

College of William & Mary Law School  
**William & Mary Law School Scholarship Repository**

---

Faculty Publications

Faculty and Deans

---

1998

## Foreword: Government Lawyering

Neal Devins

*William & Mary Law School*, [nedeви@wm.edu](mailto:nedeви@wm.edu)

---

### Repository Citation

Devins, Neal, "Foreword: Government Lawyering" (1998). *Faculty Publications*. 446.  
<https://scholarship.law.wm.edu/facpubs/446>

Copyright c 1998 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
<https://scholarship.law.wm.edu/facpubs>

# LAW AND CONTEMPORARY PROBLEMS

---

Volume 61

Winter & Spring 1998

Numbers 1 & 2

---

## FOREWORD

NEAL DEVINS\*

The origins of this symposium date back to 1982, the year I graduated from law school. While working (for Vanderbilt University's Institute for Public Policy Studies) on a project concerning religious liberty and private education, an epic policy blunder by the Reagan Administration piqued my interest in government lawyers. By claiming that "as a matter of law" racist schools were entitled to tax breaks, the Administration was slammed by the press, the Congress, and, ultimately, the Supreme Court for listening to its lawyers.<sup>1</sup> In studying this controversy, an off-hand comment by Michael Deaver, Reagan's Deputy Chief of Staff, transformed my life. For Deaver,

One of the reasons we got into this mess was that the only people Ronald Reagan had talked to about the issue were lawyers. So far as [he was] concerned, lawyers are not real 'people,' they live in their own world. . . . [T]he human and perceptual side of this was not considered and wouldn't be by the lawyers.

---

Copyright © 1998 by Law and Contemporary Problems

This foreword is also available at <http://www.law.duke.edu/journals/61LCPDevinsForeword>.

\* Ernest W. Goodrich Professor of Law and Lecturer in Government, College of William and Mary. This symposium would not be possible without Theresa Newman, General Editor of *Law and Contemporary Problems*. Theresa, after foolhardily suggesting that I put together a symposium for *L&CP*, worked with me for more than a year in putting this issue together. Her professionalism, kindness, and friendship were integral to this project. Thanks are also owed to Don Horowitz, who helped shape the symposium, and Jeff Lubbers, who as research director of the Administrative Conference of the United States, played an instrumental role in my thinking on this subject.

1. For the Court's reaction, see *Bob Jones University v. United States*, 461 U.S. 574 (1983). For Congress's reaction, see *Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearings Before the House Comm. on Ways and Means*, 97th Cong. (1982).

2. DAVID WHITMAN, RONALD REAGAN AND TAX EXEMPTIONS FOR RACIST SCHOOLS 86 (1984) (Kennedy School of Government, Case No. C15-84-609.0). During Independent Counsel Kenneth Starr's investigation of President Bill Clinton, the President's political advisers were equally contemptuous of his lawyers. In particular, by encouraging the President both to resist Starr's investigation and to decline comment to the nation, the President's lawyers were accused of weakening the President's ability to lead the nation.

Deaver's comment struck home. I intended to work for the government and had taken for granted that my three years in law school would be "value added" to the policymaking enterprise.

Two years later, I started work at the U.S. Civil Rights Commission and the unique status of government lawyers became part and parcel of every working day. My job, Assistant General Counsel, was to serve as a bridge between careerist attorneys and political appointees. In large part, that meant telling careerist attorneys—most of whom opposed the goals of the Reagan Administration—to toe the agency line. Consequently, when careerists sought to undermine official agency views (by invoking their duty either to the law or the public interest), I suggested that their duty was to do the agency's bidding (until they could find a new job).<sup>3</sup>

Beyond these intramural matters, I occasionally wound up in the midst of disputes involving other executive branch agencies as well as the Congress. Most striking, in responding to accusations of agency malfeasance by the General Accounting Office and congressional overseers, I found myself asking the question that careerists asked of me, that is, for whom do I work—the agency, the public, or "the law"? Less problematic (for me) but equally telling, in preparing an assessment of federal civil rights enforcement, I witnessed a bitter fight between Clarence Thomas, chair of the Equal Employment Opportunity Commission ("EEOC"), and Brad Reynolds, head of Justice's Civil Rights Division. Justice, in an effort to squelch the EEOC's sometimes support of affirmative action, called upon the White House to pressure the Commission into withdrawing a brief it filed in support of race preferences.<sup>4</sup>

When I left the government for law teaching, I could not shake these experiences. My scholarship was animated by questions of the government lawyer's role in shaping public policy, the need for policy cohesion within the Executive Branch, the consequential nature of who speaks the government's voice in court, the competing visions of careerists and political appointees, and, ultimately, the identification of the government lawyer's client. In pursuing these matters, my limited experience as a government lawyer (three years) served as the lens through which I examined these questions.

My experiences are hardly unique. Thanks to the (now defunct) Administrative Conference of the United States, which asked me to prepare a report on the appropriate division of litigation authority among federal agencies, I have had the good fortune to speak with government lawyers about their experiences. Through these conversations as well as other research, I was struck by the contextual nature of government lawyers' perspectives on both the sensi-

---

3. Mike Paulsen's recounting of his struggle over whether to make use of insider information to sabotage David Souter's Supreme Court nomination nicely illustrates the difficulties government lawyers face when their client's preferences are at odds with their personal moral compasses. See Michael Stokes Paulsen, *Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and Its Limits*, 61 LAW & CONTEMP. PROBS. 83 (Winter 1998).

4. I detail this fight in Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent*, 15 CARDOZO L. REV. 273 (1993).

bility of the current arrangement and the larger question of what it means to be a government lawyer. As a result, I thought it would be fruitful to organize a symposium which, among other things, brought together lawyers (careerists as well as political appointees) who worked in different parts of the government.<sup>5</sup> This kaleidoscope approach, of course, would reveal the diversity of tasks associated with government lawyering as well as the large role that personal experience plays in defining attitudes toward government lawyering. More fundamentally, a symposium that brought together lawyers from different parts and levels of government would increase awareness of the extraordinary importance and complexity of legal policymaking.<sup>6</sup>

After reading the essays in this volume, one cannot escape the obvious, that is, when it comes to government lawyering, "where you stand is where you sit." For example, nearly every contributor sings the praises of the skills they and their coworkers brought to bear on legal policymaking.<sup>7</sup> More telling, location figures prominently in the conclusions reached by nearly all contributors. Lawyers on Capitol Hill, for example, have a much harder time identifying who their client is than, say, attorneys in the Office of Legal Counsel.<sup>8</sup> In large part, this difficulty is inevitable because Congress, in many respects, is little more than an amalgamation of individual members with individual, not institutional, interests.<sup>9</sup> Correspondingly, White House lawyers are far more apt to embrace the hierarchical unitary executive than their counterparts in decentralized Offices of General Counsel.<sup>10</sup> Likewise, Justice Department litigators understand

---

5. While nearly every contributor to this symposium has worked as a government lawyer, some contributors were invited because of their scholarship on lawyering.

6. With that said, the contributors to this symposium are hardly a random cross-section of government lawyers. With one exception, all contributors are academics. Moreover, most contributors have previously written about some aspect of government lawyering.

7. The most vivid example of this is Mike Young's insightful tribute to the State Department's Office of Legal Adviser. See Michael K. Young, *The Role of the Attorney-Adviser in the U.S. Department of State: Institutional Arrangements and Structural Imperatives*, 61 LAW & CONTEMP. PROBS. 133 (Spring 1998).

8. For Kathleen Clark, committee counsel work for whomever hires them—the ranking majority or minority member. See Kathleen Clark, *The Ethics of Representing Elected Representatives*, 61 LAW & CONTEMP. PROBS. 31 (Spring 1998). For Mike Glennon, however, the client varies depending on the issue, the attorney's instincts, and a range of other factors. See Michael J. Glennon, *Who's the Client? Legislative Lawyering Through the Rear-View Mirror*, 61 LAW & CONTEMP. PROBS. 21 (Spring 1998). In sharp contrast, John Yoo suggests there are broader institutional interests that define much of the committee lawyer's work. See John C. Yoo, *Lawyers in Congress*, 61 LAW & CONTEMP. PROBS. 1 (Spring 1998).

9. Charles Tiefer, who worked at both the House and Senate counsel's offices, explains this problem in his essay on lawyering for Congress as an institution. See Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROBS. 47 (Spring 1998).

10. Peter Strauss, who served as general counsel to the Nuclear Regulatory Commission, sees agencies and departments as somewhat distinct enterprises that need to coordinate with each other. See Peter L. Strauss, *The Internal Relations of Government: Cautionary Tales from Inside the Black Box*, 61 LAW & CONTEMP. PROBS. 155 (Spring 1998). On the other hand, Steve Calabresi, who spent some time at the White House, embraces the unitary executive model. At the same time, recognizing that absolutism can prove a political nightmare, Professor Calabresi advances a nuanced strategy for the appointment of government lawyers that is most likely to advance presidential objectives. See Steven G. Calabresi, *The President, the Supreme Court, and the Constitution: A Brief Positive Account of*

the benefits of centralized litigation authority in ways that escape agency attorneys.<sup>11</sup> For their part, agency heads are more apt to prefer policymaking through notice and comment rulemaking than the trial lawyers who work under them.<sup>12</sup> Lawyers who work in policy shops are similarly troubled by the failure of enforcement lawyers to make use of cost-benefit analysis.<sup>13</sup> Finally (for this symposium), careerist attorneys put more stock in lessons learned over time than their political supervisors.<sup>14</sup>

In addition to differences based on location, political context also figures prominently in the competing views of government attorneys. Senate Judiciary Committee staffers who worked on the Clarence Thomas-Anita Hill hearings or attorneys who worked on the Iran-Contra Independent Counsel investigation, for example, cannot help but have those events shape their understanding

---

*the Role of Government Lawyers in the Development of Constitutional Law*, 61 LAW & CONTEMP. PROBS. 61 (Winter 1998).

11. Nick Zeppos, for example, defends the Justice Department's near monopoly on litigation authority because DOJ has more incentive to create a pool of goodwill and credibility with the courts than do agency's with independent litigation authority. See Nicholas S. Zeppos, *Resource Shortfalls in Government Litigation: Externalizing Costs and Searching for Subsidies*, 61 LAW & CONTEMP. PROBS. 171 (Spring 1998). In some ways, this assessment is shared by Judge Patricia Wald. Noting that she expects more from government lawyers than private counsel, Judge Wald suggests that government lawyers need to create the type of goodwill and credibility that Zeppos claims is maximized through the centralization of litigation authority. See Patricia M. Wald, "For the United States": *Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS. 107 (Winter 1998). Michael Herz and I offer another explanation for DOJ control of litigation, namely, the White House cares a great deal about enhancing hierarchical control over policymaking through centralized DOJ control. In contrast, Congress sees little gain in decentralizing litigation authority. See Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS. 205 (Winter 1998).

12. Roberta Karmel makes this point in discussing her experiences at the Securities and Exchange Commission. In particular, unlike commissioners (like herself) who had incentive to take a broad look at the costs and benefits of various policy option, trial lawyers saw little gain in making policy outside of adversarial litigation. See Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor*, 61 LAW & CONTEMP. PROBS. 33 (Winter 1998). For a somewhat competing view, that is, that lawyers are generally risk adverse, see Jonathan R. Macey, *Lawyers in Agencies: Economics, Social Psychology, and Process*, 61 LAW & CONTEMP. PROBS. 109 (Spring 1998).

13. For example, Peter Schuck, who served as Deputy Assistant Secretary of the Department of Health, Education, and Welfare, makes a strong case for law schools to teach cost-benefit analysis in a more systematic way. Pointing to the tunnel vision of most government lawyers, Schuck feels that lawyers cannot effectively communicate with policy analysts. See Peter H. Schuck, *Lawyers and Policy-makers in Government*, 61 LAW & CONTEMP. PROBS. 7 (Winter 1998). In a related vein, Jon Macey notes that lawyers bring different skills and instincts to the table than, say, economists, and consequently the substance of government policy will be affected by the mix of lawyers and nonlawyers within an agency. See Macey, *supra* note 12, at 113.

14. David Strauss and Tom Merrill both make this point in discussing their experiences at the Solicitor General's office. Strauss, who makes the point indirectly, argues that the Solicitor General's office must guard against appearing too partisan. Otherwise, the Supreme Court will treat the Solicitor General as no different than private counsel and, accordingly, defer less to it. See David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROBS. 165 (Winter 1998). Merrill likewise believes that a reputation for good faith and honesty is critical to the Solicitor General's office. But for this to occur, as Merrill forcefully argues, senior careerists must play an instrumental role in defining Solicitor General advocacy. See Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. 83 (Spring 1998).

of government lawyering.<sup>15</sup> More consequential, agency structure and personnel often define the quality of life for government attorneys and, with it, broader perceptions of the enterprise of government lawyering.<sup>16</sup> Correspondingly, government lawyering operates in the shadow of both internal (created by agency heads) and external (created by Congress) incentive schemes. Critics of politically ambitious U.S. Attorneys, ideologically-driven “private attorneys general,” and monomaniacal Independent Counsels, for example, argue that the single issue focus of these offices contributes to overzealous prosecution.<sup>17</sup>

What is most striking here is that government lawyering is so contextual that foundational questions remain up for grabs. Of particular interest, there is little common ground on the identification of the government lawyer’s client.<sup>18</sup> In the end, this symposium, rather than serving up absolute truths, underscores the varied nature and importance of government lawyering.

---

15. Kathleen Clark, who argues that committee counsel work for the member who hired them and not the committee, was weaned in the Thomas-Hill hearings. See Clark, *supra* note 8. Bill Treanor, who explains why court-appointed Independent Counsel are limited in ways that special prosecutors named by the Attorney General are not, worked for Lawrence Walsh, the Iran-Contra Independent Counsel. See William Michael Treanor, *Independent Counsel and Effective Investigation*, 61 LAW & CONTEMP. PROBS. 149 (Winter 1998).

16. Mike Young, who worked at the State Department, and Tom McGarity, who worked at EPA, highlight the ways in which internal office dynamics affect the work product and outlook of government attorneys. See Young, *supra* note 7; Thomas O. McGarity, *The Role of Government Attorneys in Regulatory Agency Rulemaking*, 61 LAW & CONTEMP. PROBS. 19 (Winter 1998).

17. Dan Kahan considers U.S. Attorneys and recommends that *Chevron*-deference be accorded DOJ, not U.S. Attorney, interpretations of federal criminal law. See Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47 (Winter 1998). Jeremy Rabkin examines private attorneys general and recommends that public law enforcement be conducted (almost) exclusively by democratically accountable officials. See Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179 (Winter 1998). Bill Treanor’s comparison of Attorney General-appointed special prosecutors to court-appointed Independent Counsels, however, suggests that the absence of a checking mechanism restrains Independent Counsel prosecutions. See Treanor, *supra* note 15.

18. On this point, one-time Associate White House Counsel Nelson Lund’s explanation of why political appointees who represent the President operate in a world without ethical rules is particularly instructive. See Nelson Lund, *The President as Client and the Ethics of the President’s Lawyers*, 61 LAW & CONTEMP. PROBS. 65 (Spring 1998); see also Clark, *supra* note 8 (noting that there are no governing standards of ethical conduct for Capitol Hill lawyers). Likewise, H.W. Perry’s examination of what it means to be a “servant of the law” calls attention to the myriad ways in which United States Attorneys and other government lawyers can identify their client. See H.W. Perry, Jr., *United States Attorneys—Whom Shall They Serve?*, 61 LAW & CONTEMP. PROBS. 129 (Winter 1998).