Loyalty in Government Litigation: Department of Justice Representation of Agency Clients

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LOYALTY IN GOVERNMENT LITIGATION: DEPARTMENT OF JUSTICE REPRESENTATION OF AGENCY CLIENTS*

Whom does the Department of Justice (DOJ or Department) represent when it appears in court? As with many simple questions, the answer is surprisingly evasive. DOJ conducts the bulk of litigation in the name of the federal government, but the interests of the federal government often are hard to define. Because the vast bureaucracy reaches in all directions, it has diverse views on litigation policy. The problems of integrating policy through litigation surface when DOJ becomes involved in representing agencies in litigation. Consider the situation that tests the question of whom DOJ represents: What is DOJ to do when an agency asks it to litigate a matter that the Department does not consider to be in the best interests of the government?

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1. 28 U.S.C. § 516 (1988) provides the general authority for litigation by DOJ. It states: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." Id.

2. The problem may arise in a variety of circumstances, such as when agency policy conflicts with DOJ's interpretation of executive policy, when resources prohibit pursuing all agency litigation, or when DOJ believes agency policy is contrary to the public's best interest. The problem is best discussed when questions of ethical wrongdoing or confidentiality are not at issue. This Note assumes that all lawyers have a duty to the court to report fraud and corruption regardless of the attorney-client relationship. The unresolved problem arises when ethical responsibilities are in question because multiple institutions are competing for an attorney's loyalty.

3. This Note uses the term "agency" as defined by the Federal Bar Association: (1) An Executive agency, including an Executive department, military department, Government corporation, Government controlled corporation, and an independent establishment; (2) The Congress, committees of Congress, members of Congress who employ lawyers, and Congressional agencies; (3) The courts of the United States and agencies of the Judiciary; (4) The Governments of the territories and possessions of the United States; or (5) The Government of the District of Columbia. MODEL RULES OF PROFESSIONAL CONDUCT FOR FEDERAL LAWYERS, Definitions (Fed. B. Ass'n 1990), reprinted in SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 566 (John S. Dzienkowski ed., 1993) [hereinafter SELECTED STAT-
The problem raises three basic issues: first, who is the "client" and whose interest does the Department represent; second, is this different from the normally established bureaucratic hierarchy; and third, is it appropriate for DOJ to dictate the types of issues that it will litigate for agencies? The answers to these questions help to determine who is responsible for implementing executive policy in the courts.

Commentators wrestle over the potential question of whom DOJ represents. Possibilities include: (1) the public interest, (2) the government as a whole, (3) the agency official, (4) the agency itself, (5) the President, (6) the Attorney General, and (7) the Department of Justice. No overarching standard, law, or guideline clearly defines DOJ's duties and loyalties. Each choice appears exclusive and in conflict with the other possibilities. As a result, theorists and practitioners artfully articulate models that explain and defend each one of these options. This Note will clarify and evaluate the rationales for these different models.

Evaluating models for Department representation requires the consideration of several factors. First, consider the potential role of DOJ regarding any issue. DOJ's legal representation duties may include rendering prelitigation opinions, reviewing pending legislation and regulations, resolving interagency disputes, litigating agency matters, and arguing before any court, including the Supreme Court. Each role requires the DOJ lawyer to have


5. In support of the agency model, see infra notes 232-56 and accompanying text. In support of the public interest model, see infra notes 187-231 and accompanying text. In support of the unified executive model, see infra notes 257-97 and accompanying text. In support of the DOJ-as-its-own-client model, see infra notes 124-52 and accompanying text.

6. For a discussion of the Department's duties, see Robert P. Lawry, Who Is the
different loyalties and perform different duties. Although different lawyers at DOJ handle these various roles, the question remains as to what the Department’s overall relationship with the agencies should be.

A model’s ability to recognize the policy implications that are part of government litigation is a second important factor in the evaluation because any decision that the government makes about taking part in litigation and settlements makes a statement about its policy. “The fact is that ingredients of law and policy inescapably permeate the conduct of the government’s litigation, both in setting general litigation policies and in making decisions in individual cases.” Decisions about litigation may reflect the importance that the government places on an issue. The question remains: who should have the responsibility for making that policy decision?

A third factor concentrates on ethical standards. These standards guide the individual attorney and potentially DOJ. Ethical responsibilities may not adequately guide an attorney when multiple institutions compete for attorney loyalty. The ethical standards define the duty of the individual lawyer, but whether they also apply to an institution is unclear. The ethical duty that the individual lawyer owes an institution may not coincide with the loyalty owed by DOJ.

Fourth, models of representation often are affected by considerations of bureaucratic power. If DOJ has a role in shaping the litigation of agency matters, then it can exert considerable


9. See generally, Douglas W. Kmiec, OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive, 15 CARDOZO L. REV. 337 (1993) (describing DOJ as the glue holding together conflicting agency agendas); Nelson Lund, Rational Choice at the Office of Legal Counsel, 15 CARDOZO L. REV. 437 (1993) (viewing DOJ as being closely aligned with the president in agency disputes); McGinnis, supra note 6, at 425-29 (noting that DOJ’s power to issue legal opinions checks agency autonomy).
control over the agency by limiting its enforcement capability. The power of wielding litigation authority can be a great tool for a president with little control over much of the administrative state.\textsuperscript{10} This power friction becomes even more evident when Congress asserts its power to control agencies by removing litigating authority from DOJ and giving it to the agency.\textsuperscript{11} Decentralized litigation authority simplifies loyalty issues but can cause inconsistent government action in the courts.\textsuperscript{12}

Finally, historical uses of the roles and functions of DOJ often help to define its loyalties.\textsuperscript{13} On the one hand, the tradition of having strong figures serve as Attorney General gives instructive guidance to many when determining DOJ's role in agency representation. On the other hand, history is replete with congressional action to decentralize litigation authority and limit DOJ's political influence.

This Note will clarify the problems of loyalty for the Department of Justice in agency representation. The first section provides the context for the discussion on loyalty by examining the current state of DOJ litigation authority.\textsuperscript{14} The second section examines behavioral models of DOJ loyalty, including a historical perspective model and a bureaucratic model.\textsuperscript{15} Some commentators look to experience and political maneuvering to explain DOJ loyalties, whereas others use normative models in an attempt to distance DOJ from arbitrary and partisan loyalties. The third section discusses the effect of using the ethical responsibilities of a government attorney as a normative model for

\textsuperscript{10} For example, in FTC v. Guignon, 390 F.2d 323 (8th Cir. 1968), DOJ successfully argued that the FTC lacked statutory authority to enforce judicially its own subpoenas or even appear in court. The Solicitor General then refused to file a certiorari petition, which cemented DOJ's litigating authority in this area. See also John F. Davis, Department of Justice Control of Agency Litigation 1-17 (Aug. 14, 1975) (unpublished report prepared for the Administrative Conference of the United States) (on file with Author) (outlining the legal relationships between DOJ and agencies).

\textsuperscript{11} See generally Susan M. Olson, Challenges to the Gatekeeper: The Debate over Federal Litigating Authority, 68 JUDICATURE 71 (1984) (describing the debate over how to distribute governmental litigating authority between DOJ and agencies).

\textsuperscript{12} See infra note 107 and accompanying text.

\textsuperscript{13} See infra notes 43-123 and accompanying text.

\textsuperscript{14} See infra notes 18-42 and accompanying text.

\textsuperscript{15} See infra notes 43-152 and accompanying text.
defining the loyalty of DOJ. The fourth section compares the normative models that attempt to explain the Department's relationship with agencies.

The Note will demonstrate that no one model exists to the exclusion of all others. Rather, the models are simply factors to consider when describing government action and loyalty. The situational application of the models shows that they are more likely to be either post hoc explanations for actions or incomplete in their designs. As a consequence, neither DOJ nor individual attorneys can use these models for definitive guidance. The models are useful for analyzing institutional norms for predictive behavior but not for mandating compliant behavior.

**CURRENT LITIGATING AUTHORITY**

The current state of government litigation authority is greatly balkanized. Under current law, adopted in 1966, DOJ retains all authority for agency litigation, "[e]xcept as otherwise authorized by law." This exception enables some forty-one agencies and government corporations to maintain some authority over their litigation. Litigating authority is divided between DOJ and the various agencies in every way imaginable. The op-

16. See infra notes 153-86 and accompanying text.
17. See infra notes 187-297 (describing the public interest model, the agency-client model, and the executive client model).
19. 28 U.S.C. § 516 (1988) (emphasis added); see also id. §§ 517, 518 (authorizing the attorney general and the solicitor general to conduct and argue cases in state, federal, and international courts). Agency heads generally are not permitted to employ counsel in litigation but are required to refer matters to DOJ. 5 U.S.C. § 3106 (1988).
21. See Neal Devins, Unitariness and Independence: Solicitor General Control over
tions range from agencies that have litigating authority before all courts on all matters to agencies that have limitations on the subject matter on which, or the court before which, the agency can practice. Of course, some statutes are ambiguous as to the grant of litigating authority, which creates even more conflict.

Formal and informal agreements between DOJ and agencies also divide litigating authority. Memoranda of Understanding (MOUs) allow an agency to handle relatively small and simple matters specific to that agency. These agreements establish formal demarcation lines and are difficult to change. Because the Department does not normally abdicate its litigating authority, MOUs often occur when Congress has threatened to statutorily remove its authority or to clarify statutory grants of litigating authority.

Informal agreements vary from phone agreements to letters of agreement. Most of these arrangements allow the agency to litigate and settle most matters unless the Assistant Attorney General believes it is necessary for DOJ to settle an issue.

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23. See Devins, supra note 21, at 275 n.104 (discussing confusion regarding the authority of the Tennessee Valley Authority and the National Labor Relations Board to litigate before the Supreme Court).

24. See, e.g., Memorandum of Understanding Regarding Representation of the FDIC and the RTC by the Civil Division of the Department of Justice in Litigation, in 3 DEPT OF JUSTICE MANUAL 4-120.1 (Supp. 1992-1); DEPARTMENT OF JUSTICE COMPENDIUM, supra note 20, apps. The Department of Labor, the Environmental Protection Agency, and the Occupational Safety and Health Administration also have MOUs on litigating authority.

25. MOUs usually are approved at the Secretary level and can be the subject of congressional oversight. Consequently, they tend to be made and changed very deliberately.


27. DEPARTMENT OF JUSTICE COMPENDIUM, supra note 20, at 7-1 to -16.

28. Id.
Informal agreements can be more attractive to DOJ because they enable the Department to become involved at its choice. Although the Department of Justice retains the legal power to represent the government in most areas, it is far from monolithic in the way in which it employs its attorneys for representation. Within the Department, loyalty varies according to tailored roles. The Office of Legal Counsel (OLC), for example, may be asked to render important prelitigation opinions, review pending legislation, or resolve interagency disputes. The OLC likely will promote executive policy when reviewing legislation but will act neutrally or quasi-judicially when resolving conflicts. Similarly, other divisions may review less divisive decisions as well as litigate or settle matters for an agency, assume litigation responsibility upon appeal or for government-wide issues, or litigate for an agency before the Supreme Court. While a DOJ attorney may be able to determine the course of litigation at the trial level, she may feel compelled to support the agency argument on appeal because of loyalty.

The Solicitor General's office is much less encumbered by the restrictions on litigating authority and loyalty toward an agency. Of the more than forty-one agencies and government corporations that have independent litigating authority, less than ten possess the power to litigate before the Supreme Court. As a result, the Solicitor General is most often concerned with creat-

29. MEADOR, supra note 7, at 15-18.
31. McGinnis, supra note 6, at 423.
32. See Kmiec, supra note 9, at 374; Lund, supra note 9, at 480; McGinnis, supra note 6, at 422.
36. See id. at 62-66.
37. See PRELIMINARY SURVEY, supra note 20, at 1-21; Devins, supra note 21, at 278; Olson, supra note 11, at 73.
ing a unified body of law for the government, and his client is most often the government as a whole, or the executive branch in particular, rather than an individual agency. The Solicitor General can use his power to affect policy by choosing not to pursue Supreme Court review of lower court decisions evaluating agency conduct. The Solicitor General's office has asserted that it has a special loyalty to the Court because of this gatekeeping function. To maintain its credibility with the Court, it may attempt to avoid the appearance of partisanship.

The many exceptions to the rule that DOJ has control over government litigation reflect on the loyalty expected from the Department. Arguably, decentralization demonstrates that Congress does not expect the Department to be loyal to agency interests in representation. When an agency's priorities are legitimate but diverge from executive policy, Congress can award it with its own litigating authority. To avoid this emasculation of power, the DOJ attorneys constantly balance their competing loyalties to the president as advocates, to the courts as officers, to the public to remain objective, and to agencies in need of fair representation. Inevitably, the divided loyalties create acrimony among these parties. While some consider the exercise of independent judgment a virtue, others see it as a violation of the ethical boundaries of representation and as an abuse of DOJ's control of litigation authority.


40. See Wade H. McCree, Jr., The Solicitor General and His Client, 59 WASH. U. L.Q. 337, 341 (1982) ("[I]t is the duty of the Solicitor General to serve as a first-line gatekeeper for the Supreme Court and to say 'no' to many government officials.").


42. See Schnapper, supra note 41, at 1202-06.
Historical Role of Loyalty

A brief overview of the history of DOJ provides insight into varying approaches toward the loyalty question. Ambivalence about the role of the attorney general that has existed since the country's inception continues in modern government. History is marked with a few strong-willed attorneys general and presidents committed to consolidating litigating authority and power within one office. Despite those efforts, however, gradual erosions of power have kept executive and legislative powers in balance. The swing of the pendulum slowly created the current structure of loyalty at DOJ.

Until the creation of the Department of Justice in 1870, the legal work of the government belonged to the Office of the Attorney General. While the attorney general's main duties involved rendering legal opinions for the executive branch and conducting the federal government's litigation in the Supreme Court, he had no department or personnel to control and was a relatively minor figure in government. The job was not even full time, as he operated out of his own law office.

Initially, Congress did not clearly define the scope of the office's duties or to whom the office owed its loyalties. Congress gave the president the power to appoint but not to remove the attorney general, as the removal power implicated more "core" presidential advisers such as those at the Treasury, War, and Foreign Affairs Departments. The attorney general had

43. An Act to Establish the Department of Justice, ch. 150, § 1, 16 Stat. 162, 162 (1870).
44. The Judiciary Act of 1789 provided for the appointment of "a meet person, learned in the law, to act as attorney-general for the United States." An Act to Establish the Judicial Courts of the United States, ch. 30, § 35, 1 Stat. 73, 93 (1789).
45. Id.; MEADOR, supra note 7, at 6.
47. See MEADOR, supra note 7, at 5-9.
48. Susan L. Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism, 1989 DUKE L.J. 561, 634-35 ("The history does suggest that law enforcement was not as 'core' a presidential function as foreign affairs and war were.").
no control over the conduct of litigation for most of the federal government because the appointment of United States attorneys was left to the district and circuit court judges.\(^4\)

The apparent congressional fear of centralized control was the product of two concerns: first, the belief that the government attorney was "quasi-judicial" in nature, owing loyalty to the court;\(^5\) and second, the fear that the office would "become a center of federal power that would infringe upon the prerogatives of the states."\(^5\)

Congress's fear of centralized control in the executive branch led to decentralized litigating authority. Congress failed to assign new legal business to the attorney general, despite presidential complaints and proposals for a more unified approach to government litigation.\(^5\) In 1820, Congress created the Comptroller of the Treasury, who was responsible for recovering money and property due the government.\(^5\) In 1830, Congress created the Solicitor of the Treasury.\(^5\) Amazingly, he exercised control over United States attorneys, while the attorney general did not.\(^5\) After this experiment, Congress created solicitors in most

\(^{49}\) An Act to Establish the Judicial Courts of the United States, ch. 30, § 35, 1 Stat. 73, 92 (1789); NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990, at 48 (1992) (explaining the Attorney General's "officer" status for executive appointment).

\(^{50}\) See BAKER, supra note 49, at 47.

\(^{51}\) LUTHER A. HUSTON, THE DEPARTMENT OF JUSTICE 7 (1967). But see Bloch, supra note 48, at 636 (asserting that Congress intended to create an office flexible enough to meet existing needs).

\(^{52}\) In 1791, President George Washington submitted a proposal that, although it never passed, would have required United States attorneys to report to the attorney general. MEADOR, supra note 7, at 6. In 1830, Andrew Jackson submitted a law department bill that Daniel Webster defeated. Id. at 7. Congress ignored James Polk's 1845 recommendation that the attorney general become an equal cabinet position, and an 1850 proposal under Franklin Pierce, to create a Department of Justice, was tabled. Id.

\(^{53}\) Act of May 15, 1820, ch. 107, § 1, 3 Stat. 592, 592 (current version vesting recovery power in the attorney general at 31 U.S.C. § 3545 (1994)); see MEADOR, supra note 7, at 7 (noting the comptroller's early lack of success in recovering money).


\(^{55}\) Id. § 5, 4 Stat. at 415; see also MEADOR, supra note 7, at 7 (citing HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE 146 (1937) and discussing the congressional compromise regarding the scope of the solicitor's duties).
of the major executive departments over the next thirty years, thereby demonstrating that the attorney general was not the only person who could represent the United States in court.

Despite these congressional limitations, many presidents regarded the Office of the Attorney General as an integral part of the executive branch. President Andrew Jackson exemplified this expectation of loyalty. During his attempt to dismantle the National Bank, he told Attorney General John Berrien: "[Y]ou must find a law authorizing the act or I will appoint an Attorney General who will." For Jackson and other presidents, there was no question that the attorney general's job was to implement executive policy in the courts.

The notion that the attorney general was quasi-judicial in nature disappeared with the activism of Caleb Cushing, whom President Franklin Pierce appointed attorney general in 1852. Cushing expanded the office to a full-time position with as many duties as he could find. He unabashedly used the law to accomplish specific executive policy goals throughout his tenure. In fact, Chief Justice Taney relied upon his support of the vigorous enforcement of the Fugitive Slave Law in deciding *Dred Scott v. Sandford*.

Cushing's most telling remarks concerning the position of the

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57. Despite this fear based on federalism, Congress continued to give the attorney general many duties with no logical rationale. See Bell, supra note 18, at 1052.
58. See CLAYTON, supra note 56, at 16-17 (noting that presidents included the attorney general in their cabinets).
59. Arthur S. Miller, The Attorney General As the President's Lawyer, in ROLES OF THE ATTORNEY GENERAL 41, 51 (1968) (quoting President Andrew Jackson). Berrien resigned and Roger Taney, who zealously opposed the National Bank for Jackson, was appointed. CLAYTON, supra note 56, at 18.
60. President Monroe had proclaimed 14 years earlier, in 1817, that the attorney general was an equal member of the executive cabinet. BAKER, supra note 49, at 57 (citing Monroe's Letter to Mr. Lowndes, in AMERICAN STATE PAPERS 1801-1823, at 418 (1834)).
61. Id. at 71-77.
62. CUMMINGS & MCFARLAND, supra note 55, at 149-51.
63. BAKER, supra note 49, at 74-76 (describing how Cushing's political advocacy while in office often undermined proper law enforcement).
64. 60 U.S. (19 How.) 393 (1857); see 7 Op. Att'y Gen. 571 (1855); BAKER, supra note 49, at 75.
attorney general were in an opinion in which he argued that the office had, through tradition and time, become subordinated to the president. He denounced the fragmentation of litigating authority as the prime cause for impeding the creation of a uniform government policy. This belief finally led Congress to give the attorney general control over the United States attorneys. More importantly, this congressional action signaled an acceptance at many political levels that the attorney general was a legitimate agent of the President.

Centralization and executive control culminated in the post-Civil War creation of DOJ. Nonetheless, the old laws granting the various solicitors power were never repealed. Despite the law that required all executive branch solicitors and attorneys to be “under the supervision and control” of the Attorney General, department solicitors clung to their enumerated powers under the old laws in an effort to preserve their power.

This frustration of congressional intent continued to expand until 1918, when President Wilson, through an executive order, required all executive law officers to operate under the supervision and control of DOJ for the duration of World War

66. See id. at 347-51.
68. Other attorneys general were not advocates like Cushing. Edward Bates, attorney general under President Lincoln, once said: “The office I hold is not properly political, but is strictly legal; and it is my duty, above all ministers of State to uphold the Law . . . .” Miller, supra note 59, at 51. Nevertheless, the impact of those who brought the attorney general into the policy realm of the executive irrevocably changed the nature of the office. For a contrast of advocate-minded and neutral attorneys general, see generally BAKER, supra note 49, at 4-36 (classifying prior attorneys general as advocates or neutral-minded).
69. Act of June 22, 1870, ch. 150, § 1, 16 Stat. 162, 162 (1870) (current version at 28 U.S.C. § 501 (1994)). Congress created the Department because the various solicitors were unable to handle the load or afford the contracts for private attorneys. See CLAYTON, supra note 56, at 24-25; MEADOR, supra note 7, at 9.
70. Bell, supra note 18, at 1054.
72. See BAKER, supra note 49, at 63; Bell, supra note 18, at 1054.
73. See Key, supra note 46, at 190 n.94 (quoting Exec. Order No. 2877 (1918)).
The confusion over a coherent government litigation policy resumed in the 1920s, however, and individual agencies pursued their own litigation.\textsuperscript{75}

The swing between centralization and erosion of litigating authority continued beyond the 1920s, further confusing the loyalties within DOJ. The advent of a large administrative state created new problems for the Department. Particularly, increased specialization of attorneys within the Department grew as new agencies emerged.\textsuperscript{76} Decentralizing litigating authority then became an acceptable political tool of Congress,\textsuperscript{77} and independent agencies with their own litigating authority enabled greater legislative steering and less executive influence.\textsuperscript{78}

The collision of law and policy occurred as more lawyers became specialized in agency, rather than executive branch, representation.\textsuperscript{79} Parochial agency needs soon became confused with the concept of a consistent government position in court.\textsuperscript{80} This decentralization resulted more from political maneuvering than from a coherent legal policy.\textsuperscript{81}

\textsuperscript{74} BAKER, supra note 49, at 63.

\textsuperscript{75} Executive law officers were so splintered that the attorney general had control of less than 13\% of government lawyers. Id. at 64 (citing Bell, supra note 18, at 1056).

\textsuperscript{76} By 1904, the Department had eight assistant attorneys general, some of whom were assigned to other agencies. MEADOR, supra note 7, at 11.

\textsuperscript{77} Devins, supra note 21, at 278-80.


\textsuperscript{79} On the interrelation of law and policy for the attorney general, see CLAYTON, supra note 56, at 120-37 (describing the political alliance between the executive and the attorney general).

\textsuperscript{80} The Department of Justice had control of only 13\% of agency counsels in 1928. See Bell, supra note 18, at 1056.

\textsuperscript{81} For a deeper analysis of the strategic considerations surrounding DOJ power and litigation authority, see STRINE, supra note 30, at 52-72. See generally BAKER, supra note 49, at 22-27 (discussing the relationship between law, politics, and the
Repeated presidential attempts to reassert control over the haphazard maze of litigating authority provided brief relief from decentralization. In 1933, President Roosevelt signed Executive Order 6166, which transferred all of the government's legal power to DOJ.\textsuperscript{82} Under President Eisenhower, the Second Hoover Commission\textsuperscript{83} reported that the fragmentation of legal services harmed efficiency, coordination, and policy, and it recommended that the Department consolidate all legal services.\textsuperscript{84}

The Commission also recommended a separate civil service system for lawyers to ensure that legal decisions were not influenced by politicians "or career civil servants tied to agency goals."\textsuperscript{85} This recommendation was a bold assertion that government lawyers should not be the advocates of partisan policy. The proposal was rejected resoundingly by Congress as being too focused on legalistic considerations and too detrimental to the congressional oversight of agencies.\textsuperscript{86}

Concerns over DOJ's loyalty accompanied the trend toward decentralization. When President Kennedy appointed his brother as attorney general, members of Congress began to question the attorney general's ability to protect the interests of all government in administering and interpreting the law.\textsuperscript{87} Under President Nixon, few questioned that Attorney General John Mitchell (attorney general).

\textsuperscript{82} Section 5 of the order reads in part:

\begin{quote}
The functions of prosecuting in the courts of the United States claims and demands by and offenses against the Government of the United States and of defending claims and demands against the Government, and of supervising the work of the United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.\end{quote}

Exec. Order No. 6166, \textit{reprinted in} 77 CONG. REC. 5707-08 (1933). The political struggles of government lawyers during this period are examined in Peter H. Irons, \textit{The New Deal Lawyers} (1982); see also Bell, \textit{supra} note 18, at 1056 (discussing Roosevelt's Executive Order).


\textsuperscript{84} Id. at 7-9. The Commission focused on integrating bureaucracies by removing political influence. See Strine, \textit{supra} note 30, at 71.

\textsuperscript{85} Strine, \textit{supra} note 30, at 71.

\textsuperscript{86} See id. at 71-72.

\textsuperscript{87} See id. at 88.
decided most issues with fierce loyalty toward the President. In his study of the Justice Department, John Ingle wrote that "the department's most pressing problem is neither the President nor Congress. It is the segment of its constituency that believes ... that Attorney General Mitchell has allowed political strategy to shape law enforcement strategy."

The tide again swung decisively against centralization following the Department's humiliation over Watergate. Watergate's effect on the Department of Justice cannot be understated. Mitchell's blind allegiance to the President rather than to the government as a whole contributed to his role in the Watergate break-in and cover-up. In contrast, the infamous "Saturday Night Massacre" proved that many in DOJ viewed their client as the entire government and not the President, who was acting against the government's best interests.

Senator Sam Ervin introduced a bill that effectively transformed the Department of Justice into an independent agency. Although the bill failed, it reflected the public opinion of the time that a neutral Department was needed to enforce the law adequately. Academics and DOJ attorneys labeled the proposal as undesirable and unnecessary. Most adhered to the belief that "the Attorney General is a political officer charged with legal duties." Still, the concept of the independent DOJ

88. See BAKER, supra note 49, at 122.
89. John Ingle, CPR Department Study/The Justice Department, 2 NAT'L J. 296, 301 (1970) (quoting the Ripon Society).
90. See BAKER, supra note 49, at 124-25. In 1975, Mitchell was convicted for his role in Watergate and served 19 months in jail. Id. at 124.
91. The "Saturday Night Massacre" refers to Nixon's attempt to fire Special Prosecutor Archibald Cox in October 1973. Attorney General Elliot Richardson, resigned, and his deputy was fired for not completing the order. See BAKER, supra note 49, at 140.
93. Id. at 1-247 (Statements of 14 of the 17 witnesses opposed an independent DOJ, though many supported independent special prosecutors.); CLAYTON, supra note 56, at 103, 105. In addition, many commentators believed that constitutional challenges to an independent DOJ could be raised under Myers v. United States, 272 U.S. 52 (1926), and Humphrey's Executor v. United States, 295 U.S. 602 (1935). See, e.g., STRINE, supra note 30, at 91-100 (discussing this conditional challenge).
94. Miller, supra note 59, at 51.
retained supporters well into the 1980s.\textsuperscript{95}

The attorneys general who followed recognized the crisis created by excessive executive loyalty and the need for a degree of independence within DOJ to restore confidence in the institution.\textsuperscript{96} President Ford appointed legal academic and Washington outsider Edward Levi as attorney general.\textsuperscript{97} The nonpartisan Levi carefully steered DOJ toward a practice of separating policy from legal reasoning, serving the public interest through neutral principles, and staying loyal to the Department as an institution.\textsuperscript{98}

Under President Carter, Attorney General Griffin Bell continued the trend Levi had started.\textsuperscript{99} He opposed a formalized, independent Department but did as much as possible to insulate the Department from policy decisions at the White House.\textsuperscript{100} At the same time, he strongly recommended centralized control of litigating authority.\textsuperscript{101} His belief was that agencies were less accountable than DOJ and created conflicting, inconsistent, and excessive litigation.\textsuperscript{102} Insisting that agency counsels did not have the professionalism and loyalty to the executive that DOJ lawyers did, he asserted that a majority of government litigation and policy problems could be avoided if routed through DOJ, thereby eliminating the "Balkanization of authority."\textsuperscript{103} Bell's independence, however, upset many at the White House, who accused the Department of being its own client when it ignored both agency and White House views.\textsuperscript{104}

\begin{itemize}
\item \textsuperscript{95} See Mitchell Rogovin, Reorganizing Politics Out of the Department of Justice, 64 A.B.A. J. 855 (1978) (criticizing the current attorney general scheme).
\item \textsuperscript{96} See BAKER, supra note 49, at 140-65.
\item \textsuperscript{97} Nomination of Edward Levi To Be Attorney General: Hearings Before the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 7 (1975) [hereinafter Levi Hearings]. Levi was the former president of the University of Chicago and was not a personal acquaintance of President Ford. BAKER, supra note 49, at 141-43.
\item \textsuperscript{98} He had not registered with any political party for many years before his appointment. BAKER, supra note 49, at 143, 150 (citing Levi Hearings, supra note 97).
\item \textsuperscript{99} Id. at 151.
\item \textsuperscript{100} Id. at 151-65.
\item \textsuperscript{101} Griffin B. Bell, Office of the Attorney General's Client Relationship, 36 BUS. LAW. 791, 792 (1981).
\item \textsuperscript{102} GRIFFIN B. BELL & RONALD J. OSTROW, TAKING CARE OF THE LAW 173 (1982).
\item \textsuperscript{103} Id.
\item \textsuperscript{104} BAKER, supra note 49, at 162.
\end{itemize}
The policy of a neutral Department quickly changed under the Reagan Administration. Reagan's closest adviser, Attorney General Edwin Meese, openly supported executive policy decisions. Reagan appointees used the political agenda of Reagan's campaign to establish "policy goals" for the Department.

For example, soon after his appointment, Attorney General William French Smith, President Reagan's attorney general during his first term, reversed the position of the United States in several cases to support Reagan's policies. Most notably, under pressure from Meese and others in the White House, he convinced the Solicitor General's office under Rex Lee to reverse its position before the Supreme Court on a discrimination issue in *Bob Jones University v. United States*. Loyalty apparently did not fully filter through the institution, however, as Deputy Solicitor Lawrence Wallace submitted the brief with the caveat that the Solicitor General did not support the government's position.

Throughout Reagan's tenure, both solicitors general refused to allow the attorney general to dictate their positions absolutely. Solicitor General Charles Fried, who succeeded Rex Lee, later explained that Reagan had appointed him with the expectation that he would exercise independent judgment. Though fiercely loyal to Reagan, he determined that he could not predict what Reagan's position would be on every decision. As a result, Fried occasionally differed with the at-

105. *Id.* at 97.
106. *Id.*
107. See Clayton, *supra* note 56, at 55. Smith had been Reagan's personal attorney prior to his appointment. *Id.* at 51.
112. See *Id.* ("Public office is an interpretive activity. The officer tries to make the
torney general and the White House. In maintaining his ethic, Fried received criticism from both sides as being too politically involved but not loyal to the administration.

Some other offices within DOJ also asserted their independence during Fried's tenure as solicitor general. As a whole, however, the attorney general and DOJ once again became vehicles for policy implementation. The swing of the pendulum, which continues into the 1990s, assures an ongoing struggle between the president and Congress over DOJ loyalty.

The executive and legislative skirmishes over DOJ loyalty rarely spill into the arena of the courts. Historically, however, the judiciary has firmly favored unified control in the Department of Justice. In 1866, the Court held that no department could oppose the attorney general in court. Two years later, it confirmed the attorney general's power to dismiss cases in the lower courts brought in the name of the United States.

The Court's most pronounced statement on the subject came in United States v. San Jacinto Tin Co., in which it described the attorney general as "the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government." The Court tried to give the attorney general as much legal responsibility as possible, interpreting ambiguities against agency litigation.

Favoring a coherent, unified approach to

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113. Id. at 188-92.
115. The OLC, for instance, asserted itself as an office that settled issues with objective, professional legal analysis. See McGinnis, supra note 6, at 423-24. For a debate on the value of the OLC's quasi-judicial development, see Kmiec, supra note 9, at 372-74; Lund, supra note 9, at 441-59.
118. 125 U.S. 273 (1887).
119. Id. at 279.
120. Marshall v. Gibson's Prods. Inc., 584 F.2d 668, 676 n.11 (5th Cir. 1978) ("[I]n
government representation enabled courts to render consistent decisions on government action and to keep dockets manageable. The courts were frustrated, however, by the continued specific statutory grants of power to agencies.\textsuperscript{121}

Historical analysis shows that the goal of centralized litigating authority has been a continuing battle for presidents. The often random conferral of agency litigation powers frustrates executive attempts at consolidation.\textsuperscript{122} A cycle has developed in our history, such that when a strong executive figure exercises control over litigation, Congress, through time, erodes this power. John Davis best states this pattern:

\begin{quote}
[T]here has been a continuing effort by Attorneys General to centralize responsibility for all government litigation in Justice, a continuing effort by many agencies to escape from that control with respect to civil litigation, and a practice by Congress of accepting the positions of the Attorneys General in principle and then cutting them to pieces by exceptions.\textsuperscript{123}
\end{quote}

The result is that, while history reveals interesting attempts at defining DOJ loyalty, no clear model emerges as instructive. The swing of the pendulum represents a balance of power between the branches of government. This power dynamic may foretell the eventual demise of any of the normative models.

\textit{The Bureaucratic Model}

The bureaucratic model is based on the reality that maximizing departmental power is a critical factor in decisionmaking. If DOJ chooses its litigation policy with its own interests in mind, then it is acting as its own client.

When the Solicitor General chooses not to file a certiorari petition on an agency case because the argument is too political, he does so to maintain the institutional political capital of the

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\textsuperscript{121} See BAKER, supra note 49, at 64-65; CLAYTON, supra note 56, at 74.
\textsuperscript{122} Devins, supra note 21, at 278-80.
\textsuperscript{123} Davis, supra note 10, at 17.
solicitor general's office.\textsuperscript{124} When OLC issues a neutral opinion on an agency position, it secures its own position in government by providing an avenue through which DOJ can review agency litigation policy.\textsuperscript{125} When DOJ drafts briefs for litigation in a manner different than an agency's preference, it asserts its authority over agency policy.\textsuperscript{126}

A main consideration of the Department of Justice is consistency in litigation.\textsuperscript{127} Uniformity of legal positions creates more need for centralized litigation, which is more efficient because it avoids duplication among many agencies.\textsuperscript{128} DOJ's expertise in litigation develops and attracts objective litigation experts\textsuperscript{129} who are better suited to represent the government than are inexperienced agency lawyers with "parochial interests."\textsuperscript{130} Courts and the public then look to the Department to reconcile inconsistencies within agencies.\textsuperscript{131}

DOJ often chooses not to litigate when an agency would choose to do so because it does not want to risk losing political capital. "While the agency lawyers are concerned with one piece of litigation and one program at a time, the Justice lawyers are watchful of the effect of any single lawsuit on the whole run of their litigation, both pending and future."\textsuperscript{132} DOJ runs the risk of alienating the courts by establishing bad precedent or arguing politically novel concepts too often.\textsuperscript{133} Expertise in litigation

\begin{footnotesize}
\item[124] See \textit{e.g.}, Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Lee, \textit{supra} note 110, at 597-99.
\item[125] See McGinnis, \textit{supra} note 6, at 421-35.
\item[126] See \textit{e.g.}, United States v. Sandstrom, 22 F. Supp. 190, 191 (N.D. Okla. 1938) (stating that, once a matter is referred to DOJ, the referring agency ceases to have control over it).
\item[127] \textit{Responsibilities of the Attorney General Re Civil Litigation, in 3 DEP'T OF JUSTICE MANUAL 4-7} (Supp. 1990-1).
\item[128] Olson, \textit{supra} note 11, at 78.
\item[129] \textit{Id.} at 79.
\item[130] \textit{Id.} at 79-80. How the divisions in litigating authority impact on recruitment and retention of government lawyers is explored in HOROWITZ, \textit{supra} note 35, at 26-37. Everyone interviewed for this Note acknowledged the rift of elitism caused by DOJ control over litigation and the resulting agency inexperience in handling legal issues. \textit{See} sources cited \textit{infra} notes 136, 140.
\item[131] HOROWITZ, \textit{supra} note 35, at 45 ("[B]ecause Justice is constantly in court, it must worry about the esteem in which it is held by the judiciary . . . .").
\item[132] \textit{Id.}
\item[133] Lee, \textit{supra} note 110, at 601 (describing the solicitor general's role as steward
\end{footnotesize}
that is detached from the business of policy or administration maintains the Department's institutional credibility.\textsuperscript{134}

By contrast, there is rarely a political cost when DOJ alters or denies agency litigation. DOJ is presumed, by statute, to have litigating authority over agency matters.\textsuperscript{135} An agency must take affirmative action and use its own resources to question DOJ's presumed authority. Consequently, an agency will pick its battles cautiously, acquiescing in its role as captive client.\textsuperscript{136}

A bureaucratic model demonstrates how loyalties often divide on many levels. For example, it can focus on the divisions among organizations, such as between agencies.\textsuperscript{137} It also can demonstrate that DOJ uses its reputation as an objective professional organization to insulate political officers from divisive issues.\textsuperscript{138} Decisions that are based on sound legal reasoning but that support the president's policy preserve executive capital.\textsuperscript{139} The result is a more politically useful DOJ. Finally, bureaucratic models also may articulate the differing roles of political appointees and civil service attorneys as a dividing line for loyalties.\textsuperscript{140}

Finally, models may emphasize the division of power according to governmental functions.\textsuperscript{141} Agencies share functions in ways that break down the separation of powers barriers between the executive, legislative, and judicial branches.\textsuperscript{142} Many agen-

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\textsuperscript{134} HOROWITZ, supra note 35, at 130.


\textsuperscript{136} Telephone Interview with John O. McGinnis, Professor, Benjamin N. Cardozo School of Law (Feb. 25, 1995) [hereinafter McGinnis Interview].

\textsuperscript{137} See generally HOROWITZ, supra note 35, at 37 (discussing the division between lawyers specializing in an agency's affairs and lawyers responsible for litigating agency business).

\textsuperscript{138} See McGinnis, supra note 6, at 424 ("It is useful for the office of Legal Counsel to cultivate a reputation of applying the law scrupulously without regard to political or policy interest.").

\textsuperscript{139} See id.

\textsuperscript{140} Such models would allow political appointees to act independently but require civil servants to treat agencies strictly as clients. Interview with James Gardner, Professor, Western New England College School of Law (Nov. 8, 1994) (former Civil Division attorney) [hereinafter Gardner Interview]; McGinnis Interview, supra note 136.


\textsuperscript{142} See HOROWITZ, supra note 35, at 5-23 (emphasizing the structure and hierar-
cies make, enforce, and adjudicate their own rules.\textsuperscript{143} Under this theory, separate agency functions hinder administrative power.\textsuperscript{144} Accordingly, decentralized litigation authority enables agencies to function without worrying about DOJ's competing loyalties.

The bureaucratic model also attempts to account for the wide differences in DOJ actions in each situation. DOJ's decision to maximize political capital hinges on its role in a given situation.\textsuperscript{145} This role theory focuses on how bureaucrats will act given their mission (for example: dispute resolution, pre-litigation advice, litigation strategy, or appellate advocacy) and how the governmental institution constrains responses.\textsuperscript{146}

Other institutions competing for position erode DOJ's traditional role as the president's counsel.\textsuperscript{147} For example, both the White House Counsel (WHC)—a smaller, closer, and more discrete office—and the Office of Management and Budget (OMB) are now used more frequently as the "Counsel for the President" than is the attorney general.\textsuperscript{148} This development has attenuated DOJ's client relationship to the executive. As a result, the OLC gradually has redefined its role, becoming a more neutral, quasi-judicial decisionmaker in order to preserve its position in the bureaucracy.\textsuperscript{149}

Though preserving agency power may underlie some decisions

\textsuperscript{143} See, e.g., Buckley v. Valeo, 424 U.S. 1, 140-41 (1976).
\textsuperscript{144} See Strauss, supra note 141, at 595-96. Strauss concludes that "[t]he choice of form [of agencies] has little relation to the work they do or the manner in which they perform it." Id. Strauss favors a system of checks and balances on agency authority through separation of functions. Id. at 578. A combination of executive and congressional oversight is an adequate check on agency power. Id. at 581.
\textsuperscript{145} See STRINE, supra note 30, at 24-30.
\textsuperscript{146} See id. at 28-29 ("Role theory and analysis is the investigation of shared values about how an incumbent should perform a job . . . . [T]he role concepts and rules . . . that emerge define expected behavior and organizational procedures . . . .").
\textsuperscript{147} See id. at 99-100.
\textsuperscript{148} See Jeremy Rabkin, At the President's Side: The Role of the White House Counsel in Constitutional Policy, 56 LAW & CONTEMP. PROBS. 75, 80 (1993) (suggesting that, as DOJ placed more emphasis on independence, the White House developed a greater need for the White House Counsel's guidance).
\textsuperscript{149} See STRINE, supra note 30, at 312-13; Lund, supra note 9, at 494-95.
in representing agencies in litigation, it does not completely explain DOJ's motivation in all situations. The bureaucratic model cynically assumes that power is the motivating factor in DOJ action. Supporters explain that apparently objective or neutral actions help DOJ preserve power by increasing its political capital. In other words, an objective DOJ gains respect from the executive and other agencies and is therefore more relied upon and a more important governmental actor.

The complexity of the bureaucratic model enables it to address the varied situations faced by the Department in agency representation. The bureaucratic model's flaw, however, is that it is an inherently post hoc explanation for DOJ action. DOJ acts to further executive policy, promote the public interest, or to serve agency needs just as often as it acts to promote its own self-interest. The bureaucratic model closes all discussion of these motivations by characterizing them as part of a power struggle.

THE ROLE OF ETHICAL STANDARDS IN DEFINING LOYALTY

Separate ethical considerations for government lawyers were not scrutinized carefully until after the Watergate debacle. After that time, many perceived that the Department's lawyers were too involved in politics and ignored a special responsibility they owed to the court and to the public. That some government lawyers condoned illegal activities in the name of loyalty to the executive was a sign that ethical standards were in

150. See Olson, supra note 11, at 79-80 (stating that DOJ considers its objectivity as one of the reasons that it is better suited than government agencies to undertake litigation).

151. See Lee, supra note 110, at 597 ("[T]here is a widely held ... impression that ... the Solicitor General's Office provides the Court ... with advocacy that is more objective, more dispassionate, more competent and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers.").

152. See CLAYTON, supra note 56, at 141 (describing the transformation of the attorney general's position from a "quasi-judicial legal advisor" to "a powerful policymaking post").

153. See, e.g., Kenneth W. Dam, The Special Responsibility of Lawyers in the Executive Branch, Chi. B. REC., Special Centennial Issue, 1974, at 4, 12 (arguing for higher federal bar ethical standards).
grave need of revision if the legal profession was to continue to police itself.\textsuperscript{154}

The legal community scrutinized the applicability of ethical standards to government lawyers during the 1970s.\textsuperscript{155} The issue of loyalty now incorporates ethical considerations because of these carefully reviewed standards. These ethical standards are not free from controversy, however, because of the issues of attorney-client privilege and conflicts of interest.\textsuperscript{156} These issues require a determination of who the client is and to whom an attorney owes loyalty. Unfortunately, a multiplicity of standards and interpretations has created a confused ethical answer to the question of loyalty in government service.

The first ambiguity in ethical standards determining government attorney loyalty is found in both the ABA Model Rules of Professional Conduct (Model Rules)\textsuperscript{157} and the ABA Model Code of Professional Responsibility (Model Code).\textsuperscript{158} Both texts virtually ignore the special position of a government attorney in favor of generally applicable rules.\textsuperscript{159}

The Model Code, which was adopted in 1969, establishes the duty of zealous representation of clients by all lawyers.\textsuperscript{160} Specifically, EC 7-14 requires government attorneys to seek justice and limits the zealousness of their representation when litiga-

\textsuperscript{154} Archibald Cox, The Lawyer's Public Responsibilities, 4 HUM. RTS. 1, 3 (1974) (calling for increased ethics education in law school); Geoffrey C. Hazard, Jr., Comment, CHI. B. REC., Special Centennial Issue, 1974, at 13, 13-15.
\textsuperscript{157} MODEL RULES OF PROFESSIONAL CONDUCT (1995).
\textsuperscript{158} MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983).
\textsuperscript{159} See Lanctot, supra note 4, at 967.
\textsuperscript{160} MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7.
tion is "obviously unfair." While this is not a new concept, it creates a question as to how much independence a Department attorney has in representing agency clients. Presumably, the standard allows the attorney to nullify agency policy decisions by refusing to litigate. The attorney, then, may have the power to frustrate executive policy by making an individual determination of fairness. Similarly, as an institution, DOJ can ethically limit its representation of clients.

The obvious counterargument to this interpretation of the Model Code is that it is not the place of unelected civil servants to frustrate policy. Instead, zealous representation applies equally to government and private attorneys, and the courts are responsible for sorting out the unfair cases. The Model Rules, which were adopted in place of the Model Code in 1983, do not account for this or any other argument concerning government attorneys. The preamble provides that all lawyers have a duty to their clients, the court, and justice but does not differentiate between private practitioners and government attorneys. The Model Rules appear to adopt a view contrary to that in the Model Code by the statement:

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.

161. Id. at EC 7-14 ("A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. . . . A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice.").
163. For a full exploration of how ethical standards must apply equally to both government and private attorneys, see generally Lanctot, supra note 4 (linking the ethical duties of government lawyers to one's views on the adversarial process). But see Keith W. Donahoe, Note, The Model Rules and the Government Lawyer, A Sword or Shield? A Response to the D.C. Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct, 2 Geo. J. Legal Ethics 987, 1000-02 (1989) (finding that the Model Rules mandate that lawyers seek to serve the public interest above that of the agency client).
165. Id.
Still, the Model Rules fail to abrogate completely the concept of a separate standard for government attorneys. The Model Rules also provide the caveat that government attorneys may have the "authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so." The Model Rules, however, do not contemplate when that authority may arise or how far the scope of that authority reaches. Model Rule 1.13 addresses the issue of representing the organizational client. The comment to Rule 1.13 attempts to apply the standards equally to government and private attorneys. To do so, the comment suggests that the client of the government attorney is generally the government as a whole, not the individual agency. The Model Rules appear to step back from the Model Code's allegiance to the public interest as a general principle but bring in a substantially similar, subjective standard by allowing an attorney to determine appropriate litigation strategy according to her assessment of the government's best interest.

The standard set forth in Model Rule 1.13 deserves some praise for its flexible approach. It presumes that zealous representation on the part of the government presents no conflict. At an institutional level, the rule could allow the executive to be the Department's client, thereby providing executive oversight of agency enforcement actions through DOJ. The weakness in Rule 1.13, however, is that it allows an attorney to determine the best interests of the government, something best left to politically accountable leadership. In addition, Rule 1.13 appears inconsistent with the Model Rules' earlier reference to service of the public interest. Although the Model Rules present problems, they at least provide a workable presumption for the development of other ethical standards.

To fill the gap left by the Model Rules and Model Code, the

166. Id. Scope.
167. Id. Rule 1.13.
168. See id. Rule 1.13 cmt. 3.
169. See id. Rule 1.13(b).
170. See id.
171. Id. Scope.
Federal Bar attempted to establish some standards of conduct for government lawyers.\textsuperscript{172} In 1973, the Federal Bar published \textit{Opinion 73-1}, which addressed issues involving the government as a client and confidentiality.\textsuperscript{173} In identifying the government lawyer's client, the opinion looked at the attorney's duty to serve the public interest.\textsuperscript{174} The opinion concluded that the government attorney's client was the agency in which he was employed, as long as the agency conducted the public's business.\textsuperscript{175} The reference to the public business received criticism for being too ambiguous.\textsuperscript{176} One year later, the Federal Bar published a more comprehensive look at the ethical problems of the government lawyer in its \textit{Federal Ethics Considerations} (FEC).\textsuperscript{177} The FEC codified the point made in \textit{Opinion 73-1} in FEC Canon 5.\textsuperscript{178} The Federal Bar also left room for the attorney to use "independent professional judgement."\textsuperscript{179} This language is narrower than the broad grant to pursue the public interest found in \textit{Opinion 73-1} but is still ambiguous.\textsuperscript{180} Unfortunately, the FEC has seldom been cited by courts and has received little attention since its publication.\textsuperscript{181}

As a result of continued ambiguity, the Federal Bar provided

\textsuperscript{172} See Lanctot, \textit{supra} note 4, at 969.
\textsuperscript{173} Federal Bar Ass'n Professional Ethics Comm., \textit{The Government Client and Confidentiality: Opinion 73-1}, 32 FED. B.J. 71 (1973) [hereinafter \textit{Opinion 73-1}].
\textsuperscript{174} Id. at 72; see also Charles Fahy, \textit{Special Ethical Problems of Counsel for the Government}, 33 FED. B.J. 331 (1974) ("It must be borne in mind very heavily that the chief responsibility of government counsel is to represent the public interest and not to promote in any manner one's private professional career.").
\textsuperscript{175} See \textit{Opinion 73-1}, \textit{supra} note 173, at 72.
\textsuperscript{176} See, e.g., Lawry, \textit{supra} note 6, at 66-71 (arguing that \textit{Opinion 73-1} is deeply flawed and allows the public interest to affect policy decisions about litigation too easily and suggesting that the attorney-client relationship should apply to those whom the attorney naturally owes obligations).
\textsuperscript{178} \textit{Id.} at 1543 ("The immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed.") (quoting FEC 5-1).
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} Lanctot, \textit{supra} note 4, at 970; Daniel Schwartz, \textit{The "New" Legal Ethics and the Administrative Law Bar}, in \textit{THE GOOD LAWYER} 236, 244 (David Luban ed., 1984) (arguing that \textit{Opinion 73-1}, by effectively requiring the government attorney to directly pursue the public interest, creates a confusing standard).
\textsuperscript{181} Lanctot, \textit{supra} note 4, at 971.
detailed ethical rules in 1990 (Federal Model Rules).\textsuperscript{182} Like other ethical attempts to define loyalty, the Federal Bar recognized the special responsibility of the government lawyer, who must be able to exercise "sensitive professional and moral judgement" when encountering conflicting responsibilities.\textsuperscript{183} The Federal Bar went on to establish the agency as the client who possesses the ultimate authority to determine the scope of the litigation under Rule 1.13.\textsuperscript{184} The District of Columbia Bar echoed this same opinion, asserting that loyalty to the public interest was too nebulous a concept.\textsuperscript{185}

Understanding the ethical standards that apply to the government lawyer is important in defining loyalty in government litigation. The ethical standards now clearly state that an agency is the client and that, absent illegal or unethical behavior, a DOJ attorney owes loyalty to that agency.\textsuperscript{186} These standards resolve the issue for the individual attorney but not necessarily for the institution. The rules were never intended to define DOJ's role. Historical analysis shows the evolution of loyalty through practice; ethical analysis gives a theoretical understanding of the individual government lawyer's duty of loyalty. The normative models of loyalty complete the picture by identifying and attempting to resolve the institutional conflicts within the Department of Justice.


\textsuperscript{183} Id. pmbl.

\textsuperscript{184} Id. Rule 1.13 ("Unless otherwise specifically provided, the Federal Agency, not the organizational element, is ordinarily considered the client. . . [T]he client-lawyer relationship exists between the Government lawyer and the Federal agency, as represented by the head of the organization."); \textit{see id.} Rule 1.6 cmt. 1.


The Public Interest Model

The model that identifies the public interest as the primary client of the Department assumes that DOJ has a certain level of institutional independence. As in the Model Code, the public interest approach to loyalty assumes that DOJ has a duty greater than merely parochial agency interests or partisan executive interests. DOJ is able to use its discretion to determine how to best serve the public interest. The only way for this to occur is if DOJ is unencumbered by loyalties to any one entity.

The first point in support of this model is that the Department has a responsibility to act in the most efficient manner possible.\(^{187}\) Waste occurs when government spends money litigating an issue that DOJ would not pursue. Instead, DOJ, agencies, and the judiciary should strive to achieve the same goals in order to minimize public costs.\(^{188}\) As a result, the government lawyer has a special duty to preserve judicial resources.\(^{189}\)

Second, the public interest model recognizes that agency representation is not the same as representation of a private individual. Eric Schnapper points out that there is no constitutional guarantee of unlimited agency representation.\(^{190}\) An agency is not a person with interests separate from the government.\(^{191}\) As a result, representation is only appropriate when the agency's position reflects public policy.\(^{192}\)

Third, the public interest model asserts that a lawyer's duty to exercise independent judgment and protect the public interest is the cornerstone of professional responsibility.\(^{193}\) To ensure fairness in government action, the lawyer has a special license

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188. See Lee, supra note 110, at 596.
189. Id.
190. See Schnapper, supra note 162, at 649-50.
192. See Schnapper, supra note 162, at 650.
193. See generally Steven H. Leleiko, Professional Responsibility and Public Policy Formation, 49 ALB. L. REV. 403 (1985) (describing the significant role that lawyers play in public policy formation and suggesting ethical standards to govern that role).
to use discretion as to which issues do not merit representation.\textsuperscript{194} Attorneys have a special duty because of their understanding of the law and their role as public servants.\textsuperscript{195} All of these points suggest that lawyers within the Department have a duty to represent the interests of the people and not merely the concerns of government.\textsuperscript{196}

A separate but related concept of the public interest is the idea of the entire government as a client.\textsuperscript{197} According to this concept, the ultimate client is not the public interest but the good of the entire government. This model, which arguably provides for consistent government policy on issues that cross agency lines, more often is advanced by solicitors general, who are charged with the broader role of advocating the government's interests before the Supreme Court.\textsuperscript{198} This model may allow more partisan ideas to creep into policy decisions\textsuperscript{199} or it may mandate the application of neutral principles.\textsuperscript{200}

The study of ethics and the judiciary provides support for the public interest model.\textsuperscript{201} Scholars looking at broad ethical issues find an attractive logic to holding lawyers responsible to a greater cause than the immediate client.\textsuperscript{202} Eric Schnapper, for

\textsuperscript{194} See Weinstein & Crosthwait, supra note 156, at 5.
\textsuperscript{195} See Harold Levanthal, What the Court Expects of the Federal Lawyer, 27 FED. B.J. 1, 5-6 (1967).
\textsuperscript{196} Donahoe, supra note 163, at 997.
\textsuperscript{197} See, e.g., Robert E. Palmer, The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General, 11 PEPP. L. REV. 331, 351-53 (1984) (arguing that the solicitor general's and attorney general's ultimate duty is to uphold the Constitution).
\textsuperscript{198} See sources cited supra note 39.
\textsuperscript{199} See CAPLAN, supra note 39, at 62-64 (describing how the solicitor general's office became less independent under Reagan appointee Paul Bator, a "political deputy," to the solicitor general's office).
\textsuperscript{200} See BELL & OSTROW, supra note 102, at 182; Griswold, supra note 39, at 535 (describing the solicitor general's obligations to aid the Supreme Court and to serve the government); Lee, supra note 110, at 599-600; Schnapper, supra note 41, at 1202-03 (explaining the solicitor general's duty of complete and balanced disclosure before the Supreme Court).
\textsuperscript{201} See, e.g., Levanthal, supra note 195, at 5-6; Weinstein & Crosthwait, supra note 156, at 9-12.
\textsuperscript{202} See PROFESSIONAL RESPONSIBILITY OF THE LAWYER, supra note 155, at 95 (stating that government lawyers have the responsibility to determine which matters are good for government); cf. TEACHING PROFESSIONAL RESPONSIBILITY, supra note 155, at 1043-1123 (analyzing the problems involved in teaching professional respon-
example, argues that a government lawyer must use discretion not to pursue litigation cavalierly and endlessly on behalf of public agencies.\textsuperscript{203} He proposes that an agency only deserves representation as long as the disputed facts support public policy.\textsuperscript{204} Because the government has the advantage of free representation and each agency is bound to support public policy, "government counsel has a greater obligation than that of private counsel."\textsuperscript{205}

Use of attorney discretion to support the public interest leads to obvious problems. First, attorneys general, for example, support such a policy.\textsuperscript{206} Second, individual determinations of public policy can be haphazard and inconsistent. Supporters of the model, however, assert that such a policy permits each government lawyer to ensure that government litigation is fair because lawyers are uniquely able to control government enforcement in court. Individual determinations, however, undermine a representational government designed to exercise the public will.\textsuperscript{207} Third, while injustices do occur, the lawyer may not appreciate the larger governmental implications from litigation.\textsuperscript{208} Fourth, requiring a different standard of conduct for government lawyers undermines a judicial system based on adversarial representation.\textsuperscript{209} Equal zeal by participants in litigation is the only way

\textsuperscript{203} Schnapper, \textit{supra} note 162, at 650-51.

\textsuperscript{204} \textit{Id.} at 650 ("The decision whether an agency or official is 'entitled' to government counsel seems to turn on whether the disputed conduct in fact represents public policy.").

\textsuperscript{205} \textit{Id.} at 655. As such, the government should use restraint in advancing arguments designed to terminate litigation on grounds other than the merits of the case. \textit{Id.} at 658.

\textsuperscript{206} See Josephson & Pearce, \textit{supra} note 156, at 555 n.75 (citing a survey in which most state attorneys general viewed their role primarily as representing the agencies of state government).

\textsuperscript{207} See \textit{id.} at 556.

\textsuperscript{208} The policy of nonacquiescence by the Social Security Administration had a negative effect on many individuals yet served a definite policy objective. See Samuel Estreicher & Richard L. Revesz, \textit{Nonacquiescence by Federal Administrative Agencies}, 98 \textit{YALE L.J.} 679, 692-704 (1989).

\textsuperscript{209} See Lanctot, \textit{supra} note 4, at 958 (asserting that government attorneys should not substitute their own judgments of "justice" and "fairness" for those made by the officials whom they represent within the adversary system).
to ensure fair representation of all interests.\textsuperscript{210} Catherine Lanctot summarized this position by stating: "For better or worse, the American political system places the burden of determining the 'fairness' or 'justice' of public policy upon elected officials in the first instance and, ultimately, upon the courts."\textsuperscript{211} Fifth, the developers of federal ethical standards rejected this approach and decided that there must be a discernible agency client who dictates the scope of representation.\textsuperscript{212} An agency, represented by its agency head, best characterizes the client under the ethical standards.\textsuperscript{215} To hold otherwise would give an unacceptable amount of discretion to the individual lawyer.\textsuperscript{214}

The courts prefer the public interest model because it empowers government attorneys to act as gatekeepers who manage the courts' burden.\textsuperscript{215} This is a cynical but true statement. Although courts seek to restrain agency discretion, they accept that discretion and embrace agency self-regulation.\textsuperscript{216} Similarly, courts recognize DOJ's ability to speak with a voice that "reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people."\textsuperscript{217}

Despite selfish rationales for the public interest model, judges, acting responsibly, are quick to find fault with any wrongdoing by a government lawyer.\textsuperscript{218} In fact, the issue usually arises when there has been some sort of attorney misconduct.\textsuperscript{219}

\textsuperscript{210} See id.
\textsuperscript{211} Id. at 1014.
\textsuperscript{213} See Josephson & Pearce, supra note 156, at 562-69 (criticizing the public interest approach as creating divided loyalties that are counter to representational government and inconsistent with ethical standards).
\textsuperscript{214} Id. at 564 ("Such a lawyer is not a lawyer representing a client but a lawyer representing herself.").
\textsuperscript{216} See id. at 156.
\textsuperscript{218} See Lanctot, supra note 4, at 990.
\textsuperscript{219} See United States v. Sumitomo Marine, 617 F.2d 1365 (9th Cir. 1980) (impos-
Courts are insistent that the government attorney seek justice just as do the courts.\textsuperscript{220} The Supreme Court's statement from 1935 still rings true for most judges:

The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest ... is not that it shall win a case, but that justice shall be done.\textsuperscript{221}

Because most courts address the issue of loyalty when there has been wrongdoing, it is difficult to determine if many courts view the public interest model as being applicable when the choice to litigate is purely a policy decision. The assumption that an individual government attorney has a greater responsibility to report wrongdoing does not necessarily equate with a model of institutional loyalty for the Department of Justice.

The public interest model presents readily identifiable problems. Most glaringly, the model allows unelected officials to substitute their judgment for that of an agency.\textsuperscript{222} Although this model provides the individual attorney with the flexibility to determine the fairness of each case, at the institutional level it subordinates all agency policy choices to those of the Department. The public interest model allows each attorney at the Department to determine what is in the public interest, thereby replacing those reposed with decisionmaking authority in a specific area. A law degree cannot change the nature of a civil servant.

The public interest model also assumes that the Department can separate legal issues from policy issues. While DOJ may have more experience in determining the best legal course to resolve conflicts,\textsuperscript{223} the decisions and reasoning behind litiga-

\textsuperscript{220} See Levanthal, supra note 195, at 5.
\textsuperscript{221} Berger v. United States, 295 U.S. 78, 88 (1935).
\textsuperscript{222} See Lanctot, supra note 4, at 1006.
\textsuperscript{223} See supra notes 127-34 and accompanying text.
tion have policy implications. The vagueness of this model forces a lawyer into a situation in which his loyalties are divided.\textsuperscript{224} Increasingly, law and policy are intertwined, and neat separations of the two are simplistic solutions to more complex issues.

Finally, no ethical standard specifically limits a government attorney's duty to zealously represent a client.\textsuperscript{225} In fact, the Federal Model Rules make agency representation a higher priority than the public interest.\textsuperscript{226} The public interest model takes a narrow view of the judgment of what is a good action. It does not explain how an agency fails to pursue the public interest by choosing to litigate a certain issue that it deems important. The interests of the public and government are so vast and divergent that DOJ may be overly presumptive to assume that litigation of an issue that an agency deems important would waste government resources. The Department of Justice is located within the executive branch so that it can be accountable to the political agendas that drive policy decisions.

When issues cross agency lines, DOJ properly should determine consistent government policy.\textsuperscript{227} For example, issues concerning administrative procedure, civil procedure, the Freedom of Information Act,\textsuperscript{228} or equal protection implicate the way that government acts as a whole.\textsuperscript{229} Adverse precedents in these areas hurt government entities other than just the litigating agency. The risks, therefore, demand DOJ involvement in these areas. Officers like the solicitor general, for example, have a mandate to look after the interests of all of government.

Although the public interest is not the proper object of DOJ loyalty, the model has many useful attributes. Certainly, most attorneys at DOJ believe that they are in government service to advance the public good and the interests of the government.\textsuperscript{230}

\begin{itemize}
\item \textsuperscript{224} See Josephson & Pearce, supra note 156, at 564.
\item \textsuperscript{225} See Lanctot, supra note 4, at 1017 ("If government lawyers simply follow the directions of the ethical codes, their resolution of these dilemmas will be the same as that reached by private practitioners.").
\item \textsuperscript{226} See supra notes 182-86 and accompanying text.
\item \textsuperscript{227} Bell, supra note 18, at 1059.
\item \textsuperscript{228} 5 U.S.C. § 552 (1994).
\item \textsuperscript{229} Id.
\item \textsuperscript{230} Gardner Interview, supra note 140.
\end{itemize}
This civil service is based on the concept that objective loyalty to the government, not political loyalty to the executive, is paramount. Most attorneys at the Department of Justice are motivated by this objective loyalty. The public interest model provides a partial explanation for DOJ loyalty but fails to account fully for why DOJ acts as it does, often not in conformity with this model.

The Agency Model

Recognition that the agency is the client of the Department repudiates the need for a separate public interest model. Honoring the wishes of the agency in pursuit of legal policy is a DOJ attorney's primary duty under this model. The agency model shifts loyalty from individual determinations of appropriate action to the immediate lawyer-client relationship. Strict adherence to this model casts Department attorneys as "hired guns" with no discretion over litigation except for standard attorney advice.

The ethical rules adopted the agency model because it provides direct accountability of individual attorneys to the needs of agencies. Judge Griffin Bell emphasized the need to view the agencies as clients in order to improve government action. The most powerful argument in support of the agency model, however, is that the president or Congress has chosen the agency and its head to make decisions on agency issues and it is not the prerogative of DOJ to question that authority by deviating from the agency's desired litigation policy. This argument reinforces the hierarchical nature of political appointees who act on a subject with presidential authority and congressional ap-

231. See Fahy, supra note 174, at 336 (discussing ethical considerations of promoting public interest over private gain).
232. See Lanctot, supra note 4, at 958.
233. See Bell, supra note 101, at 793.
234. The Department is not a "super-agency ratifying or vetoing determinations made by other departments or agencies." Griswold, supra note 39, at 528.
235. See supra notes 182-86 and accompanying text (detailing the ethical standards).
236. See Bell, supra note 18, at 1061-62.
237. See Griswold, supra note 39, at 528.
proval. Executive policy control and congressional oversight provide the sole checks on agency autonomy. Certainly, this model appears to be the normal course of dealing for line attorneys at DOJ when dealing with their agency counterparts.\textsuperscript{238}

Advocates for the agency-client model point to its analogy in corporate representation.\textsuperscript{239} An in-house counsel represents the interest of the corporation as a whole but generally follows the policy and direction of its officers and directors. An attorney only varies from this progression of loyalty when she may have reason to believe that the officer is not acting in the best interests of the corporation.\textsuperscript{240} Objective, dispassionate legal advice is important to both the corporate and government sectors, and DOJ best provides such advice in the government sector.\textsuperscript{241} As Nelson Lund emphasized, "the analogy between the Attorney General's opinion function and the advisory role of a private lawyer seems to capture adequately the normative implications of the doctrine of the unitary executive as it is reflected in our law."\textsuperscript{242} From an ethics perspective, this model harmonizes standards for lawyers both in and out of public service.\textsuperscript{243} Loyalty thus easily translates into zealous representation because the only true concern of DOJ is the adequate representation of agency needs.

The ease of this model's logic is also the source of its flaws. The model can be viewed either as extremely naive or hopelessly incomplete.\textsuperscript{244} First, DOJ devotion to agency needs ignores a world of limited legal and government resources. DOJ does not

\textsuperscript{238} Most DOJ attorneys believe that they do not have the authority to question the litigation goals of an agency because these goals are political matters for the agency head or general counsel to determine. Gardner Interview, \textit{supra} note 140.

\textsuperscript{239} \textit{See} Cramton, \textit{supra} note 4, at 302; Lund, \textit{supra} note 9, at 448.

\textsuperscript{240} \textit{E.g.}, Cramton, \textit{supra} note 4, at 302.

\textsuperscript{241} \textit{See} Lund, \textit{supra} note 9, at 448 (asserting that, just as in-house counsel provide conservative advice in private practice, the OLC acts quasi-judicially because objective advice is most beneficial to the client—the executive).

\textsuperscript{242} \textit{Id.} at 451-52. Lund, however, does not believe that such an analogy is universal and points to criminal prosecutions as an example of differences in loyalties between private and government attorneys. Telephone Interview with Nelson Lund, Associate Professor of Law, George Mason University School of Law (Jan. 26, 1995).

\textsuperscript{243} \textit{See} Lanctot, \textit{supra} note 4, at 958.

\textsuperscript{244} \textit{See generally} Barsdate, \textit{supra} note 191 (providing a more detailed discussion of attorney-client privilege when dealing with a government entity).
have the capacity to litigate every matter that agencies want litigated and must prioritize legal resources to focus on certain areas. Any decision to exclude a matter implicates policy. Even if done with diplomatic cooperation between agencies, some types of cases will be excluded more frequently than will others, according to DOJ policy. The use of a central body to sift out worthy government claims appears consistent with the plain language of DOJ's statutory grant of authority over litigation.  

The tension created by DOJ's use of legal resource management further underscores how the agency-as-client model is incomplete. Agencies often express dissatisfaction with DOJ representation. This dissatisfaction fuels their determination to lobby Congress for more independent litigating authority. Donald Horowitz refutes the agency model concept by describing this awkward situation as one of the "captive client." The agency has no choice but to go along with DOJ decisions, making it an involuntary client very unlike a client in the private sector, who can choose from a competitive market.  

The corporate analogy also fails under scrutiny. This analogy gives credence to the public interest model by advocating that lawyers are primarily bound to the institution and not the individual for whom they work. This approach opens the door to the position that DOJ may determine what is in the government's or public's best interests despite conflicting agency wishes. If the private sector/corporate analogy applied only to the DOJ-agency relationship, then there would be little need for DOJ representation of agencies. With allegiance solely to

245. See supra note 1.  
246. Gardner Interview, supra note 140; McGinnis Interview, supra note 136.  
247. See generally Olson, supra note 11, at 80 (emphasizing that agency lawyers have greater expertise in substantive agency matters than do DOJ lawyers).  
248. See HOROWITZ, supra note 35, at 5-12, 37-44 (describing the division of legal counseling and litigation functions between executive agencies and DOJ).  
249. See Cramton, supra note 4, at 302.  
250. Admittedly, the attorney usually takes independent action only when she suspects fraud, corruption, or a conflict of interest among her superiors, whether they be corporate officers or agency officials. See id.  
251. See, e.g., Devins, supra note 21, at 325 (arguing that independent litigating authority for independent agencies would not hurt the solicitor general); Olson, supra
agencies, the Department would be nothing more than a holding cell for agency lawyers. Congress might as well reformulate the legal divisions to give agency counsel the bulk of the litigating resources. This restructuring would enable attorneys to work more closely with their clients and determine their needs. Congress and the president repeatedly have decided to reject this structure in favor of a more centralized method of control. A complete decentralization of litigating authority would eliminate any hope of maintaining a consistent government litigating position on matters of broad effect.

The basic fault with the agency-as-client model is that exclusive agency loyalty may conflict with institutional loyalty to the president. In the vast majority of cases, the Department views the agency as possessing the authority to make executive policy decisions and the ability to understand the nuances of a legal field. The agency-as-client model, however, also ignores the fundamental relationship between DOJ and the president; DOJ is responsible for the government's consistent and coherent litigation policy. On a practical level, this relationship means that, in a case of conflict between agency policy and DOJ's interpretation of executive policy on the matter, DOJ has the authority to modify, adapt, or ignore agency policy in litigation. The compelling logic of this model provides a valuable norm of conduct but fails to explain other influences on Department conduct.

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note 11, at 83 (proposing that there is little use for DOJ involvement in "routine" litigation matters).
252. If the corporate analogy were true, it also could apply to the executive. DOJ also could view the president as the true client/corporate head deserving loyalty before any agency.
253. Despite DOJ's broad grant of litigating authority, see 28 U.S.C. § 516 (1988), Congress continues to make limited moves toward such a structure, recognizing that the Department cannot adequately represent agency needs by granting independent litigating authority, see supra notes 18-42 and accompanying text.
254. See Bell, supra note 18, at 1059.
255. Gardner Interview, supra note 140.
256. This does not address the level at which DOJ may take such action. Modifying, adopting, or ignoring agency policy is ordinarily a function of political appointees, not DOJ, unless such policy is inconsistent with overall government interests. See Bell, supra note 18, at 1061.
The Executive Model

The idea that, "[w]ithin the Executive Branch, the government attorney is emphatically a servant of the President" is pervasive.257 Claiming loyalty to the president as the ultimate client of the Department is a more direct means of asserting authority over agency litigation. Such an assertion is not only antagonistic toward other agencies but also raises problems of executive intent, interpretation, and control in a variety of contexts. Both the agency model and the executive model can claim DOJ allegiance to the president as a rationale for their validity. The question that they pose is: who best articulates executive policy—the agency entrusted with the subject matter or DOJ, which is entrusted with representing the United States in court? As with most issues in the administrative state, the answer is unclear.

An agency model supports one theory of a unified executive. When agencies and departments act in furtherance of executive policy over congressional or independent decisionmaking, they promote the position of a unitary executive.258 The presidential powers of official appointment and control of the executive branch and the president's role as chief law enforcer indicate that an agency is responsible primarily to the president.259 As a result, agencies rationally argue that their choices in litigation accurately reflect executive policy.260

Nevertheless, just as each agency derives its mandate from elected officials, DOJ derives its mandate from the president.261 Because no one agency can understand litigation as well as can DOJ, arguably, DOJ has a responsibility to fulfill

258. For a comprehensive exploration of the policies behind the unitary executive, see Neal Devins, Political Will and the Unitary Executive: What Makes an Independent Agency Independent?, 15 Cardozo L. Rev. 273 (1993); Devins, supra note 21.
260. See sources cited supra note 20 and accompanying text.
261. See Bell, supra note 101, at 791.
presidential policy in litigation. {

Centralized control of litigation is a tool that the president can use to establish a unitary executive. \(^{264}\) In varying degrees, a president with an aggressive attorney general can control bureaucratic action and steer policy through government litigation, filtering out unworthy cases for the lower courts just as the solicitor general does for the Supreme Court. \(^{265}\) Through its close political role, DOJ can serve the president as a watchdog against legislation and regulation that would dilute executive policies or power. \(^{266}\) DOJ can assert that it reflects true executive policy better than do agencies because of its position within the executive branch.

For several reasons, the Department is an easy vehicle through which executive policy may be implemented. First, compared with agencies, few interest groups affect nominations and alliances within DOJ. \(^{267}\) Appointments and attitudes within DOJ are consequently more closely aligned with the president’s positions. \(^{268}\) Second, the attorney general’s long history of being a revered cabinet member encourages the appointment of a close presidential ally and a politically homogeneous group within the Department. \(^{269}\) Third, DOJ attorneys depend on the

\(^{262}\) Olson, supra note 11, at 78, 79.

\(^{263}\) See Responsibilities of Client Agencies, in 3 DEPT OF JUSTICE MANUAL, supra note 24, at 4-17 (“Authority over the disposition of a civil matter, once it is referred to the Department of Justice, resides in the Attorney General or his/her delegate, and the client agency may not control its handling or disposition.”) (citing FTC v. Guignon, 390 F.2d 323 (8th Cir. 1968); United States v. Sandstrom, 22 F. Supp. 190, 191 (N.D. Okla. 1938)).

\(^{264}\) See HOROWITZ, supra note 35, at 107 (stating that “[c]entralized litigating authority is one of the few ready handles on the bureaucracy that a President possesses”).

\(^{265}\) Id. For an explanation of the solicitor general’s gatekeeping function, see SALOKAR, supra note 38, at 173. But see Bell, supra note 18, at 1061 (detailing how the filtering process should occur throughout DOJ but is roadblocked by agency independent litigating authority).

\(^{266}\) Kmiec, supra note 9, at 341.

\(^{267}\) See generally HOROWITZ, supra note 35, at 133 (expressing concern that agency attorneys may be more beholden to special interests than are DOJ attorneys).

\(^{268}\) McInnis Interview, supra note 136.

\(^{269}\) Harold R. Tyler, Jr., The Attorney General of the United States—Counsel to the President or to the Government?, 45 ALB. L. REV. 1, 7 (1980) (stating that the presi-
Department’s hierarchy, not their agency clients, to determine policy. Department dynamics make it easier to disseminate, understand, and implement executive policy that flows downward through a direct chain of command. Fourth, because DOJ often litigates on matters that affect the government as a whole, it is more in tune with executive policy in litigation. Because such a close relationship exists between an agency lawyer and the subject matter of the litigation, an agency lawyer becomes more tied to the subject than to the executive’s will. A DOJ lawyer, in contrast, is forced to become a generalist who supports broader executive policy.

Support for the executive model is readily found in the statutory grants and executive orders that establish the Department’s supremacy in litigation. The OLC promotes DOJ supremacy by the scope of agency litigation powers. Ted Olson, head of
the OLC during part of the Reagan Administration, developed arguments that advance the theory of a unified executive through statutory construction and executive intent. 277 To Olson, the president is clearly the client of the Department. 278 All litigating control is centralized, except when explicitly granted to agencies, and the expansion of litigating authority should be uniformly rejected. 279 In his opinions, Olson attempted to solidify DOJ control over interagency disputes despite ambiguous congressional grants of agency control of litigation. 280 Both Olson and his predecessor, John Harmon, used OLC opinions to limit the scope of MOUs by promoting the Department's role within a unitary executive model. 281

Political accountability of the Department through the attorney general is inherent in the unified executive model. 282 Bruce Fein, former General Counsel of the Federal Communications Commission, advocated a unitary model when he said: "The President is entitled, however, to the best legal advocacy of government attorneys devoted to shaping the evolution of legal doctrines that will sustain the President's programs and policy objectives. Otherwise, the President's constitutional powers will be blunted, and the will of the electorate thwarted." 283 When


277. E.g., The Attorney General's Role As Chief Litigator for the United States, 6 Op. Off. Legal Counsel 47, 48 (1982) (stating that, absent clear legislative directives to the contrary, the attorney general has full authority over all litigation).

278. Id. at 54 ("[T]he Attorney General alone is obligated to represent the broader interests of the Executive."); id. at 481, 483 (stating that the president is the client of the attorney general for purposes of a confidantatory and advisory relationship).


280. See sources cited supra note 275.


282. Fein, supra note 257, at 408.

283. Id.
DOJ does not account for presidential policy, it can harm its own institutional power by losing executive respect.\textsuperscript{284} Presidential control over DOJ arguably is more important than presidential control over any other agency because DOJ goes to the core of the president's duty to faithfully execute and enforce the laws.\textsuperscript{285} The president "must have the ability to closely oversee such activity, in order that he may understand the difficulties of enforcement and the possible ramifications of those difficulties for his own national policies."\textsuperscript{226}

Following executive will may take two forms. First, one constantly can address situations by interpreting and following the president's policy. Bruce Fein advocated this approach, calling for government attorneys to be continually vigilant.\textsuperscript{287} Grounding his argument in the right to self-government, Fein stated that "the government attorney must both understand and adhere to the ethical imperative of promoting the President's policies to avoid constitutional malfunctioning."\textsuperscript{228} While commendably attempting to further uniformity, lawyer interpretations at different levels may in fact lead to inconsistent translations of executive will or to a host of unthinking presidential instruments acting by second-guessing another.\textsuperscript{229}

A second view of loyalty focuses on individual judgment and applies most readily to political appointees. Second-guessing presidential action is unnecessary because the political hierarchy will account for any disloyal acts.\textsuperscript{290} Charles Fried, solicitor general under President Reagan, asserted this view, stating that "loyalty [is] essentially an interpretive virtue according to which the officer uses his own judgment and values to make the best and most coherent whole out of his administration's projects and tendencies"\textsuperscript{291} and that "I had been appointed to exercise my

\textsuperscript{284} Kmiec, supra note 9, at 353-59 (arguing that, when useful, OLC should act as a stronger advocate for presidential policies in its opinions).
\textsuperscript{285} Tyler, supra note 269, at 8.
\textsuperscript{226} Id.
\textsuperscript{287} Fein, supra note 257, at 408.
\textsuperscript{228} Id.
\textsuperscript{229} FRIED, supra note 39, at 188-90.
\textsuperscript{290} See generally id. at 173-205 (describing the nature of loyalty owed to the president by a high government official).
\textsuperscript{291} Id. at 173.
judgment, rather than to try to guess what Ronald Reagan
would have said about some particular technical matter."292
The principles for which the president was elected are the prin-
ciples on which the subordinates should base their actions.293

The executive model suffers from the same flaw that plagues
the public interest model. Under the theory of constant inter-
pretation, DOJ suffers from a lack of objectivity in its ac-
tions.294 This lack of neutrality harms the Department's repu-
tation within the government.295 Imposing executive will
through representation, however, is a foundation of much of our
government. Nevertheless, when it is the only force acting on
decisions, confrontation and conflict in a public manner is
bound to occur. Resignation or dismissal then becomes the re-
course for noncompliance.296

The problems with the executive model, as with the previous
models, are often a matter of degree. Interpreting executive
policy creates a new set of problems and choices, but it is, sim-
ply, the cost of public service. Assertions that DOJ more closely
reflects executive will in litigation support a theory that the
 corporate analogy of the agency model is more appropriate than
is the executive model.297 Unchecked use of discretion, howev-
er, is much akin to the public interest model's arrogance in poli-
cymaking. This model appears to describe DOJ action at the
political level but is incomplete in its analysis of the total scope
of agency representation.

292. Id. at 191.
293. See id. at 189-90.
294. See Schnapper, supra note 41, at 1196-210 (discussing how the solicitor gen-
eral must maintain an image of relative neutrality before the Supreme Court).
295. See Joseph R. Biden, Jr., Balancing Law and Politics: Senate Oversight of the
Attorney General Office, 23 J. MARSHALL L. REV. 151, 157 (1990) ("[W]hen the Attor-
ney General loses his balance and begins to serve only his political masters . . . ,
the Congress has an obligation to step in and attempt to restore the balance. . . .
[We are duty-bound to act.").
296. Fried suffered the results of his theory, as he resigned once his actions be-
came too inconsistent with executive policy. Fred Strasser, Justice Department Now
Taking Shape, NAT'L L.J., Dec. 5, 1988, at 2; see Fried, supra note 39, at 193 (stat-
ing that "[t]o put oneself at odds with one's superior and then continue to act in his
name suggests an entitlement to office which no unelected person has").
297. Lund, supra note 9, at 447-52.
CONCLUSION

The behavioral and normative models for DOJ loyalty reflect its history, ethical responsibilities, and surrounding political forces. DOJ continually balances these different loyalties to preserve its own power, implement executive policy, and justly represent agency needs. Models that focus only on one potential motivation for DOJ action misinterpret the complexity of DOJ roles and interests in agency litigation.

History demonstrates a constant swing between centralized litigation functions at DOJ and decentralization among the many agencies. Possibly searching for efficient regulatory enforcement or concerned with executive influence, Congress has repeatedly limited DOJ power by decentralizing litigating authority. Repeated attempts to reconsolidate this power keep DOJ's intergovernmental power in balance. As a result, history as a precedent for DOJ loyalty provides a paradigm for every view.

Centralization of litigating authority allows DOJ to develop a uniform government legal policy on broad issues that arguably best serves government and its citizens. Its dispassionate expertise in litigating often provides a respected voice for government in contrast to the approach of agency lawyers, who may be beholden to the policies and interests of a specific agency. The Department's desire to centralize litigating authority, however, brings with it an obligation to represent agency needs fairly. In a world with limited budgets, this creates the conflict of having to limit agency representation through policy choices.

A bureaucratic model of agency representation contends that DOJ lawyers always act with the interest of maximizing DOJ power. This presumably occurs through supporting executive

298. See supra notes 43-123 and accompanying text.
299. See Horowitz, supra note 35, at 1-9 (discussing the different functions of DOJ and agencies with respect to litigation and counseling).
300. Id. at 133.
301. Id. at 39. The Department rarely refuses to defend agency practices: "It is rather well established that every agency is entitled to be defended." Id.
302. See supra notes 124-52 and accompanying text.
policy when necessary but remaining neutral and supportive of agency needs to preserve reputational capital with Congress. Institutional security and position is a great underlying motivational factor in government today.\textsuperscript{303}

The bureaucratic model accounts for the various interagency relationships under one theory but most likely oversimplifies individual motivations. Self-promotion through DOJ decisionmaking assumes that a well-planned strategy permeates such a large and diverse organization. Undoubtedly, DOJ lawyers often make litigation decisions with no concern as to institutional reputation.\textsuperscript{304} The bureaucratic model’s post hoc explanation of loyalty provides little guidance as to which loyalty best serves government litigation.

Many theorists advance the idea that an agency must always remain the client of DOJ when it chooses to litigate a matter. When DOJ cannot fulfill its duty adequately, independent litigating authority is appropriate.\textsuperscript{305} Agencies see their own counsel as more responsive to their needs because of their counsels’ continued familiarity with the issues.\textsuperscript{306} Agencies prefer a system allowing litigation of their own issues, whereas the Department handles broader government-wide issues.\textsuperscript{307}

The agency-client model is useful in describing most DOJ-agency litigation relationships.\textsuperscript{308} Unfortunately, when conflict between an agency and DOJ arises, the agency model rigidly sees only the agency view as determinative. This model fails to recognize that DOJ may have a more holistic view of the governmental effect of litigating a matter. Parochial agency concerns may contradict executive policy or set a bad precedent for other matters. Periodic presidential attempts to consolidate litigation authority evidence a concern that DOJ most effectively repre-

\textsuperscript{303}See STRINE, supra note 30, at 24-33 (examining closely the institutional roles and positions within a bureaucracy).
\textsuperscript{304}Gardner Interview, supra note 140.
\textsuperscript{305}See HORIZON, supra note 35, at 107. Independent litigating authority becomes a symptom or result of the larger problem—DOJ cannot be loyal to agency interests. Id. at 107-16.
\textsuperscript{306}See Olson, supra note 11, at 80.
\textsuperscript{307}See id. at 83.
\textsuperscript{308}See supra notes 232-56 and accompanying text.
sents executive will.

The public interest model balances DOJ's ability to determine the duty and ethics of a public servant with the pledge to uphold the Constitution and obey duly appointed government officers.\textsuperscript{309} This idealistic model embodies the general sentiment that a public servant should do good whenever possible. This duty to serve the public interest is important when another government agent suggests illegal or unethical activity. Unfortunately, however, this model fails to support client relationships that do not involve wrongdoing. Ethical standards specifically reject this model as being too ambiguous.\textsuperscript{310} The possibility of having hundreds of individual determinations of the public interest would defeat DOJ's purpose of creating a uniform government litigating policy.

The executive model recognizes the president as the true client of DOJ.\textsuperscript{311} Because of the attorney general's historically close relationship with the president, DOJ often can implement executive policy more effectively than can the agencies. DOJ strips agencies of their parochial interests by making litigation choices with only the executive's will in mind. Implementing executive will can be done through constant interpretation or by representation stemming from presidential appointment.\textsuperscript{312}

Like the public interest model, the executive model leaves open the possibility of multiple interpretations of the client's will. Excessive executive loyalty blinds DOJ from varied interests within government. DOJ's resulting lack of objectivity reduces its own reputational value with other agencies, Congress, and the courts.

The validity of each model under different circumstances shows that no one model completely describes Department loyal-

\textsuperscript{309} See U.S. Const. art. II, § 1. Most government officials are required to pledge their oath to support and defend the Constitution, not the president. This, however, does not diminish the dilemma of how and when they should defy superiors or agencies. See Schnapper, supra note 162, at 654 (stating that, when the law is in conflict with the policies of a client, the government attorney must still inform the client of the law, regardless of whether the individual at odds with the law is a public official).

\textsuperscript{310} See supra notes 153-86 and accompanying text.

\textsuperscript{311} See supra notes 257-97 and accompanying text.

\textsuperscript{312} See supra notes 287-93 and accompanying text.
ty. Each model addresses loyalty according to the relationships between the parties and the parties' respective roles. The varied facts and forces that operate in each case of representation make a single model inappropriate for describing the loyalty relationship. Loyalties may change according to the Department's capacity as adviser or litigator, the interests represented, the nature of the conflict, and the political level of the actors involved. These models, therefore, describe only valid factors used in the Department's decisionmaking when pursuing agency litigation.

This Note provides a framework, comprised of several different theories for determining DOJ's loyalty when representing agencies in litigation. This comprehensive collection of loyalty models consolidates the various legal concepts into a single discussion. Hopefully, statistical-based analysis can incorporate this information into a more analytically sophisticated discussion of DOJ action.\(^{313}\)

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313. Updating Donald Horowitz's analysis in *The Jurocracy*, supra note 35, which relies heavily on statistical data, would facilitate a more complete understanding of these theories' impact.