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Articles

**Patrick J. Bumatay**<sup>a1</sup>Copyright © 2007 Journal of the Legal Profession; **Patrick J. Bumatay****CAUSES, COMMITMENTS, AND COUNSELS: A STUDY OF POLITICAL AND PROFESSIONAL OBLIGATIONS AMONG BUSH ADMINISTRATION LAWYERS****Introduction**

To some observers, the recent Supreme Court confirmation hearings of John G. Roberts and Samuel A. Alito, Jr. might have seemed like a debate on the presidency of Ronald Reagan. Many questions posed during the hearings dealt with the Reagan Administration's positions on issues such as abortion, civil rights, and civil liberties. Armed with Reagan-era legal memoranda written by the nominees, who were both Republican political appointees as young lawyers, Senators questioned Roberts and Alito on a range of controversial positions they had advocated during their government service. Senators hoped to gain political traction by tying the nominees—and their confirmation responses—to these contentious issues.

Nevertheless, instead of engaging on the merits of those positions, the nominees largely deflected personal accountability for their words by suggesting those memoranda only represented work product done on behalf of clients. For example, in response to a question from Senator Ted Kennedy about a memorandum regarding the Voting Rights Act, Chief Justice Roberts stated: I was a staff lawyer in the Justice Department. It was the position of the Reagan administration for whom I worked, the position of \*2 the attorney general for whom I worked, that the Voting Rights Act should be extended for the longest period of its extension in history without change.<sup>1</sup>

Similarly, when Senator Jeff Sessions asked Justice Alito about a memorandum he wrote advising the Reagan Administration on a litigation approach against *Roe v. Wade*, he responded:

That [*Roe v. Wade* was wrongly decided] was the express position of President Reagan himself. He had spoken on the issue and he had written on the issue.

....

... I was doing what I thought my job was as an advocate, which was to outline the litigation strategy that would be in the best interests of my client, given what my client was interested in.<sup>2</sup>

Chief Justice Roberts's and Justice Alito's comments pose interesting questions for lawyers serving in the executive branch. Can government lawyers divorce themselves from the positions they take on behalf of an Administration? Are they simply advocating the position of their "client," which happens to be the government? Or, as political appointees, are government lawyers held to a higher standard of personal accountability for their public sector work?

Under the customary norms of lawyering, attorneys are not to be held morally responsible for the positions they take as legal advocates.<sup>3</sup> The positions they take represent impersonal, disinterested advocacy on behalf of a client.<sup>4</sup> As Kenney Hegland states, "[t]he traditional ideal of the attorney is that he is a professional—one who will put aside personal belief in the practice

of his skills.”<sup>5</sup> Traditional attorneys thus have no deeply-held personal investment in the outcomes of their legal activity—aside from pecuniary and/or professional interests—and should be allowed to dissociate themselves from the moral or political implications of the work they perform on behalf of clients. In fact, this view is enshrined in the American Bar Association's Model Rules of Professional Conduct Rule 1.2(b) \*3 (ABA Model Rules) which dictates that a “lawyer's representation of a client does not constitute an endorsement of the client's political, economic, social or moral views or activities.”<sup>6</sup>

Under the traditional norms of the profession, few would hold a corporate attorney morally responsible for drafting a motion that allows a corporate client to defeat a civil suit. Most would not hold culpable a tax lawyer who structures a transaction in a way to avoid millions of dollars in tax liability. Although some may, many would not hold a criminal attorney personally accountable for obtaining a “not guilty” verdict for a criminal defendant. While it may be difficult to tie these conventional lawyers to the outcomes of their legal efforts, what about those government lawyers whose work directly and purposefully intersects the political, the moral, and the legal? Is the comparison to the corporate, tax or criminal attorney an apt one? Is the more appropriate analogy to those lawyers that are identified personally and professionally with a cause? Are government lawyers more like so-called “cause lawyers” for the American Civil Liberties Union, the Institute for Justice, or the NAACP Legal Defense Fund? It becomes more difficult to separate these lawyers from the ends they seek, as they often have a moral, political, or ideological commitment to the causes of their organizations. Do government lawyers operate in such a manner that they too may be justifiably linked to the causes of their client—the government? Are they so motivated by their moral, political, or ideological commitments that they are no longer conventional lawyers?

This Article explores how personal, moral and political commitments influence politically-appointed government lawyers and whether such commitments expose these lawyers to accountability for the legal positions they undertake for their Administration.<sup>7</sup> Are they lawyers in the traditional sense or do their motivations and legal work more accurately classify them as “cause lawyers”? Naturally, resolving where conventional lawyering ends and cause lawyering starts is a necessary part of this discussion. Part I begins by examining the contours of conventional and cause lawyering. Part II surveys the current scholarship on government lawyering. It divides the academic literature into three conceptual frameworks for understanding government lawyers. Part II also raises some unique questions facing cause lawyers in the public sector. Finally, applying the tripartite framework, Part III investigates the attitudes of current and former George W. Bush Administration lawyers. By analyzing the perspectives of actual government lawyers, Part III offers a more complete understanding of how moral and political convictions affect government \*4 attorneys, ultimately providing greater insight into how to evaluate these attorneys' responsibilities for their legal undertakings.

## **I. The Spectrum of Lawyering: The Cause v. The Conventional**

What are the aims of lawyering? Do personal commitments of any kind have any place in the legal profession? How lawyers resolve these questions delivers them somewhere on the spectrum between conventional lawyering and cause lawyering. At one end of the spectrum is the lawyer who holds the client's interests above all else. At the other end is the lawyer whose primary allegiance is to his or her “cause.” At both ends, professional ethics constrain and challenge the lawyer's actions. The following section illustrates how the two poles of the spectrum appear.

### **A. Conventional Lawyering**

In the adversarial legal system, the traditional role of lawyers is to provide zealous advocacy on behalf of clients without regard for the client's identity, views, or activities.<sup>8</sup> Several commentators describe this conception as the “hired-gun model” of lawyering.<sup>9</sup> These lawyers can be considered mercenaries, sellers of legal services to any willing buyer. Under this system, the client directs the lawyer's actions, only constrained by the bounds of the law.<sup>10</sup> They can represent any side of any case and engage in no independent moral evaluation of the client or the positions needed to support the client. Ideally, the lawyer is neutral, detached, and disinterested in the client and the client's positions. Whether the lawyer has personal objections to clients or their behavior is irrelevant under the norms of the profession.

Thus, a central component of the conventional lawyering framework is the dissociation of personal and professional ethics. Lawyers operate in the realm of “role-differentiated morality” where they “adhere to moral practices distinct from those that govern ordinary citizens.”<sup>11</sup> Lawyers are expected to subordinate their personal ethics to the professional obligations they

owe to their clients.<sup>12</sup> Moral or political apprehension or affinity toward \*5 clients could compromise lawyers' ability to advocate their clients' interests objectively and rationally.<sup>13</sup> As Stephen Pepper argues, “[i]f the law is to treat individuals equally, then lawyers must refrain from allowing their personal moral or political commitments to ‘filter’ or ‘screen’ their professional obligation to give their clients unfettered access to all that the law has to offer.”<sup>14</sup> Thus, the professional distance between clients and lawyers ensures that clients enjoy all the protections of the legal system.

This professional distance works both ways, as conventional lawyering also discourages holding lawyers personally responsible for their work product. If lawyers are asked not to judge clients morally or politically, then lawyers should also not be judged by the actions they undertake on behalf of those clients. If lawyers are to provide zealous advocacy, then they must not fear the ramifications of association with their clients. As Ann Southworth states, under conventional professional norms, lawyers “are morally unaccountable for the work they pursue on behalf of clients.”<sup>15</sup> ABA Model Rule 1.2(b) specifically prevents attorneys' actions on behalf of clients from being construed as an “endorsement” of those clients.<sup>16</sup> By providing lawyers with this moral immunity, the ABA Model Rules free them to represent their clients' best interests without hesitation. This freedom from moral culpability also derives from the client's status as the ultimate decision-maker.<sup>17</sup> The client dictates the ends of the legal representation and the lawyer serves in support of those ends.<sup>18</sup> While lawyers may feel accountable for their legal judgments, concern about winning or losing, or even client sympathy, professional norms allow conventional lawyers to avoid moral obligations to their client.

Under this conception of lawyering, the attorney's ethical obligation is to the individual client without any regard for the broader social, political, or economic interests at stake in the case.<sup>19</sup> This does not mean that the conventional lawyer is limitless in his advocacy or advising capacity. “As an officer of the court,” asserts Wilkins, “a lawyer should not counsel or assist the client in fraudulent conduct, file frivolous claims or defenses, unreasonably delay litigation, intentionally fail to follow the rules of the tribunal, or unnecessarily embarrass or burden third parties.”<sup>20</sup> Nevertheless, \*6 within the “bounds of the law,”<sup>21</sup> the lawyer owes the duty of loyalty, confidentiality, and competence to the client and only the client. As Hegland describes the conventional model, “the role of the attorney is not to work out his own political philosophy or even to sleep well at night. It is to help others not as interests, but as individuals.”<sup>22</sup>

## B. Cause Lawyering

In contrast to the conventional lawyer, cause lawyering favors personal moral aspirations and political purposes over the purely client-driven approach. In the words of Stuart Schiengold and Austin Sarat, “[c]ause lawyering is a vocation in which people pursue their version of a more just society while they work to make a living.”<sup>23</sup> These cause lawyers do not see themselves as disinterested automatons in the legal-political machine. They do not want to be interchangeable parts in the mechanism of change; instead, they want to be the creators and producers of change themselves. Instead of adhering to the conventional advocacy model, which “corrupts the soul by encouraging a studied indifference to the truth,”<sup>24</sup> these lawyers want “something to believe in”—to do good as they define it.<sup>25</sup>

They challenge the “hired-gun” mentality, discard the stringent professional norm of neutrality, and only utilize their legal skills in the service of the causes of their choice.<sup>26</sup> They argue that the “amorality” of the conventional model is neither descriptively nor prescriptively adequate.<sup>27</sup> Thus, while the conventional lawyer is more concerned with the legal process, cause lawyers are “ends” lawyers: their aim is to produce a particular outcome through their legal work.<sup>28</sup> Rejecting the conventional lawyering model, cause lawyers believe that working on behalf of deeply held personal beliefs makes them more effective advocates rather than compromised ones.<sup>29</sup> By uniting their personal and professional interests, \*7 cause lawyers view the law as more than a job and invest themselves in their advocacy.<sup>30</sup>

A consensus definition of the cause lawyer is yet to materialize in the academic literature, as these lawyers are “associated with many different causes, function with varying resources and degrees of legitimacy, deploy a wide variety of strategies, and seek extraordinarily diverse goals.”<sup>31</sup> Nevertheless, the literature seems to include five elements with a large degree of variation within each: (1) intentional commitment (2) to some “cause,” (3) rather than to the client, (4) using various forms of legal activity, for which they feel (5) personally or morally accountable.

## 1. Intentional Commitment

A central feature of cause lawyering is that lawyers expressly decide to work for a particular cause. According to Southworth, without a “self-conscious commitment to the cause,” attorneys could not qualify as cause lawyers.<sup>32</sup> This does not mean that singular devotion to the cause must be the only motivation for engaging in a particular legal practice. Lawyers may pursue a legal career for multiple reasons which include both ideological, political, or moral elements and “more crass or mundane concerns.”<sup>33</sup> Numerous studies indicate that activists may engage in the promotion of causes for ideological as well as self-interested reasons.<sup>34</sup>

Lawyers with mixed motives for advocating on behalf of a cause may qualify as cause lawyers, but, at a minimum, lawyers must be conscious of the decision to serve a particular cause. Attorneys who just happen to advocate positions that they may personally agree with would not qualify. As Scheingold and Sarat state, “[s]erving a cause by accident does not, in our judgment, qualify as cause lawyering.”<sup>35</sup> This still permits the question, what level of personal commitments must lawyers have in order to be cause lawyers? Must cause lawyers remain 50-percent-plus-one motivated by their personal commitments?

## 2. “Cause”

What kinds of political or moral commitments qualify as a “cause” for purposes of cause lawyering? The panoply of interests, clients, ends, and methods involved in cause lawyering makes resolving this question difficult. Several commentators adopt a laissez-faire approach to characterizing “cause,” arguing for an inclusive, individualized approach to defining the term. Ronen Shamir and Sara Chinski, for example, recognize that “cause” is not an objective fact “out there,” but a concept that evolves through the work of lawyers who “shape it, name it, and voice it.”<sup>36</sup> Seemingly, under this conception, lawyers are free to label their “cause” as they see it.

Other scholars, however, adopt a more robust, exclusive definition of “cause.” Much of the early literature on cause lawyering originated from left-liberal interests.<sup>37</sup> Not surprisingly, some of the early definitions of cause lawyering skewed toward left-leaning ends and questioned the inclusion of right-leaning lawyers. For example, Carrie Menkel-Meadow describes the basic thrust of cause lawyering as “achiev[ing] greater social justice—both for particular individuals and for disadvantaged groups.”<sup>38</sup> The language of “social justice” and “disadvantaged groups” tend to be associated, although not necessarily, with the left.

Southworth challenges the presumption that “cause lawyers” must be left-leaning and accepts a broader consensus definition that cause lawyers “must be engaged in advocacy that challenges prevailing distributions of power and resources.”<sup>39</sup> Under this definition, right-leaning libertarian and conservative lawyers fit in among the ranks of cause lawyers.

While the Southworth definition may be more ideologically neutral, it still intimates certain normative assumptions about the proper scope of “cause” activity. “Challeng[ing] prevailing distributions” of power and resources implies a moral or political disagreement with the current social-political order. Could not a cause lawyer work to defend current institutions, practices or traditions? Political or moral imperatives may lead some cause lawyers on the left and the right to resist change.

In the end, a definition of “cause” that is value-neutral seems more appropriate for the range of lawyers driven by political or moral commitments. Cause lawyers are those that engage in advocacy that seeks to effectuate any personally-held substantive world view. Under this approach, any ideological ends are accepted, but purely procedural interests are not.

## 3. Clients

Another distinct quality of cause lawyering is the elevation of political or moral commitments above the client. At its ideal, cause lawyering is “\*9 “about using legal skills to pursue ends and ideals that transcend client service.”<sup>40</sup> Cause lawyers still engage in client service, but, significantly, they view that work as a “means to their moral and political ends.”<sup>41</sup> Accordingly, they seek clients with whom they agree or whose positions may advance their own cause. Often, cause lawyers are quite explicit

about their interests in a client's case. If those interests ever diverge, cause lawyers face an ethical dilemma to protect the client without compromising the cause.

Conventional lawyers would find this de-prioritization of the client ethically suspect. They believe that lawyers have a professional obligation to their clients without any personal investment in their clients' ends. Cause lawyers may respond that they are adhering to higher ethical obligations and are driven by the imperative to not differentiate their personal and professional ethics.

#### 4. Legal Activity

What distinguishes cause lawyers from non-lawyer activists? Scheingold and Sarat divide cause lawyers into two categories: rule-of-law cause lawyering and political cause lawyering.<sup>42</sup> They believe that rule-of-law cause lawyering primarily utilizes the courts and litigation, using class actions, amicus briefs, or raising legal and constitutional issues through a client, to achieve their political or moral ends.<sup>43</sup> Political cause lawyering operates in a wider array of fora, engaging in lobbying, political mobilization and organization, demonstration, and even civil disobedience.<sup>44</sup> These lawyers may participate both as movement activists and attorneys supporting direct political action.<sup>45</sup>

Similarly, Susan Sturm identifies four types of legal strategies cause lawyers employ: individual service, impact litigation, institutional change, and political empowerment models.<sup>46</sup> Menkel-Meadow acknowledges the changing “parameters of behaviors, practices, and activities” involved in cause lawyering, especially noting the increasing mix of legal and non-legal work.<sup>47</sup> She adopts the expansive definition that cause lawyering includes “any activity that seeks to use law-related means or seeks to change laws or regulations.”<sup>48</sup>

**\*10** This mix of legal and non-legal work is in no way limited to cause lawyering. Increasingly, more conventional lawyers employ these legal and non-legal tactics to benefit their clients. This trend represents how the two models influence each other and may not always be so easily distinguishable.

#### 5. Personal Responsibility

As Scheingold and Sarat state, cause lawyering is “an outlet to express [a lawyer's] already formed beliefs.”<sup>49</sup> Accordingly, for the cause lawyer, the disclaimer of ABA Model Rule 1.2(b) does not apply. Since personal commitments, not clients, drive cause lawyers, they do not claim moral unaccountability for the consequences of their work. They gladly “endorse” the moral ramifications of their legal work.

The hallmark of cause lawyering is to allow lawyers to personally identify with a cause and take responsibility for these actions. “Not only are they eager to take sides in social conflict and to identify themselves with the sides they take,” say Scheingold and Sarat, “but they are determined to construct their legal practice around this taking of sides.”<sup>50</sup> By eschewing the “role-differentiated morality” of the legal profession, these lawyers open themselves to the same moral judgments as ordinary citizens. With their professional ethics reflecting their personal ethics, every legal action becomes a moral or political choice for these lawyers, and they willingly accept the consequences of those choices.

## II. Three Models of Government Lawyering: The Law, The Client, or the Cause

Serving as elected and unelected officials, as career bureaucrats and political appointees, working both inside and outside of government, lawyers exert an extraordinary influence on the American political process.<sup>51</sup> As Mark Miller explains it, lawyers “colonize” the government, dominating the judicial, legislative, and executive branches.<sup>52</sup>

Lawyers working in the executive branch face unique tensions between their professional, political, and personal selves. As Cornell Clayton points out:

Each [government] lawyer serves as advocate for an agency or a department that has its own organizational objectives, as well **\*11** as for a partisan administration that expects the individual to fit the law to its political agenda. At the same time, however,

each lawyer belongs to a profession that has trained and exhorted its members to maintain a detached and neutral adherence to the law. This tradition is not just a matter of professional culture but a requisite for any system of government that aspires to uphold the rule of law. If law cannot be interpreted objectively and neutrally, then law—like other forms of politics—simply becomes synonymous with the exercise of power. The tensions between political allegiances and professional independence affect all aspects of government lawyering.<sup>53</sup>

In other words, it is difficult to describe government lawyers as “purely legal or purely political.”<sup>54</sup> Often, they provide support that blends policy and legal analysis.<sup>55</sup> For example, some government lawyers have legal advisory functions, offering the Administration interpretations of court decisions, statutes, and administrative regulations.<sup>56</sup> Depending on the mode of interpretation adopted, this analysis could range from pure objectivity to pure advocacy.<sup>57</sup> Either way, this analysis has a profound impact on policy choices.<sup>58</sup> Government lawyers are also litigators who defend the government or prosecute on behalf of the government, often with a large range of discretion and significant policy implications.<sup>59</sup> They also have policy-advising functions such as drafting proposed legislation or regulations, writing speeches, and issuing press releases.<sup>60</sup>

Government lawyers, thus, have obligations to the law, the legal profession, the President, and their own personal beliefs. How these attorneys view their role may have a tremendous impact on how decisions in the government are made.<sup>61</sup> Where these lawyers' ultimate loyalties lie may instruct them on how they undertake their jobs.<sup>62</sup> Part II seeks to explore where executive branch government lawyers fall in the continuum of lawyering described in Part I, and examines some unique issues for cause lawyers in the public sector.

Part II divides the academic literature on government lawyering into three conceptual frameworks in terms of how they resolve these tensions: \*12 quasi-judicial officers, private attorneys, or activist lawyers. “Quasi-judicial officers” represent those lawyers who believe their role is to provide an objective analysis of the law above all.<sup>63</sup> “Private attorneys” view their government position no differently than their private sector position, which is to provide their client with whatever legal service is needed.<sup>64</sup> Finally, “activist lawyers” utilize their public sector role to advance their conception of the public good.<sup>65</sup>

The different models shift the ultimate end of lawyering from “the law” to “the client” to “the cause.” Correspondingly, each model represents a shift from “the apolitical” to “the political” to “the personal.” The quasi-judicial officer model lawyer is devoid of politics and likely not a cause lawyer, unless upholding the law can be considered a cause.<sup>66</sup> The private attorney model lawyer who happens to have the President as a client engages in highly political work, but may lack the personal investment in outcomes to qualify as a cause lawyer.<sup>67</sup> Finally, activist government lawyers who place their personal convictions before an Administration or conflates their personal interests with that of an Administration is likely a cause lawyer.<sup>68</sup>

### Matrix of Government Lawyering

	Quasi-Judicial Officer	Private Attorney	Activist Lawyer
Ends	The Law	The Client (President or Agency)	The Cause
Attributes	Apolitical	Political	Personal

#### \*13 A. Government Lawyers as Quasi-Judicial Officers

Abraham Lincoln's Attorney General, Edward Bates, once propounded, “[T]he office I hold is not properly political, but strictly legal; and it is my duty to uphold the law and to resist all encroachment, from whatever quarter, of mere will and power.”<sup>69</sup> This view represents the quasi-judicial officer model of government lawyering. Like judicial officials, the government attorney provides the presidential Administration with only objective legal analysis, unclouded by personal or policy preferences. While the professional norms of neutrality and nonpartisanship of conventional lawyers govern these government lawyers, they do not adhere to the primacy of client service as other “hired-gun” lawyers. Accordingly, they resolve any tension between their

political self, their client, and their professional self in favor of the profession and the law, unlike the ideal of either the cause or conventional lawyer.

In her study of U.S. Attorney Generals, Nancy V. Baker identifies a similar model of government lawyering that she calls “Neutral;” the lawyer’s only loyalty is to the rule of law, regardless of personal convictions or duty to the President or his political agenda.<sup>70</sup> Baker describes this lawyer as the “eminent professional—capable, cautious, thoughtful, legalistic, nonpolitical.”<sup>71</sup> Expected to expound the law in a neutral manner, this lawyer privileges the procedures of sound and objective legal interpretation over any concern for substantive ends.<sup>72</sup> By neglecting the political needs of the Administration, this type of attorney “stresses [the] rule of law over majoritarian principles.”<sup>73</sup> Thus, this lawyer is inclined to eschew high involvement in policy considerations and often limits her role to legal interpretation.<sup>74</sup> A neutral lawyer tends to be a political neophyte, Washington outsider, and/or an academic.<sup>75</sup> She is not a close friend or a political associate of the President.<sup>76</sup>

The quasi-judicial lawyer interprets the law free from her own political convictions or those of the President.<sup>77</sup> Serving a quasi-judicial function, government lawyers define the legal limits of executive action in neutral terms as dictated by or analogized from Supreme Court precedent \*14 or established law.<sup>78</sup> John O. McGinnis describes this as the “[c]ourt-[c]entered” model of executive branch legal interpretation; government lawyers are bound by the judicial branch’s view of the law and lack any independent jurisprudential principles of legal interpretation.<sup>79</sup> These lawyers say what the law is, not what it should be or what the President would want it to be. Like the cautious jurist, government lawyers in these roles exercise “executive restraint” in expounding the law and do not advance substantive changes in the law.<sup>80</sup> Whether this legal advice is helpful to the President’s ability to implement his agenda is inconsequential to the quasi-judicial lawyer.<sup>81</sup>

This quasi-judicial model of government lawyering lacks much of the character of cause lawyering. These lawyers seem to pursue government service not out of dedication to an agenda or a person; rather, they view government service as another avenue to practice and serve “the law.” It is possible that their desire to engage in “public service” or preserve the “rule of law” may be classified as a “cause.”<sup>82</sup> Nevertheless, this is different than the aforementioned conception of the “cause” as a particular substantive end. On the other hand, they are not conventional lawyers either. For example, ABA Model Rule 2.1 permits a lawyer to counsel his client with “other considerations such as moral, economic, social and political factors[] that may be relevant to the client’s situation.”<sup>83</sup> Quasi-judicial officers would likely resist these extralegal factors in assisting their clients. For them, what the law says is the end of the analysis. Nevertheless, quasi-judicial officers bear a closer resemblance to conventional lawyers, with their emphasis on procedural interests and lack of a personal agenda. Furthermore, since these lawyers maintain a professional distance from their legal advice, they would likely not claim any personal culpability for how decision-makers utilize or politicize their advice.

## B. Government Lawyers as Private Lawyers

The next model of government lawyer eschews the disinterestedness of the quasi-judicial officer model, but still retains the professional detachment of the conventional lawyer. This model sees government lawyers as private attorneys in the public sector. It advocates that “differences between \*15 private and public clients do not necessarily imply any fundamental difference in the nature of the attorney-client relation itself.”<sup>84</sup> As articulated by Nelson Lund, the President, or whoever the government lawyer determines is her public sector client, is no different than any other client in private practice. The President is entitled to set the ends of his lawyers’ service and to require them to provide legal advice that would be most useful to him within the bounds of the law.<sup>85</sup> The government lawyer’s role is to assist the President in making fully informed decisions by providing an assessment of the legal constraints and risks in pursuing certain ends.<sup>86</sup>

Accordingly, whereas the quasi-judicial officer lawyer might limit the range of legal advice to well-established or “court-centered” interpretations of the law, the private attorney may give the President a broader range of legal advice. For example, ABA Model Rules permit a lawyer to advocate a “good faith argument for an extension, modification or reversal of existing law,”<sup>87</sup> and to consider non-legal factors in counseling the client.<sup>88</sup> While a quasi-judicial lawyer may be reluctant to utilize these options, the private attorney would have no problem doing so. Like the private attorney, the government lawyer provides the President with arguments to support his policies, even advice at odds with precedent or a consistent jurisprudence. McGinnis

describes this approach as the “situational lawyer” model where the lawyer's role is to interpret “the law in a manner that most advances the President's political or situational interest on a particular issue with little or no sense of obligation to either court-centered or autonomous jurisprudential principles.”<sup>89</sup> While still obligated to counsel against any fraudulent or illegal client conduct, the government lawyer's primary responsibility is to advise the client on an array of legal positions. This view is clearly political, bending or inventing legal justifications to allow the President to respond to majoritarian pressures.

If government lawyers are no more than private attorneys, then the professional norm of not construing these lawyers' actions as an endorsement of their client would still apply. Lund would likely agree with this view. In justifying the private attorney model, Lund states that “[i]t is true that the President has legal obligations that are different from those of any private citizen, but they are his obligations, not those of his lawyers or other subordinates.”<sup>90</sup> Lund unambiguously draws a line of separation \*16 between the President and his lawyers. They are not to be judged by the same standard. The government lawyer is not morally or legally responsible for the decisions of the President, nor can the lawyer substitute his judgment for the President's.<sup>91</sup>

The government lawyer following the private attorney conception, as articulated above, cannot be considered a cause lawyer. Even though this lawyer engages in highly partisan work, she does so only because of the nature of the presidency and not because of an intentional commitment to the President's political ends. The lawyer is not constrained or motivated by any sense of obligation to the President other than the normal fiduciary duty owed to clients. She engages in no moral or political evaluation of the President's positions. Her work is viewed as partisan only because every action in support of the President is considered political. In this case, the lawyer is a mere advocate for a client who happens to be President.

Richard Wasserstrom would likely regard this importation of the conventional lawyering model to government service as troubling. Writing in the backdrop of the Watergate scandal, he argues that the many government lawyers who engaged in morally opprobrious behavior at the time may have done so because they “viewed Richard Nixon as they would a client and ... sought, therefore, the advancement and protection of his interests—personal and political.”<sup>92</sup> He reflects that the “amorality of the lawyer” in government leads to these improper results.<sup>93</sup> In fact, outside of the criminal defense realm, Wasserstrom argues, “it is quite likely that the role-differentiated amorality of the lawyer is almost certainly excessive and at times inappropriate.”<sup>94</sup> He also suggests that the ethos of the “lawyer qua advocate” in government is quite different than the “lawyer qua counselor.”<sup>95</sup> Some of the tactics that may make sense in the adversarial setting of litigation may not be similarly appropriate for the government official as a legal counselor or adviser.<sup>96</sup>

### C. Government Lawyers as Activist Lawyers

The final model of government lawyering found in academic literature approaches the ideal of the cause lawyer—the lawyer who places moral or political convictions above professional norms as a lawyer. As Miller states, some lawyers join government service out of “a strong ideological commitment to the agency's political goals.”<sup>97</sup> Under this activist model, \*17 lawyers match their professional obligations with their personal obligations and view government service as a means to achieving their conception of the public good. Often, the activist lawyer's political goals closely adhere to the President's political agenda. It is this common purpose that drives the lawyer's decision to join the presidential Administration. Thus, in most cases, the activist lawyer acts as a loyal subordinate and defender of the Administration. Yet, on the rare occasions where the President and the lawyer's personal agendas substantially diverge, the lawyer may face the difficult decision to advance his or her own agenda above the Administration's.

Baker defines this category of U.S. Attorney Generals as the “Advocate [s].”<sup>98</sup> These types of government lawyers view their roles similarly to the political activists, promoting both the President's and their own policy agendas while in office.<sup>99</sup> Unlike Baker's Neutral, the law, as it stands, is not paramount; the Advocate works as an “assistant, an adviser, a pleader of causes” and does not hesitate to use the legal process in the service of those causes.<sup>100</sup> Much like the cause lawyer outside of the government, Advocates view the law as the means rather than the end and utilize expansive legal interpretation to advance the President's and their own agendas. These government lawyers are generally comfortable expressing policy recommendations based on their view of what is good policy.

Baker's Advocate government lawyer often comes from a highly partisan background. Many have served as party leaders, political allies, or campaign managers to the President prior to appointment.<sup>101</sup> Often this connection and loyalty to the President leads the government lawyer to become a trusted adviser and amass a wide portfolio of both legal and non-legal matters, including domestic and foreign affairs.

Nevertheless, these lawyers clearly do not see their work as mere client service. They have a demonstrated history of cause advocacy and view government service as another avenue for that advocacy. The Advocate's "strong bond of loyalty to the president does not mean that he merely acquiesces; he may pursue the president's political agenda because he shares it, not because he is ordered to do so."<sup>102</sup> In fact, as noted earlier, sometimes the Advocate elevates her own ends over loyalty to the President. "[S]ome Advocates," says Baker, "have been noted for their independence \*18 of the White House."<sup>103</sup> In the classic model of the cause lawyer, the "independently minded Advocate may even use his political skills to pursue a policy that differs from his president's."<sup>104</sup>

Similarly, Michael S. Paulsen, a law professor and attorney in the Office of Legal Counsel in the first Bush Administration, believes that government lawyers must sometimes violate their professional ethical obligations to protect moral imperatives.<sup>105</sup> A government lawyer, like a cause lawyer, is not required to leave his moral or political beliefs at the office door. According to Paulsen, where a personal conviction is sufficiently important, lawyers' moral obligations should overtake their professional ones.<sup>106</sup> During his government service, he contemplated violating his duty of confidentiality by leaking derogatory information about the nomination of David Souter to the Supreme Court, which he feared breached his strong pro-life convictions.<sup>107</sup> He felt that there were circumstances "when adherence to role-obligations results in complicity with clear moral wrong, even if such complicity is expected by the legal regime and non-compliance is likely to be futile, ineffective, and punished."<sup>108</sup>

Although he did nothing at the time, Paulsen claims that a lawyer would have been justified in divulging the confidential information to those outside of government. As Paulsen states, An attorney for the United States unquestionably owes a duty of loyalty to the Administration within which he or she serves. But when that Administration wants to take the country "to hell in a handbasket," legally or illegally, there are some circumstances in which the government attorney simply must not be a compliant handmaiden.<sup>109</sup>

While disclosure of confidential information would be an extreme option, Paulsen argues that government lawyers at least have a responsibility to press against morally offensive decisions even if it sacrifices their career advancement.<sup>110</sup> If that fails, the other option is resignation. Under conventional norms, the attorney may withdraw from representing a client \*19 if he finds the client's objectives "repugnant."<sup>111</sup> Yet, would a quiet resignation satisfy the requirements for an activist lawyer? Must a lawyer resign "loudly"—that is, publicly stating the reason for the resignation—to classify as an activist? This would be more consistent with "ends" over "means" lawyering.

Under this conception, the activist government lawyer is undoubtedly a cause lawyer. Many of the hallmarks of cause lawyering appear in this framework. Personal convictions drive the lawyer's professional services. The lawyer places personal beliefs over the client's. Finally, the lawyer is concerned with substantive ends rather than just a conception of procedural justice. Since this lawyer independently evaluates government service work through a personal moral or political code, the activist government lawyer should accept moral accountability for her legal activity, much like the cause lawyer in the private sector. Nevertheless, it may be difficult to distinguish the activist lawyer from the private attorney model since major disagreements between the Administration and the lawyer are likely rare. Only on these rare occasions where the lawyer is publicly advancing his or her own agenda could the objective observer note that the attorney is working for their own ends rather than the Administration's.

#### **D. Unique Issues for Cause Lawyers in the Public Service**

Government lawyering may clearly serve as a venue for cause lawyering. Nevertheless, some definitional issues unique to cause lawyering in the public sector still exist because of the different tensions, choices, and methods they face. Menkel-Meadow posits some interesting questions about government lawyers:

[W]e might ask whether all government lawyers, working for “the public interest,” qualify, or whether we make individualized judgments about what ends particular lawyers are seeking to achieve. Is the environmental defense lawyer in the U.S. Department of Justice politically and morally equivalent to the environmental prosecutor in the same agency, much less lawyers representing the Sierra Club? Does the lawyer who writes welfare regulations to increase work requirements in federal or state agencies qualify? <sup>112</sup>

Although Menkel-Meadow betrays a left-liberal bias in her consideration of cause lawyers, she introduces some useful points about cause lawyers. First, how may government lawyers define their “cause”? Can any \*20 “public service” automatically constitute a “cause”? Second, if cause lawyering utilizes clients to advance a cause, who is the client in government service? Third, if cause lawyering requires intentional commitment, what is the government lawyer committing to? This section will discuss how government lawyers may begin to answer some of these questions.

### 1. Cause in Government Service

Part I.B.2 outlines the difficulties with defining which “causes” qualify for cause lawyering. This question becomes even more complex for government lawyers since the possibilities for formulating “cause” are more numerous. Under the Shamir and Chinski individualized approach, all government attorneys may consider themselves cause lawyers. <sup>113</sup> Under the Southworth definition, some question remains as to whether all government lawyers could be included. <sup>114</sup> Under the value-neutral “ends” definition, all activist government lawyers could be cause lawyers.

First, with the laissez-faire individualized approach, all government lawyers, including quasi-judicial and private attorney types, may consider themselves cause lawyers by broadly construing their cause. Instead of defining the cause as a substantive end, quasi-judicial officers and private attorney lawyers may fashion procedural interests, such as “public service” or “serving one’s country” or “preserving the rule of law,” as their cause. For these lawyers, entering government service is the end in itself.

Additionally, private attorneys or activist lawyers could identify their client, the President, as their cause. While traditional “causes” focus on groups or interests over individuals, these lawyers may style their cause as one individual—the President—out of personal belief in his agenda or general loyalty to his principles, party, or philosophy. These lawyers feel their role is to assist him in implementing his agenda. This model is different from the purely conventional lawyering model since these lawyers chose their clients out of personal, moral, or political conviction. This conception of a “cause” would challenge the necessity to view clients as a means to an end.

Second, the Southworth requirement of “challeng[ing] prevailing distributions” excludes many government lawyers from cause lawyering. Quasi-judicial officers plainly may not qualify as a cause lawyer, since they accept the law as is and do not attempt to change it. Private attorney-type government officials are not cause lawyers as a group. Depending on the aims of the Administration they serve, private attorneys may or may not be challenging existing power structures. Finally, some activist government lawyers may not qualify as cause lawyers, as some might view \*21 their government service as a method to protect established and traditional institutions. Activists for Republican administrations might particularly view their role this way.

Finally, under the value-neutral ends definition, only activist governmental officials can be considered cause lawyers. Of the three types, they are the only lawyers committed to producing a particular substantive outcome through their government service. To them, government lawyering provides a venue for bringing about their view of a just world.

### 2. Client in Government Service

In government service, lawyers face the unique question of defining their client. In private practice, the client question is generally apparent. Usually, private sector lawyers encounter a physical client or face rules for representing a corporation or organization. <sup>115</sup> For the government attorney, the client is not so clear. The government lawyer may choose any number of client possibilities: the presidency (the office), the President (the person), the executive branch, an executive department, a particular component in the department, a particular government official, or some conception of the law, the common good, the American people, or the United States. As Baker says, “[h]ow the client question is answered can have a profound effect on [the government lawyer’s] service, because it resolves for him the disturbing question of where his ultimate loyalties lie.” <sup>116</sup>

Some conceptions of the client permit the government lawyer to pursue her own “causes.” If the lawyer views the American people or the public good as her client, she may begin to promote ends that are not necessarily in line with the President's or the established law. She may have convictions of what is a desirable policy or law in the interest of the common good. On the other hand, if the lawyer views the President in her official capacity as her client, then she has an obligation to pursue the Administration's ends subject to ethical and legal constraints.

### 3. Intentional Commitment and Moral Accountability in Government Service

Moral accountability for cause lawyers stems largely from their intentional choice to work for a certain cause. As the preceding sections explore, government lawyers face some uncertainty in defining their causes and clients and, thus, what their commitment entails. When the lawyer joins a specific Administration, are they consenting to the Administration's <sup>22</sup> entire body of policies, their department or direct superior's goals, the President or political party's platform, or only to the work they directly engage in? Consequently, from an objective perspective, judging what the government lawyer is intentionally committing to may be difficult.

While the objective observer might conclude that the lawyer is working for the government for a particular purpose, the lawyer might have a different aim in mind. For example, if one views all government lawyers as activists, then it would be proper to hold them responsible for the actions of their Administration. If government lawyers view themselves as quasi-judicial officers engaged in public service, however, such accountability for their Administration may be inappropriate, since the lines of consent are more attenuated.

Some may argue that private sector cause lawyers in large advocacy organizations face the same challenge. Large organizations may encompass coalitions of advocates where endorsement of some organizational goals does not necessarily entail support for all of their activities or clients.<sup>117</sup> Nevertheless, in the private sector, cause lawyers have a greater ability to tailor their legal work. Private sector advocacy groups exist in all shapes and sizes, and a private sector cause lawyer makes a more pronounced choice to join a specific organization. In government, lawyers generally have a binary choice between a Republican and Democrat Administration; they may agree with many or most of an Administration's ends, but not all. Accordingly, one may need to be more cautious in formulating the lines of moral accountability between government lawyers and their Administration's actions.

## III. Study of George W. Bush Administration Lawyers

With more than 26,000 attorneys with different roles and functions in the federal government, academic models could not fully capture the range of motivations, methods, and beliefs of actual government lawyers.<sup>118</sup> This section seeks to explore how political commitments affect the choices of government lawyers and how they evaluate their own responsibility for their Administration's actions. While the preceding sections generally observe attorneys from an objective stance, the goal of this section is to analyze government lawyers' subjective views. To that end, several political appointees of the Bush Administration participated in a study about their <sup>23</sup> thoughts on early career plans and motivations, influences for government service, styles of lawyering, and their views of cause lawyering. As suspected, these lawyers do not follow the models of cause or conventional lawyering from Part I or the models of government lawyering from Part II in exact detail. In most cases, these lawyers bring elements of multiple frameworks into their government service.

### A. Methodology

This study draws from interviews of twelve current and former lawyers for the Administration of George W. Bush. The purpose of this study is not to make empirical conclusions about all government lawyers. Instead, the examination seeks to investigate government lawyer attitudes on an anecdotal basis obtained from a small sample. Furthermore, this sample selects from a very specific category of government lawyers: lawyers who are politically appointed in the current Republican Administration. This examination does not suggest any normative claims about the significance of this subset in the larger context of government lawyers. Rather, the chosen sample has more to do with the ease of gaining access to the pool. While an attempt was made to diversify the pool of interviewees, the study does not claim that the twelve participants are representative of all Bush government lawyers. With such a small sample, the investigation does not seek to make broad claims about the Bush Administration or government lawyers in general. Any findings presented herein pertain only to the twelve participants in the study. Whether these observations may be extrapolated to government lawyers in general is beyond the scope of this Article.

The study compiled interviews obtained through confidential written responses, phone discussions, and face-to-face meetings. The interviews lasted from twenty to thirty minutes and were conducted in early 2006. A questionnaire structured the interviews and delved into the attorneys' personal histories and attitudes about government service.<sup>119</sup>

As Lund identifies, any study of government lawyers faces inherent challenges.<sup>120</sup> Multiple pressures deter government lawyers from speaking candidly with researchers. First, government lawyers work in the public eye. While professional reputation is important for all lawyers, this consideration is magnified in the public sphere. Lawyers in the government are open to greater public scrutiny and their careers may be more sensitive to public pressures. Second, it is more difficult to protect the confidentiality of their work. In the private sector, it would be easy to speak in generalities \*24 without disclosing any privileged client information. In the case of government workers, the client is clearly the government. The disclosure of any sensitive information has not only legal significance, but also political significance that may affect the Administration or the lawyer's political career. Accordingly, Lund warns that interviews of government lawyers may be self-serving or incomplete and viewed with some skepticism.<sup>121</sup>

To minimize flaws in the investigation, anonymity was promised to all those interviewed. Hence, no identifiable attributes will be published in this piece aside from basic descriptors. Furthermore, interviewees were offered an opportunity to decline to answer any question they would prefer not to answer. Several lawyers utilized this option.

## **B. Backgrounds**

The government lawyers interviewed for this section come from a diverse cross section of Administration lawyers. They all served in at least one legal office within the Administration; four worked in two or more offices in the Administration. The offices comprised in this sample include: Office of Legal Policy (OLP), Office of Civil Rights (OCR), Office of the Associate Attorney General (OAAG), Office of Legal Counsel (OLC) in the Department of Justice (DOJ), Office of Counsel to the President, and general counsel's offices within several executive agencies.

They represent lawyers at different stages of their career. Five graduated from law school between 2000 and 2005, four between 1995 and 1999, and three before 1995. Nine of twelve graduated from a top ten law school according to 2007 rankings.<sup>122</sup> Four participants are women. Although the participants resided in the Washington, D.C. area during their government service, they originated from diverse parts of the country. All participating attorneys identified themselves as Republicans.

Most of the lawyers had a mix of private and public sector jobs prior to joining the Administration. Two were partners in large Washington, D.C. law firms prior to their government service; seven were associates in various-sized law firms at some point before working for the Bush Administration; and only three had no prior private sector experience (excluding summer associate work).

All but one of the participants served as a lawyer in some branch of government prior to their Bush Administration experience. One worked as senior counsel to a congressional committee; another worked in the general counsel's office of a governor; another worked as a state prosecutor; and still another worked as a career DOJ lawyer. One attorney was a political \*25 appointee at DOJ during the Administration of President George H. W. Bush. Almost all participants worked as legal clerks in the judicial branch: three were United States Supreme Court clerks, eight were federal circuit court clerks,<sup>123</sup> one was a federal district court clerk, and another clerked for a state court. The two participants with no previous legal experience in government did serve as paid campaign staff for the Bush-Cheney campaign or the Republican National Committee before joining the Administration. One additional lawyer worked as a campaign official in the 2004 campaign.

## **C. Analysis**

### **1. Early Plans and Motivation**

One way to start the inquiry into whether these government lawyers can be considered cause lawyers is by delving into the process of how they decided to work in the Bush Administration. If government service was an early and intended career

choice, then political commitments likely played a larger role in shaping their legal career. To that end, the questionnaire asked participants questions related to their early career plans and how they entered government service. Was government service an anticipated part of their career path? If so, how long was it part of their plans? Or was it by chance they ended up in the Bush Administration? How did they actually enter into government service?

For most participants, government service was an intentional part of their career plan from early on. Eleven of twelve participants had some interest in government work from law school or before. Most expressed a general interest in “politics,” “public service,” or “government” work. Others were more specific in what they wanted to accomplish with their government work. A former Administration lawyer said he always wanted to be a criminal prosecutor (and was for many years).<sup>124</sup> A self-described “conservative” lawyer stated that he was “ideologically driven” into government service.<sup>125</sup> One young lawyer stated that she was always attracted to “policy formation.”<sup>126</sup> In language reminiscent of cause lawyering, she stated that she “yearned to be a participant in the world's happenings, not merely a reviewer of them.”<sup>127</sup>

\*26 These lawyers all made decisions immediately after law school to bolster their chances of government service. Three attorneys explicitly chose D.C. law firms with a history of the “revolving door”<sup>128</sup> to facilitate their government service. Four either volunteered or worked for the Bush-Cheney campaign in 2000 or 2004 to get their foot in the door. One lawyer was offered an Administration job after participating in the Florida recount. Another credited the Washington conservative legal circle, specifically the Federalist Society, for her introduction into government service.<sup>129</sup> These lawyers resemble Baker's “Advocate” lawyers with strong political ties and D.C. “insider” status.

For some, involvement with clerkships was the stepping stone into government service. One White House lawyer got involved in government service after two clerkships with prominent jurists in Washington. Another White House lawyer did not intend to pursue a career in the public sector, but was encouraged by professors and fellow students to consider clerking. After clerkships on the Circuit and Supreme Court levels, he built relationships with people involved in politics.

## 2. Influences

Another indicia of cause lawyering is a determination of why a lawyer entered government service. Lawyers likely have multiple motivations in accepting a government position. Some motivations may deal with one's moral or political commitments, while others may be more attributable to career or lifestyle interests. In an attempt to determine which factors had a greater impact on the lawyers' decision-making, the questionnaire asked them to rank how influential a number of political and non-political factors contributed to their decision to work for the Administration, on an ascending scale of influence from one to ten.

The questionnaire first inquired into the political factors in the decision-making. As stated earlier, in government, “cause” may be difficult to define. Political commitments may be expressed in several ways. The lawyers may have more ideological interests or have more partisan interests. The lawyers may have a personal affinity for President Bush because of his stances, personality, or leadership style. They may be interested in the opportunity to work for the office of the Presidency or the executive branch. Some lawyers may be driven by the patriotic duty to serve one's country. Unfortunately, time limitations prevented the questionnaire from \*27 delving into too many factors or resolving any ambiguities in how these participants interpreted these influences. In the end, the questionnaire presented five political influences: “Enacting policies that you believe in;” “Supporting the Republican Party;” “Working for President Bush (the person);” “Working for the President (the office);” and “Serving your country.”

The questionnaire then asked the lawyers to rank four factors unrelated to political commitments. Miller identifies the perceived reduced number of hours and higher job security compared to private practice as prominent factors for government service.<sup>130</sup> He also states that government work can serve as a stepping stone for more lucrative employment in the private sector or for making contacts for their legal or political careers.<sup>131</sup> The nature of government work may also attract lawyers: for example, government lawyers may gain more responsibility early on or develop a greater variety of skill sets. The questionnaire attempted to capture these interests in four categories: “Interest & quality of government work;” “Advancing your career;” “Quality of life issues;” and “Desire to leave private practice.”

To reiterate, this study does not intend to make empirical conclusions about Bush lawyers. It is important to remember Lund's admonition about self-serving biases in government lawyer interviews.<sup>132</sup> Nevertheless, the difference in these ratings offers

some valuable clues about the comparative significance of political and moral commitments in pursuing a career with the Bush Administration.

Comparing the two categories of factors reveals that political factors are significantly more influential on the decision of these Bush lawyers to enter government service.<sup>133</sup> Averaged over the twelve participants, the four political influences receive a 7.06 rating,<sup>134</sup> compared to a 4.25 rating for non-political factors. This may indicate why these lawyers decided to serve as political appointees rather than career non-political line attorneys.

Chart #2 shows responses on an individualized basis.<sup>135</sup> On an individualized basis, the political influences outweigh the non-political factors for all participants except one. Furthermore, there seems to be a correlation between the political and non-political influences. Generally, higher political rankings tend to lead to lower non-political rankings.

**\*28** Furthermore, the “Enacting policies that you believe in” factor tracks the closest with the ideal of cause lawyering since it most privileges personal beliefs over client service. Nonetheless, it does not rank among the most influential of the factors. It ranks lower than serving the office of the President which indicates a strong desire to abstractly serve the government. It also ranks slightly lower than working for the President as a person, indicating that they may conflate their cause with their client. At the very least, that these lawyers so highly value their specific client is indicative of their uniqueness as lawyers. The conventional lawyer would not typically have such partiality toward a client. Surprisingly, purely partisan concerns (“Supporting the Republican Party”) equaled or ranked lower than some non-political concerns, suggesting its relative insignificance. On the other hand, “Serving your country” ranked the highest of the factors possibly signifying the considerable value placed on public service in general.

### 3. Model of Government Lawyering

As Part II demonstrates, government lawyers may choose from a number of models of government lawyering. This section delves into which model these Bush lawyers adhere to: either the quasi-judicial, private attorney, or the activist lawyer. The questionnaire asked the lawyers to describe how they approach their positions as government lawyers. Surveying their responses, it is clear that no government lawyer fits cleanly into any of these models of government lawyering. All showed elements of two or even three models. Nevertheless, the prominent view seems to follow the private attorney model, while the quasi-judicial role was the least articulated. Elements of the activist lawyer are found among adherents of both models.

#### Private Attorney

Most of the lawyers saw no fundamental difference between government lawyering and private practice lawyering, aside from procedural differences. In this respect, most viewed their roles as more in line with the conventional, private attorney model. For example, one lawyer focused on the increased level of responsibility for younger lawyers, the greater role of management in government jobs, and the natural public attention to government jobs as the primary difference.<sup>136</sup> Another lawyer said that there is less individual accountability in government since there are so many people involved on issues.<sup>137</sup> He stated that the issues are more interesting **\*29** in the public sector and the ability to advance is faster and easier.<sup>138</sup> One agency counsel stated that the biggest differences arise from the differences in litigation and non-litigation.<sup>139</sup> Most of these lawyers came from litigation backgrounds, while none of them directly participate in litigation matters for the government.

Nevertheless, this litigation background is certainly reflected in how these lawyers view their government roles.<sup>140</sup> As a White House lawyer stated, “[o]ur job is to protect the client’s legal interest, so we are still the ‘hired gun.’”<sup>141</sup> Another agency general counsel echoed this response, stating that “[t]he issues are the same: you are protecting your client whether it is the government or your company.”<sup>142</sup> Accordingly, these lawyers still felt that the client drove their legal work. The same White House lawyer stated that government lawyers do not get to dictate what they do or necessarily work on the issues they believe in. A DOJ lawyer agreed, stating that “I try to formulate policy and legal positions that I believe that the Attorney General and President would support or that would be consistent with the policies of the Administration. I don’t look at it as expressing [personal] beliefs.”<sup>143</sup>

Just like the private lawyers who do not evaluate their client's moral or political positions, many of the lawyers viewed their role as the dispassionate advocate for their client, who happens to be the President or the Administration. "I had to advance the President's belief or desire," said a DOJ lawyer with a strong political background, "even if that position was not 100% in line with my own."<sup>144</sup> A young agency counsel said, "I truly see my role as helping those who were elected implement policies that they feel their voting public desires."<sup>145</sup> Another lawyer said that once the President's policy is set, "the lawyer's job is to provide whatever legal support is necessary."<sup>146</sup> If there is a personal disagreement, the same White House lawyer said, "I would follow marching orders, it happens all the time. I don't fret about it."<sup>147</sup> According to another attorney, it is the role of the "good staffer" to suppress any private disagreement once a decision has been made.<sup>148</sup>

### \*30 Quasi-Judicial

Nevertheless, several lawyers indicated some differences from the conventional private attorney model. Three lawyers expressed views reflecting the quasi-judicial model of government. One former OLC lawyer suggested government lawyers were subject to unique obligations not faced by private lawyers. "Government lawyers are charged with pursuing the public interest," he states, "whereas private lawyers represent a specific client's interest."<sup>149</sup> Accordingly, he felt his role was to express an objective view of the law. "As a lawyer, I always attempted to advance an objective view of the law, without regard to whether the law reflected a policy position with which I agreed or disagreed."<sup>150</sup> He further stated that he did not feel obligated to express the law in terms agreeable to the President. Another White House lawyer concurred, stating that he "expressed [his] best judgment of what the law required."<sup>151</sup> Possibly revealing role-obligations, two of these attorneys spent some time in the Office of Legal Counsel (OLC), an office that serves as the executive branch's legal advisor on all constitutional issues.<sup>152</sup> An agency counsel agreed that, as a government lawyer, the "duty of a lawyer to serve the law and the profession" must be balanced with the client's interests.<sup>153</sup> The former OLC lawyer further stated that [i]f [he] had a serious disagreement on a matter of law, in which [he] felt that the Administration was about to do something that could not seriously be thought to comply with applicable law, [he] would have quietly resigned. Otherwise, [he] would have continued to serve [his] client as best as [he knew] how.<sup>154</sup>

Of course, all attorneys are obligated to practice within the bounds of the law. Yet, what may be distinctive about these lawyers is their resistance to injecting their personal or their Administration's views into the proper interpretation of the law.

### \*31 Activist Lawyers

On the other end of the spectrum, several lawyers blend elements of the activist lawyer model in their legal work. As one WHC lawyer stated, "[b]eing a government lawyer requires one to apply not only legal judgment to a problem but also political judgment."<sup>155</sup> Accordingly, these lawyers are open to introducing policy preferences in their government service.

As Baker mentioned earlier, who the government lawyer identifies as the client resolves where the lawyer's loyalty lies.<sup>156</sup> According to one participant, "who the client is is more complicated" for government lawyers.<sup>157</sup> Another lawyer identifies multiple conceptions of the client: "the personal, the agency, the departmental, the executive, or the public/common good/country."<sup>158</sup> Under this formulation, lawyers may begin to inject personal causes and commitments into their legal work. For example, decisions made in the interest of the "public/common good" are clearly value-laden.

Framing the client matter in a different manner, another lawyer argued that the government lawyer must actually deal with the absence of a client. "A government lawyer has no true client," says the lawyer.<sup>159</sup> In the absence of a physical client, government lawyers have a greater ability to infuse their political preferences into their positions or advice. "The government lawyer is driven more by the ability to shape outcomes," stated a DOJ lawyer with a strong policy portfolio. "In government,

you are the advocate and the client; you can craft outcomes or decide on courses of actions. In private practice, the client drives the outcome.”<sup>160</sup> The White House lawyer who stated that government lawyers are still “hired guns” acknowledged that “there is more flexibility to introduce your ideas and policy beliefs since government work is a blend of law and policy.”

In comparison, the former White House lawyer who most adhered to the quasi-judicial model would not completely divorce his political/moral convictions from his work. “If I had a serious disagreement on a matter of policy about which I felt strong moral convictions, I would have quietly resigned.”<sup>161</sup> Still, the lawyer felt he had an obligation to not speak publicly about disagreements as a cause lawyer may be obligated to do.

In fact, all twelve participants suggested it was inappropriate to violate duties of loyalty or confidentiality in the face of disagreement with the \*32 Administration in opposition to Paulsen's views.<sup>162</sup> Most stated that they would argue internally against a policy or position that they disagreed with using the appropriate channels. If a favorable resolution could not be made, then they felt that their only options were to resign or support the policy or position.

Among the self-identified cause lawyers in the sample, it is difficult to surmise if the standard for resignation for these lawyers is any different than the “repugnant” standard under the ABA Model Rules. One felt he would resign only if he had a “very serious disagreement with a major position I was personally involved in.”<sup>163</sup> Another reiterated the “morally repugnant” standard. A third said he would defend the Administration “to the end of the law,” which may challenge whether he truly adheres to the cause lawyering model.<sup>164</sup> Another lawyer, who fit more closely the private attorney model, suggested it would require a disagreement over “something very extreme.”<sup>165</sup>

Disputing the concept of “loudly” resigning, two lawyers who considered themselves cause lawyers believed they must still follow their ethical command of nondisclosure. One stated that “[i]t is inappropriate to wage warfare through leaking or going outside the chain of command.”<sup>166</sup> Another said he would resign and “[o]nce back in the private sector, [he would] generally remain silent (at least publicly).”<sup>167</sup>

#### 4. Moral Responsibility

As stated earlier, “taking sides” is one of the hallmarks of cause lawyering.<sup>168</sup> Unlike conventional lawyers, cause lawyers wholeheartedly endorse the ends of their legal work. They are eager to accept the moral ramifications of their participation in the legal process. The questionnaire next focused on this question for government lawyers. Do they feel morally responsible for the positions and decisions of the Bush Administration? If willing to accept culpability for the ends of the Bush Administration, these lawyers then begin to take on the characteristics of cause lawyers.

Interestingly, the twelve participants divided equally among the three possible categories of moral responsibility: those that felt accountable for all the decisions and positions of the Bush Administration; those that felt \*33 accountable only for the positions and decisions they contributed to; and those that felt no accountability for the actions of the Bush Administration at all.

Of the four participants claiming a moral responsibility for all actions of the Bush Administration, three had extensive experience campaigning for President Bush. This campaign background likely impacts their attitudes on the Administration. “After dedicating nearly four years to working for President Bush inside the government and nearly two years working on President Bush's campaigns, I feel accountable for the performance of the Administration overall.”<sup>169</sup> Another lawyer who acted as field staffer during one of the campaigns stated, “I am a surrogate for all Bush policy.”<sup>170</sup> In campaign terms, a “surrogate” is any individual other than the candidate who agrees to speak positively about the candidate or campaign. “It is inevitable that my personal beliefs end up being tied to the Administration,” he added.<sup>171</sup> Another DOJ lawyer with no campaign experience likened joining the Administration to working for a tobacco defense firm, suggesting that even if you do not directly work on tobacco-related issues, you tacitly endorse their efforts. “You chose to take the job after all,” she says, “I didn't have to sign up.”<sup>172</sup>

Another four participants claimed responsibility only for the work they participate in. As one lawyer put it, if “I had no participation in the decision or control or no chance to weigh in, I have no obligations to defend it.”<sup>173</sup> Another lawyer stated

that he felt “somewhat” accountable for the overall record, but felt comfortable expressing disagreement with policies he did not support. “I feel much more accountable for those policies that I helped to enact.”<sup>174</sup> A young DOJ lawyer stated, “Insofar I am helping shape policy, I feel responsible. But not so to already decided policy or policy that I am implementing.”<sup>175</sup> Three of these four participants ranked “non-political factors” significantly lower than the average while ranking the “political factors” above average.<sup>176</sup>

The final four participants felt no moral accountability for the actions of the Bush Administration. Their most common response was that they were not decision-makers. As one senior White House lawyer stated, lawyers “serve a support function and are morally accountable to give the best \*34 legal advice possible.”<sup>177</sup> Accordingly, they felt no personal responsibility for any of the substantive ends of the Administration. Not surprisingly, three of these participants also ranked “non-political influences” higher on average than the rest of the participants; two could squarely be considered quasi-judicial government lawyers.<sup>178</sup>

This third view clearly echoes the conventional norm of non-accountability as embodied in ABA Model Rule 1.2(b). Conversely, two-thirds of the participants endorsed some elements of their client's work. Something about government work plainly challenges this norm of the profession. Of the two categories that felt some accountability, it is open to debate which one most closely adheres to the cause lawyer ideal. Since the essence of cause lawyering is that lawyers choose the ends they work on, those that only feel morally responsible for the work they contributed to most closely reflect the cause lawyer. Such lawyers would argue that since they had no control or input in the Bush Administration's entire platform, they should not be held accountable for all of its actions. On the other hand, those that feel accountable for the entire Administration could be identifying their client, the President, as their cause; cause lawyering, according to these lawyers, therefore requires continued loyalty to his entire program.

## 5. Cause Lawyer

While the above sections all provide clues on whether to view these Bush lawyers as cause lawyers, the next section asks them to consider this question directly. As noted earlier, a common definition of cause lawyering is difficult to craft. The questionnaire provided the broadest definition of cause lawyering in order to allow each participant to characterize it as they see fit, describing it as “lawyers whose legal work is driven by ‘moral or political commitments.’”<sup>179</sup> The responses again varied: half completely accepted the label of cause lawyer, one qualified his acceptance, and the rest flatly rejected the label.

Six participants identified themselves as cause lawyers without qualification. One lawyer, who has had varied government experience and is now working in the private sector, views himself as a cause lawyer “completely.”<sup>180</sup> “I am a conservative,” he stated, and he would not work for any Administration, Republican or Democrat, in which he was not comfortable with its social policy, except in the time of war.<sup>181</sup> In his private \*35 sector work, his personal commitments are reflected through his pro bono choices and the discretion that is available to him. In the future, however, he plans on returning to government service.

Not surprisingly, three of the participants who accepted the label of a cause lawyer work at a DOJ office with a strong policy portfolio. One higher level attorney stated, “I believe that the policies of the Republican Party are better for this country. That is an important reason that I made the decision to work at the Department.”<sup>182</sup> Another lawyer in the same office chose a firm with similar political leanings at an early career stage in hopes of agreeing with its litigation choices. The third participant from this office worked on both of President Bush's national campaigns and has never worked in the private sector.

Another attorney, who recently joined the private sector after a long tenure in the public sector, stated that he believes moral prerogatives drive his legal career.<sup>183</sup> In his government work, he was motivated by a strong sense of “public service.” Even more, this lawyer stated he is strongly pro-life and would have serious reservations working for any pro-choice President.

Another self-described cause lawyer at DOJ declared that his cause was “to enforce the law and carry out the objectives of the President.”<sup>184</sup> Emphasizing his long history with the Bush Administration, he expressed some of the strongest loyalty to President Bush's agenda, which he agrees with “the vast majority of the time.”<sup>185</sup> Reflecting his other cause, he stated he would consider serving in a DOJ career position regardless of the Administration, such as an Assistant United States Attorney.

A seventh attorney qualified his inclusion among cause lawyers. He claimed he was a cause lawyer only “in part.” “I have always been highly motivated by my political and philosophical belief system, and service in government is in part a way to indulge that motivation.”<sup>186</sup> Nevertheless, most of his career has commenced at a Washington, D.C. firm and “most of [his] work in private sector has little overlap with those motivations or commitments.”<sup>187</sup>

Five lawyers rejected the cause lawyer label. Not surprisingly, two of these lawyers demonstrated the quasi-judicial attributes in the earlier sections. As one stated, “I vote based on my moral and political commitments, but I believe that laws should be interpreted and applied objectively.”<sup>188</sup>

**\*36** Two other lawyers declined the label since they did not believe their work was issue specific. “I’m not a cause lawyer in the sense that I’m trying to put forth a single policy or represent a particular interest.”<sup>189</sup> Another participant holds “very few strongly-held policy attachments” and is more attracted to the “process” of public policy.<sup>190</sup> Reflecting the problems of defining “cause,” this lawyer thinks she may be a cause lawyer “in the sense that [she is] driven by [her] moral commitment to participate in the American democratic process and to continue to see our country strive to live up to its own goals.”<sup>191</sup> Nevertheless, as she acknowledges, this would not comport with the traditional conception of cause lawyering.

A White House lawyer agreed that she is not a cause lawyer because she believes that that “seems more issue specific.”<sup>192</sup> She works on behalf of an Administration with political and moral values, “but there are so many [issues] that I do not think I am a cause lawyer.”<sup>193</sup> Nevertheless, she expressed enjoyment in being able “to advance policies that are value laden.”<sup>194</sup>

Another lawyer challenged whether lawyers with mixed motivations could be considered cause lawyers. He believed that “lawyers are always driven by clients” and that so many interests motivate government lawyers that they could not all be labeled “cause lawyers.”<sup>195</sup> He agreed that political or moral commitments drive the choice to enter government service, but so do career or lifestyle interests. He felt that political appointees are not driven by a “single motivating factor” and thus not cause lawyers.<sup>196</sup>

#### IV. Conclusion

This study shows that most of these government lawyers do not fall near the poles of the cause-conventional lawyering spectrum. Rather, each blends ethos from both groups. Similarly, while the three frameworks of government lawyering offer valuable tools of analysis, none of these lawyers tracked cleanly with any single model.

The question remains: how does this study help evaluate the statements of Chief Justice Roberts and Justice Alito? While this Article does not seek to make broad generalizations about government lawyers, it may offer one conclusion: perhaps the assessment of whether government lawyers are cause lawyers requires an extremely individualized approach.

**\*37** Judging from their career trajectories following their service in the Reagan Administration, the two Supreme Court Justices more closely resemble the “quasi-judicial” model lawyers. Chief Justice Roberts went on to enjoy a prominent career as an appellate lawyer in private practice and then a short tenure as a D.C. Circuit judge. Justice Alito became a U.S. Attorney and then sat on the Third Circuit bench for fifteen years. Such backgrounds indicate that these two were “public service”-oriented conventional lawyers; thus, their assertions that their Reagan Administration work was mere client service ring true.

In the end, does this matter? Might it be better for effective government that government lawyers receive the protections of ABA Model Rule 1.2(b) despite how they view their role? If government lawyers had to defend every work product or defend entire administrations in the future to advance in public service, it may chill government service in general or the effectiveness of their work in particular. They would be afraid to express controversial legal or policy positions out of concern that it would be used against them at a future date. They may forego political appointments to protect future public service opportunities.

Of course, publicly declared cause lawyers in government should be held responsible for their work as any other cause lawyer. By definition, they work only for the goals they believe in and should face the consequences of that choice. Nevertheless, as noted earlier, it is often difficult to distinguish between the “private attorney” government lawyer who views the President as her client and the “activist” government lawyer driven by personal convictions since their agendas generally coincide. Objective

proof to classify a lawyer as either an activist lawyer or a private attorney may be hard to obtain. Thus, it may only be appropriate to attach the label of “cause lawyer” to those that publicly claim the label.

In other circumstances, regardless of whether government lawyers actually believe in their moral responsibility for their government service, maybe good governance requires that they be judged as traditional lawyers anyway. The interest in effective government may outweigh the need to hold individual lawyers accountable for their actions on behalf of clients—even if that client is the President of the United States.

**\*38 APPENDIX**

**Interview Questionnaire**

Preliminary Questions

Gender: Please Pick Hometown (Town & State): \_\_\_\_\_

Law school & year of graduation: \_\_\_\_\_

Please list the title, employer & dates of legal positions held in the private sector:

Title, Employer	Dates
_____	_____
_____	_____
_____	_____
_____	_____

Please list the title, office & dates of legal positions held in public service:

Title, Office	Dates
_____	_____
_____	_____
_____	_____
_____	_____

Were you a member of the Federalist Society in law school? \_\_\_\_\_

Are you currently? \_\_\_\_\_

Party Affiliation: \_\_\_\_\_

**\*39 Questions**

- 1) How did you get involved in government service? Was it part of your early career plans?
- 2) Is the role of a government lawyer different from the role of a private sector lawyer? What are the similarities and differences?

3) Who did you consider the “client” in your government service?

4) In literature, scholars describe “cause lawyers” as lawyers whose legal work is driven by “moral or political commitments.” Do you consider yourself a cause lawyer?

5) From 1-10, how influential were the following factors in your decision to enter government service? (1 = not influential at all, 10 = most influential)

- Enacting policies that you believe in \_\_\_\_\_
- Supporting the Republican Party \_\_\_\_\_
- Working for President Bush (the person) \_\_\_\_\_
- Working for the President (the office) \_\_\_\_\_
- Serving your country \_\_\_\_\_
- Advancing your career \_\_\_\_\_
- Quality of life issues \_\_\_\_\_
- Interest & quality of government work \_\_\_\_\_
- Desire to leave private practice \_\_\_\_\_

6) Please list any other factors that contributed to your decision:

7) In your government service, did you mostly express your own personal beliefs or the beliefs that you think the President supports?

8) Do you feel morally accountable for the positions and decisions of the Bush Administration? If so, do you feel morally accountable for all actions of the Administration or only for those positions or decisions that you personally contributed to?

\*40 9) Which statement below would you most agree with? \_\_\_\_\_

A. President Bush is more politically conservative than me.

B. President Bush is generally identical to me politically.

C. President Bush is less politically conservative than me.

10) How would you deal with a serious disagreement with the Bush Administration?

11) Would you serve in the Administration of a Democrat if asked? Would you serve in the Administration of any Republican President?

**\*41 Chart #1**

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

**\*42 Chart #2**

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

## Footnotes

- a1 J.D., Harvard Law School, 2006; B.A., Yale College, 2000. The author wishes to thank Professors Ann Southworth, David B. Wilkins, Jamil Jaffer, and Bishop Grewell. He also appreciates the participation of so many current and former government lawyers in this study. The author has served in the Administration of President George W. Bush in several capacities, including the Office of Counsel to the President and on the confirmations of Chief Justice John G. Roberts and Justice Samuel A. Alito.
- 1 Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 172 (2005), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html>.
- 2 Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 407-408 (2006), available at <http://thomas.loc.gov/cgi-bin/ntquery/r?nomis:109PN0105900>.
- 3 MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002).
- 4 See *id.*
- 5 Kenney Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805, 810 (1971).
- 6 MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002).
- 7 While examining the attitudes of career government lawyers would offer an interesting comparison, it is beyond the scope of this Article.
- 8 See MODEL RULES OF PROF'L CONDUCT pmb1.2 (2002) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").
- 9 See, e.g., Ann Southworth, *Professional Identity and Political Commitment among Lawyers for Conservative Causes*, in *THE WORLDS CAUSE LAWYER MAKE* 83 (Austin Sarat & Stuart Scheingold eds., 2005).
- 10 MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued.").
- 11 See David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached Out Lawyering*, 5 INT'L J. LEGAL PROF. 141, 144 (1998).
- 12 *Id.*
- 13 *Id.*
- 14 *Id.* (describing Stephen L. Pepper, *The Lawyer's Amoral Ethical Role*, 1986 AM. B. FOUND. RES. J. 613 (1986)).
- 15 Southworth, *supra* note 9, at 83.
- 16 MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002).
- 17 MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002).
- 18 *Id.*
- 19 STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN* 8 (2004).
- 20 David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801, 815 (1992) (footnotes omitted).

- 21 MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1983) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law").
- 22 Hegland, *supra* note 5, at 811.
- 23 SCHEINGOLD & SARAT, *supra* note 19, at 73.
- 24 ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* vii (1993) quoted in David B. Wilkins, Book Review: [Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics](#), 108 *HARV. L. REV.* 458, 458 (1994).
- 25 SCHEINGOLD & SARAT, *supra* note 19, at 6.
- 26 Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issue*, 5 *HUMAN RIGHTS* 1 (1975), reprinted in ANDREW L. KAUFMAN & DAVID B. WILKINS, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION* 4, 12 (2002).
- 27 *Id.*
- 28 SCHEINGOLD & SARAT, *supra* note 19, at 9.
- 29 *Id.*
- 30 *Id.* at 73.
- 31 *Id.* at 3.
- 32 Southworth, *supra* note 9, at 85-86.
- 33 *Id.* at 87.
- 34 See *id.*
- 35 SCHEINGOLD & SARAT, *supra* note 19, at 3.
- 36 Ronen Shamir & Sara Chinski, *Destruction of Houses and Construction of a Cause*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 227, 231 (Austin Sarat & Stuart Scheingold eds., 1998).
- 37 Southworth, *supra* note 9, at 85.
- 38 Carrie Menkel-Meadow, *The Causes of Cause Lawyering*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 31, 37 (Austin Sarat & Stuart Scheingold eds., 1998).
- 39 Southworth, *supra* note 9, at 85.
- 40 SCHEINGOLD & SARAT, *supra* note 19, at 3.
- 41 *Id.* at 7.
- 42 *Id.* at 18-19.
- 43 *Id.* at 19.
- 44 *Id.*
- 45 SCHEINGOLD & SARAT, *supra* note 19, at 19.
- 46 Susan Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 *U. MICH. J.L. REFORM* 1-129 (1993), quoted in Menkel-Meadow, *supra* note 38, at 36.

- 47 Menkel-Meadow, *supra* note 38, at 37.
- 48 *Id.*
- 49 SCHEINGOLD & SARAT, *supra* note 19, at 4.
- 50 *Id.* at 9.
- 51 MARK C. MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS* 29 (1995).
- 52 *Id.*
- 53 Cornell W. Clayton, Introduction: Politics and the Legal Bureaucracy, in *GOVERNMENT LAWYERS* 1-2 (Cornell W. Clayton ed., 1995).
- 54 MILLER, *supra* note 51, at 36.
- 55 *See id.*
- 56 *See id.*
- 57 *See id.*
- 58 *See id.*
- 59 MILLER, *supra* note 51, at 37.
- 60 *Id.* at 37.
- 61 *See id.* at 36-37.
- 62 *See* MILLER, *supra* note 51, at 38.
- 63 *See infra* notes 69-83 and accompanying text.
- 64 *See infra* notes 84-96 and accompanying text.
- 65 *See infra* notes 97-111 and accompanying text.
- 66 *See infra* notes 112-117 and accompanying text for an extended discussion of what may constitute a “cause” in government service.
- 67 *Id.*
- 68 *Id.*
- 69 NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990*, at 3 (1992) (quoting Arthur S. Miller, *Justice without Politics*, *PROGRESSIVE*, Apr. 1974 (quoting Edward Bates)).
- 70 *Id.* at 35.
- 71 *Id.*
- 72 *See id.*
- 73 *Id.*
- 74 *See* BAKER, *supra* note 69, at 35.

- 75 See id.
- 76 See id.
- 77 For a legal realist critique regarding whether the “bounds of the law” could be objectively determined, see David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469 (1990).
- 78 John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 377 (1993).
- 79 Id. at 382.
- 80 Id. at 389.
- 81 To read how this model of legal interpretation may frustrate a President's agenda, see Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993).
- 82 This will be further addressed in Part III.D.1.
- 83 MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002).
- 84 Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 451 (1993).
- 85 Id. at 449.
- 86 Id. at 448.
- 87 MODEL RULES OF PROF'L CONDUCT R. 3.1 (2002).
- 88 MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002).
- 89 McGinnis, *supra* note 78, at 377.
- 90 Lund, *supra* note 84, at 449.
- 91 Id.
- 92 Wasserstrom, *supra* note 26, at 11-12.
- 93 Id. at 11.
- 94 Id.
- 95 Id.
- 96 Id.
- 97 MILLER, *supra* note 51, at 38.
- 98 BAKER, *supra* note 69, at 67-106.
- 99 Id. at 35.
- 100 Id. Baker fears that this model may lead government lawyers to overstep the law to achieve their ends. Nixon Administration Attorney General Elliot Richardson notes that there is a “difference between the proper role of the political process in the shaping of legal policies and the perversion of the legal process by political pressure.” Id. at 107.
- 101 Id. at 67.
- 102 BAKER, *supra* note 69, at 67.

- 103 Id.
- 104 Id. at 67-68. For an example of how Attorney General Herbert Brownell was able to push through a stronger civil rights bill than President Dwight Eisenhower wanted, see BAKER, *supra* note 74, at 68.
- 105 Michael S. Paulsen, Government Lawyering: Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and its Limits, 61 LAW & CONTEMP. PROBS. 83 (1998).
- 106 Id. at 95.
- 107 Id.
- 108 Id.
- 109 Id. at 106.
- 110 Paulsen, *supra* note 105, at 96.
- 111 MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2002).
- 112 Menkel-Meadow, *supra* note 38, at 33.
- 113 See *supra* text accompanying note 36.
- 114 See *supra* text accompanying note 39.
- 115 See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.13 (2002).
- 116 BAKER, *supra* note 69, at 29.
- 117 For example, Bob Barr, a conservative, former Republican Congressman and Bill Clinton impeachment manager, works on privacy issues for the ACLU. It is unlikely that he endorses all the ends of the organization. See, e.g., Ed Bark, Ex-Congressman Barr: Out of Office But Never Off Stage, DALLAS MORNING NEWS, June 5, 2004, at 13A.
- 118 BUREAU OF LABOR STATISTICS, U.S. DEP't OF LABOR, CAREER GUIDE TO INDUSTRIES, 2006-07 EDITION, FEDERAL GOVERNMENT, EXCLUDING THE POSTAL SERVICE, <http://www.bls.gov/oco/cg/pdf/cgs041.pdf> (last visited Jan. 22, 2007).
- 119 For a sample of the survey, see the Appendix.
- 120 Nelson Lund, Guardians of the Presidency: The Office of the Counsel to the President and the Office of Legal Counsel, 209, 214-15, in Clayton, *supra* note 53.
- 121 Id.
- 122 U.S. NEWS & WORLD REPORT, AMERICA'S BEST GRADUATE SCHOOLS 44 (Ben Wildavsky ed., 2007).
- 123 The three Supreme Court clerks and the one federal district court clerk also served as clerks on the circuit court level, so only four clerked solely for a circuit court.
- 124 Interview (Jan. 2006). All interviews were conducted on condition of anonymity. Accordingly, the names, titles, and institutional affiliations (if any), of all participating attorneys have been withheld. This information and complete records of all interviews are, however, on file with the author.
- 125 Id.
- 126 Id.
- 127 Id.

- 128 The “revolving door” refers to the continuous two-way flow of lawyers between government and private law firms.
- 129 Much has been written about the influence of the Federalist Society in the Bush Administration. See, e.g., Thomas B. Edsall, *Federalist Society Becomes a Force in Washington*, WASH. POST, Apr. 18, 2001, at A4.
- 130 MILLER, *supra* note 51, at 37-38.
- 131 *Id.*
- 132 See Lund, *supra* note 120.
- 133 See Chart #1 in Appendix.
- 134 For the purposes of comparison to non-political factors, the “Serving your country” factor was eliminated since all participants ranked it so highly it is questionable whether it qualifies as a dependent variable.
- 135 See Appendix.
- 136 Interview (Apr. 2006).
- 137 Interview (Jan. 2006).
- 138 *Id.*
- 139 Interview (Jan. 2006).
- 140 Likely to the chagrin of Wasserstrom. See *supra* notes 92-96 and accompanying text.
- 141 Interview (Apr. 2006).
- 142 Interview (Jan. 2006).
- 143 Interview (Jan. 2006).
- 144 Interview (Feb. 2006).
- 145 Interview (Jan. 2006).
- 146 Interview (Apr. 2006).
- 147 *Id.*
- 148 Interview (Feb. 2006).
- 149 Interview (Jan. 2006).
- 150 *Id.*
- 151 Interview (Apr. 2006).
- 152 OLC is often compared to the Supreme Court for the executive branch. For more information, see, e.g., McGinnis, *supra* note 78.
- 153 Interview (Jan. 2006).
- 154 Interview (Apr. 2006). For a possible example of this attitude by another Bush Administration lawyer, see Daniel Klaidman, Stuart Taylor Jr., & Evan Thomas, *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34.
- 155 Interview (Jan. 2006).

- 156 See supra note 116 and accompanying text.
- 157 Interview (Jan. 2006).
- 158 Interview (Jan. 2006).
- 159 Interview (Jan. 2006).
- 160 Interview (Jan. 2006).
- 161 Interview (Apr. 2006).
- 162 Of course, one could not expect many lawyers to declare that they would violate their ethical obligations in certain situations.
- 163 Interview (Jan. 2006).
- 164 Interview (Jan. 2006).
- 165 Interview (Jan. 2006).
- 166 Interview (Jan. 2006).
- 167 Interview (Jan. 2006).
- 168 See supra note 50 and accompanying text.
- 169 Interview (Feb. 2006).
- 170 Interview (Jan. 2006).
- 171 Id.
- 172 Interview (Jan. 2006).
- 173 Interview (Jan. 2006).
- 174 Interview (Jan. 2006).
- 175 Interview (Jan. 2006).
- 176 The rankings for the “non-political factors” were 3.25, 4.50, 3.75, and 1.75 where the average was 4.46. For the “political factors,” they were 8.00, 9.25, 7.31, and 7.00 where the average was 7.06.
- 177 Interview (Apr. 2006).
- 178 They ranked them as 5.50, 5.75, and 5.00, whereas the average was 4.46.
- 179 The definition derives from Scheingold and Sarat. See SCHEINGOLD & SARAT, supra note 19, at 5.
- 180 Interview (Jan. 2006).
- 181 Id.
- 182 Interview (Jan. 2006).
- 183 Interview (Jan. 2006).
- 184 Interview (Feb. 2006).
- 185 Id.

- 186 Interview (Jan. 2006).  
187 Id.  
188 Interview (Jan. 2006).  
189 Interview (Jan. 2006).  
190 Id.  
191 Id.  
192 Interview (Apr. 2006).  
193 Id.  
194 Id.  
195 Interview (Jan. 2006).  
196 Id.

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