

1965

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Recommended Citation

James W. Payne Jr., *Ethical Problems of Government Lawyers*, 2 U. Rich. L. Rev. 151 (1965).
Available at: <http://scholarship.richmond.edu/lawreview/vol2/iss3/5>

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Ethical Problems of Government Lawyers

JAMES W. PAYNE, JR.

Most discussions of the ethical problems confronting an attorney for the government refer primarily to the more obvious situations involving a potential conflict of interest, such as the offer of some substantial benefit from a private party having business with the government and seeking the aid or good will of the attorney. To be sure, these problems exist and should not be minimized. There are, however, problems with subtler overtones (although they may involve substantially the same interests) which present ethical difficulties and which cannot be resolved neatly by reference to existing canons of ethics. Although it is not suggested that the government lawyer is in the position of a monopolizer as to the difficulties, real or imagined, discussed herein, he may be peculiarly vulnerable to some of them. He owes an obvious duty to serve the public interest; he often performs or fails to perform in public fashion; the nature of his responsibilities makes his performance a matter of public and political concern, and, certainly, concern on the part of economic interests affected thereby.

Assuming, for the sake of illustration, that lawyer, L, is employed by an agency charged with enforcing the anti-trust laws, the following are suggested as recurrent problems and discussed under two broad headings:

1. The problem of the "small deep freezer."

As best the author can determine, no government attorney is wrapped in cotton wool by his agency. Inevitably, then, L will have frequent contact over a substantial period of time with those lawyers whose clients have frequent business with the agency involved. A genuine or psuedo-friendly relationship may develop.

Should L accept the small and customary gift *e.g.*, passes to World's Fair exhibits, Christmas turkeys, tobacco, luncheons, honoraria or generous expenses when called upon to travel and make a talk, and similar relatively small items presented to him on infrequent occasions and not necessarily or even usually according to any schedule? It is conceivable that the question can be answered by the word game involved in referring to such items as token gifts, or, via variety, small courtesies. It is also possible that rejecting such items can make L feel a trifle silly or, perhaps, more than a little pompous or prudish. Occasionally, rejection simply is not feasible because of the nature of the item or favor extended. The difficulty can be compounded if L, from time to time, devotes his energies to advice or informal consultation with the donor regarding the latter's problems, involving time or effort substantially beyond the requirements imposed by L's office but within the limits of his discretion. Such a situation is conducive both to the friendly relationship described and an accompanying and increasing tender of favors to L.

2. The pressures of expediency.

In *Pickwick Papers*, Charles Dickens has two of his characters engage in a brief dialogue:

'It's always best on these occasions to do what the mob do.' 'But suppose there are two mobs?' suggested Mr. Snodgrass. 'Shout with the largest,' replied Mr. Pickwick. (Dickens, Charles, *Pickwick Papers*, New York: Modern Library, n.d., Ch. 13)

The government lawyer, barring extreme circumstances, is relatively secure in his employment. However, he is not assured of promotion, interesting or significant work, the trappings of status, or relative permanence of location. One or more of these prospects would be important to L and to his family. One is reminded of the

conjecture as to Mrs. Henry's reaction to Patrick's speech at the suggestion that L should remain on a white charger. Many government attorneys are in a position to make decisions or to participate in the formulation of policy that will affect the public interest. This statement sounds so very trite, but the trite truth expressed affects millions of lives in various and important ways. It is here that we may witness the goading of many an ox, and, conceivably, if the owner of the ox is sufficiently influential and vocal in his wrath, the goading of many a lawyer. Most men who hold jobs above the shoeshine level are vulnerable to personal or economic pressure. As to them we may often simply suggest that each man must decide whether he will live according to his own and best lights, feeble though they may be. This could be supplemented by a reference to Professor Fuller's discussion of the morality of duty and the morality of aspiration, and, in truth, the sense of obligation to the public and to oneself must, in such large part, be self-sustained. Fuller, Lon L., *The Morality of Law*. New Haven: Yale University Press, 1964, Ch. 1.

But political pressure, sometimes subtle, sometimes an unanswerable roar of red rage, can be a peculiarly powerful form of attrition, retaliation, or rapid devastation. Susceptibility to such pressure, to the extent that it influences the conduct and decisions (or total abstention from conduct and decisions of any significance) on the part of the government lawyer or his agency, can affect the entire national population. The author poses the question which will be reserved for subsequent comment: Is there any proper and practical method of protecting the lawyer or his agency from political or economic reprisal for unpopular actions or decisions which are neither arbitrary nor irrational? This is indeed a delicate question and serious ethical and legal problems would confront any such effort.

· It is perhaps likely that the temptation to be ex-

pedient rather than right will arise from pressures imposed within the agency itself. L's superior, who is himself under pressure, may demand anything from money to services for political ends and in response to a party policy that he serves. Discipline for refusal could come from within the structure of the agency, again in the form of altered employment, limited prospects for promotion, or reduced responsibility. L may feel that he should be free from a demand to contribute some fixed sum of money to a given political party. Yet the demand may come, and it may require some boldness to refuse, and this can be true even though discipline is an imagined and not a real threat.

Similar influences affect areas in which the lawyer's function is to make recommendations or to participate in decisions regarding cases potentially or actually before his agency. Perhaps most of us would accede to the proposition that if L performs the semi-judicial function of making either preliminary or final decisions affecting or potentially affecting any party to the case or the public interest, he should be free from any prospect of discipline resulting from the unpopularity of his decision, excepting the extreme situation involving dishonesty or gross incompetence on his part. Yet the path to this goal must, assuredly, be a rocky one. Among the more obvious boulders, the following may be suggested: If L is not a career lawyer, is it natural to suspect that he may cast an eye toward prospective employers while formulating his decision? If L is a career lawyer, is it unreasonable to suppose that he may be tempted to render a decision or make a recommendation that is counter to his judgment, but that is safe in that it accords with agency policy or Congressional sentiment, or safe in the sense that a ruling adverse to the "defendant" places the entire burden of reversal upon the latter instead of the agency so that authoritative disposition of the case is less apparently an agency action? Is it

also possible that the sheer size and economic or political strength of a corporation or an industry with which the agency is concerned can create most of the foregoing problems in addition to the policy problems entailed in the very decision to strike at large aggregations of economic power? This, of course, can frequently be a matter of agency policy. It is possible that the factors determinative of such a policy can involve ethical considerations. Our anti-trust laws, for example, reflect a basic political philosophy as well as an economic philosophy.

It would seem entirely justified, without the necessity of extensive reference, to suggest that administrative agencies "make law" within the sphere of their activities (conceding differences in methods of operation) pretty much as courts or judges make law. It is also possible that this process, dealing as it does with a purposive set of human inclinations, has achieved, or will achieve, the "morality" of a creative process striving through reason to discover principles of order that will yield a maximum fulfillment of the large complex of individual and social purposes within the ambit of the agency's concern. This is an end or a purpose in the same sense that economics may be said to have the less ambitious purpose of solving problems relating to the distribution of resources. This same idea is suggested by Justice Cardozo when he states that the phrase natural law "ought to mean today the law that springs from the relations of fact which exist between things." Cardozo, Benjamin N., *Nature of the Judicial Process*. New Haven: Yale University Press, 1921, p. 123.

This means nothing more pretentious than the fact that the essence of the judge's function is the application of reason to discover and apply those principles that will be conducive to successful group living in the environment that confronts him. Sometimes this will require the creation of precedent; sometimes adherence to precedent; and, sometimes, it will result in some form of in-

novation. In any event, in time, this process can result in a core of tradition, philosophy, and decisional law that might survive political change and pressure. The chances that this will be true, and that attorneys working within the agency will be accorded a fair measure of freedom from undue pressures or temptation of a degree that is undesirable might be enhanced if the heads of agencies possessed the life tenure of judges, with the disciplinary power over agency attorneys vested in their hands under procedural steps provided for by legislation.

This proposal is not suggested as a panacea, but it is responsive to a query raised earlier in this note; and it might be worth considering as a step that would tend to reduce the number and severity of the ethical difficulties that we have attributed to the lot of the government lawyer. Certainly, with our long tradition of respect for the judicial process, most of us might react with considerable indignation at the suggestion that our judges be made quite so vulnerable to economic or political pressure. Yet the government lawyer often judges, and often, too, shapes national policy in ways that are not the responsibility of the traditional judge or within his power. Obviously, substantive and procedural safeguards should exist to safeguard the public from the incompetent, from the consistently lazy, and from the dishonest lawyer, if any such tenure proposal be implemented.

More specifically, and with reference to the categories of problems suggested herein, this tentative proposal might be effective in the following ways:

1. Consider our first problem involving the "little deep freezer": It certainly seems desirable to preserve an area within which relatively informal conferences and negotiations may take place between the citizen or industrial enterprise and the government. The administrative agency possesses a degree of flexibility here that a court, as presently structured, could not possibly match, as witness the large number of labor-management settle-

ments in NLRB regional offices, the advisory opinion program of the Federal Trade Commission, or the whole area of field examination by administrative agencies. At the same time, if the commissioners themselves are cast more in the traditional role of judges than the role of relatively temporary political appointees or politicians, with their own ambitions pressing upon them, two things might happen: (a) The agency might have sufficient continuity to establish a known tradition (or something more positive) concerning the various kinds of problems involved in the tender of small favors which might well serve to prevent the government lawyer from feeling either compromised or embarrassed. (b) The degree of movement away from the political arena and toward the concept of an agency exercising a judicial function in a relatively customary and traditional manner might well place the agency's attorney more on the level of a law clerk with reference to the problems previously noted, with the dual effect of internal sanction and relative freedom from embarrassment in rejecting our "little deep freezer."

2. Second, as to the pressures toward expediency:

The fact that L would achieve relative independence from economic or political pressure would seem obvious if L is primarily answerable to commissioners who are free from such pressure. The need to bend to the quick cry of outrage is simply reduced to the point of *de minimus*, except as pressure can be applied via Congressional control of agency funds, agency organization, or by the spotlight of publicity resulting from Congressional criticism. It is possible, however, that Congressional response to constituency pressure can and would be more restrained if the pressure is directed toward an independent and more clearly judicial body over which Congressional control is substantially reduced.

The shift from relative sensitivity to political pressure to the security and long term responsibility of a func-

tion more closely resembling that of the traditional judiciary could, conceivably, have additional consequences. Just as we tend to be more careful, in an average of instances, in the selection of our judges, the same tendency might become stronger and more manifest in the selection of our administrative officials. Also, both because of increased selectivity and the change of emphasis regarding the position of the administrative official, it is at least possible that the process of adjudication on the administrative level might tend to be more objective and more responsible. There is authority for this, although stated in terms of extremes. In his book *Productive Thinking*, Professor Wertheimer states:

One can sometimes observe marvelous changes in individuals, as when some passionately biased person becomes a member of a jury, or arbitrator, or judge, and when his actions then show the fine transition from bias to an honest effort to deal with the problems at issue in a just and objective fashion. The very development of the idea and institution of courts of justice is at issue here. (Wertheimer, Max W., *Productive Thinking*, New York: Harper and Bros., 1945)

The implications of this shift to some sort of "permanent tenure" for the heads of administrative bodies are also various for the attorneys employed by these bodies. Given a sustained effort toward objectivity and impartiality at the top level and a more apparent continuity of tradition and precedent, it is certainly conceivable that this would be reflected in the efforts of agency lawyers insofar as the quality of their preliminary, or perhaps, final, decisions are concerned. Certainly, this would seem to be true with reference to the vast bulk of intermediate decisions subject to agency review at the highest level. Further, if the atmosphere within the agency is that it is "out of politics," with a job to

do, the lawyer for the agency may well seek to perform that job with less regard for political expediency or popularity. It may also be true that counsel for private enterprise, as an employee of such enterprise, might find shelter in the position of the agency which would tend to make him less responsive to the desires of prospective employers, where responsiveness would amount to a "yes-man" kind of expediency. Concern for the public interest could achieve a more prominent role in the work of such a lawyer, given a substantial degree of independence from extraneous pressure and a heightened respect for the decisional process within the agency.

Admittedly, this brief note is incomplete, offers no detailed proposal, can be classified as a tentative and general suggestion for thought, and certainly tenders no panacea for the problems noted here or for those not noted. Some readers may fear with Hayek in his *Road to Serfdom* (1950) that a proliferation of governmental agencies is inconsistent with a democratic society, vesting arbitrary power to hurt or help a citizenry in the hands of governmental agents, with an accompanying dependancy upon the largesse of bureaucrats and decline in the independent exercise of political rights. The tenure suggestion tossed out for consideration is not necessarily calculated to increase social or economic control by the administrative process. The author wonders if the proposal for relative independence on the part of the agency and removal from the political arena might not remove some of the bias and potentially arbitrary character of a control that already exists.