrants a request for a reduction of costs or a waiver of costs." In other words, the new memorandum creates a presumption for moving for costs while mine created a presumption against doing it.

memoranda.

Internal due process is the decision-mode most highly developed by the Solicitor General's office and helps shape the mystique of that office.²⁶ But due process comes so naturally to lawyers that the range of consultations described in my costs example are common throughout the department, even when not officially institutionalized as they are in the Solicitor General's office.

CONCLUSION²⁷

Government lawyering offers the chance to do work that matters. I'm not speaking here only of work as a political appointee. In fact, I often thought the line lawyer at justice had a better job than either the career administrator or the assistant attorney general—as interesting as our jobs were. Although there is some stress in representing multiple interests and seeking the meaning of many roles, it is more engaging and more significant than most other work.

My fellow contributors to this symposiums have all written about their respect for the government lawyer. I join in that expression and add my hope that the account we have given of our experience may affirm or inspire the purpose in readers to devote some years of their working lives to government service.

26. KAPLAN, *THE TENTH JUSTICE* (1988); Note, *The Solicitor General and Intragovernmental Conflict*, 76 MICH. L. REV. 324 (1977).

27. "Defending the Government" had been in the computer for several months when the earthquake hit the Bay Area. My house on the Stanford campus is located near a major fault, but we experienced only broken glass and fallen books; when power returned, I not only found this essay safely stored on the hard disc but also that I had prudently backed it up. Since I had made no claim to be dealing with earth-shaking events, any difference in my definition of these should not change what I wrote before.

Yet I may not be entirely the same person who dragged out her Justice files to start this article. The earthquake has deepened my sense of the importance of work that matters. A lawyer should spend her working life—so many hours out of such a brief and fragile time—on things that interest her and have meaning for other people.