

UCLA

UCLA Public Law & Legal Theory Series

Title

Hired Guns and Ministers of Justice: The Role of Government Attorneys in the US and Israel

Permalink

<https://escholarship.org/uc/item/6x70f63f>

Journal

Israel Law Review, 19

Authors

Asimow, Michael

Dotan, Yoav

Publication Date

2016



THE HEBREW
UNIVERSITY
OF JERUSALEM

The Hebrew University of Jerusalem Faculty of Law

Mt. Scopus, Jerusalem 9765418

Israel

Hired Guns and Ministers of Justice: the Role of Government Attorneys in the US and Israel

Michael Asimow & Yoav Dotan

Hebrew University of Jerusalem Legal Studies Research Paper Series No. 16-02

Hired Guns and Ministers of Justice: the Role of Government Attorneys in the US and Israel

Michael Asimow & Yoav Dotan*

Abstract: What is the role of a government attorney who represents a government agency on judicial review? Most academic literature in US advocates the “hired gun” model in which the role of the government lawyer is no different from a lawyer representing a private client (although some academics and government lawyers disagree). The prevailing view in Israel is that government lawyers are “ministers of justice” owing a primary obligation to the public interest rather than to the client agency. This difference is attributable to fundamental differences in legal culture between the US and Israel as well as to unique features of the Israeli system of judicial review.

Key words: Comparative administrative law, administrative law-Israel, government lawyers-United States, government lawyers-Israel, legal ethics.

A comparison between the administrative law systems of the United States and Israel reveals many interesting differences.¹ One of them concerns the role of government attorneys who represent a government agency during the process of judicial review of agency action. Such attorneys must choose between two different conceptions of their role. The first conception treats a government attorney representing a government client as no different from a private attorney representing a private client. This is the view of most of the US academic literature, although some academics and government lawyers disagree with it. We refer to this approach as the “hired gun” model. The second conception is that government attorneys are public officials accountable to the public interest rather than owing exclusive loyalty to the agency they represent. This is the prevailing view in Israel. We refer to it herein as the “minister of justice”

* Michael Asimow is Visiting Professor of Law, Stanford Law School; Professor of Law Emeritus, UCLA School of Law. Law.asimow@law.stanford.edu. Yoav Dotan is Edwin A. Goodman Professor of Public Law, Hebrew University. Yoav.dotan@mail.huji.ac.il. We gratefully acknowledge the assistance of persons who provided interview data about the practices of US government attorneys (see note 22, *infra*) and also to Mariano-Florentino Cuellar, Adam Dodek, Eitan Levontin, Anne O’Connell, Itay Ravid, Dorit Reiss, Debra Rhode, Yuval Roitman, and Bill Simon. An earlier version of this paper was presented at the Research Workshop on *The Scope of Judicial Review and the Dilemma of the Administrative Record in Comparative Perspective* held at The Hebrew University in December 2014. We are grateful to the Halbert Center for Canadian Studies and to the Harry and Michael Sacher Institute for Legislative Research and Comparative Law for their generous support for the workshop. We appreciate the comments of the participants at the workshop.

¹ Some of these differences are discussed in Michael Asimow & Yoav Dotan, *Open and Closed Judicial Review of Agency Action: The Conflicting US and Israeli Approaches*, forthcoming, AM. J. OF COMP. L. (2016). (hereinafter *Asimow-Dotan 2016*).

model. This article discusses these conflicting approaches and expresses a normative preference for the minister of justice model.

I. THE HIRED GUN MODEL IN THE US

A. JUDICIAL REVIEW OF AGENCY ACTION IN THE US

In the US, federal agency actions are normally subject to judicial review.² Most cases are initially heard in the federal district court (with decisions reviewable in one of the eleven federal courts of appeal). Statutes require some administrative law cases to be heard initially by a federal court of appeals. The US Supreme Court has discretionary review power over court of appeals decisions. The identity of the agency's lawyer in the judicial review process depends on whether the agency is independent or part of the executive branch. Broadly speaking, executive branch agencies are represented by the Department of Justice (DOJ),³ whereas independent agencies are represented by their own staff lawyers..⁴ The Solicitor General (SG), a high-ranking official of DOJ, represents nearly all agencies before the Supreme Court.

B. THE HIRED GUN MODEL IN US ACADEMIC LITERATURE

The hired gun model is deeply rooted in the adversary system as it is practiced in the US. Under that system, a lawyer's duty is to provide zealous advocacy of the client's interest as defined by the client. Assuming the client's objective is legally permissible and that the representation does not violate some rule of legal ethics (such as the duty not to present knowingly perjured testimony), the strategic decisions are up to the client. The lawyer is free, of course, to discuss such matters with the client before the decision is made, but the ultimate decision belongs to the client.⁵ Once the strategy is decided upon, the lawyer must zealously pursue it, regardless of the impact on the opposing party or third parties.⁶

Most academic writing in the US takes the position that the client of a government attorney is the agency that the attorney is representing, not the government as a whole or some

² The pattern of judicial review, as well as the adversarial culture surrounding the process, is similar in US state administrative law. However, this article covers only federal law and practice.

³ See 28 USC §516, which reserves representation of the United States to the officers of the DOJ under the direction of the Attorney General, except as otherwise provided by law.

⁴ About 40 federal agencies and government corporations have authority to employ their own lawyers in litigation by or against the agency. See James R. Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1573-76 (1996). See ADMINISTRATIVE CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 115-16 (2012).

⁵ MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2: "...A lawyer shall abide by a client's decisions concerning the objectives of representation..."

⁶ Thus a comment to the Model Rules of Professional Conduct states: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.3 (comment).

amorphous entity called the public interest.⁷ The hired gun model and the duty of zealous representation should apply to this representation.⁸ In other words, representation of a government client is no different than representation of a private client. Under this approach, a lawyer's only alternative to doing what the client agency wants the lawyer to do is to withdraw from the case or resign from government service.

In the leading article arguing in favor of the hired gun approach, Catherine Lanctot puts the "three hardest questions" for government attorneys and provides her answers to these questions:⁹

- i) G, a government lawyer, represents Agency A. A provides benefits to persons who are totally disabled. Plaintiff P claims that Agency A erroneously denied benefits to P. P is impoverished and desperately needs the money. G decides that A's decision denying benefits was probably incorrect and would be reversed on judicial review. However, G also determines that the statute of limitations has run on A's petition for judicial review. Agency A tells G to assert the statute of limitations defense. G must do so even though G believes it would be unjust to prevent P from obtaining judicial review.
- ii) J is a federal district court judge reviewing an action taken by Agency A that adversely affected P. J dismisses the case on the ground that the statute of limitations ran on P's petition for judicial review. G did not make this argument and knows that J's decision is erroneous. However, P's lawyer L is inexperienced and does not realize that J's decision was erroneous. Hence, L has no plans to appeal J's decision. Agency A tells G not to tell L about the error. G cannot disclose J's error to L even though G wants to do so.

⁷ For discussion of the identification of the client of a government lawyer, see Harvey, *supra* note 4. See also Robert P. Lawry, *Who Is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. BAR J. 61 (No. 4, 1978) (identity of client is not helpful in resolving confidentiality issues); Yoav Dotan, *LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL* (2014) at 121-24 (doubting whether it is methodologically useful to frame these issues by discussion of the identity of the client) (hereinafter *Dotan 2014*).

⁸ Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 SO. CALIF. L. REV. 951 (1991); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987); Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1115-20 (1995); Peter L. Strauss, *The Internal Relations of Government: Cautionary Tales from Inside the Black Box*, 61-2 LAW & CONTEMP. PROBS. 155 (1998). Similarly, government lawyers in Canada are widely regarded as having the same ethical duties as private lawyers. See Adam Dodek, *The Role of the Attorney General and Government Lawyers in Canada on Judicial Review* [this symposium] (criticizing this conception).

⁹ Lanctot, *supra* note 8. Each of Lanctot's three questions is framed as a Social Security case. We have generalized them so that they apply to the representation of any agency. Lanctot's three-question approach was inspired by a famous article by Monroe Friedman. *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). Friedman took the unflinching view that a criminal defense lawyer must present the strongest possible defense case (including introduction of perjured testimony if the client insists) even though the lawyer knows that the client is guilty because the client has confessed to the lawyer.

- iii) Agency A's decision adversely affected P, but the procedure used by Agency A probably violated the rules of constitutional due process. Under Supreme Court precedent, there is a 90% likelihood that A's decision will be reversed. G wants to concede error. Agency A tells G to argue in court that A's procedure was valid. This position is weak but not frivolous. G must follow A's orders.

Lanctot and other academic commentators¹⁰ defend the hired gun model for government attorneys by making two arguments. In their opinion, i) government attorneys are not in a position to determine the public interest because the concept of public interest is indeterminate; ii) government attorneys should not take account of the public interest even if they could determine it because the client agency is politically accountable and the attorney is not.

1. The "public interest" is indeterminate

Lanctot argues that concepts like "justice" or the "public interest" are indeterminate or incoherent.¹¹ For example, in the first hypothetical, G believes it would be unjust (and contrary to the public interest) to assert the statute of limitations so as to bar P's claim for judicial review. But perceptions of justice and public interest vary widely. Some people believe that the government should assert the statute in every case in which it might apply; others believe that the lawyer should decide on a case-by-case basis whether it would be unjust to assert limitations. In addition people in the latter group might differ as to whether it would be equitable to assert limitations in P's case. If this determination is made on a case-by-case basis, government lawyers will make different decisions in cases similar to P's.

Similarly, in hypo 2, reasonable people might disagree about whether justice requires G to call J's error to L's attention. It depends on that person's views about the meaning of "justice" as that rather vague concept is defined under an adversary system. Finally, in hypo 3, reasonable people might disagree about the ethicality of making a weak but non-frivolous argument if the client wants to make the argument. In short, in all three hypotheses, the "public interest" is nothing more than an individual preference and thus the concept is incoherent.

Indeed, some authorities go further, contending that if government attorneys have discretion to defy client instructions when making litigation decisions, they will choose positions that maximize their own political preferences or their self-interest rather than asserting some vague public interest.¹²

¹⁰ See note 8, *supra*.

¹¹ Similarly, see Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice*, 41 VANDERBILT L. REV. 45 (1991). Zacharias argues that the rule calling on prosecutors to do "justice" (see text at note 65, *infra*) is incoherent. He argues that the standard means that prosecutors must not prosecute someone they think is innocent and must assure that the adversary system is functioning properly, but no more than that.

¹² See Macey & Miller, *supra* note 8 at 1116-18; Michael Selmi, *Public v. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998). These authors suggest that government

2. Agencies rather than attorneys should make judgment calls

Lancot argues that, even if the attorney can reliably ascertain the public interest, the attorney should not defy the instructions of the agency by asserting the attorney's view of the public interest because the attorney should be accountable to politically responsible officials. For example, in Hypo 1 about whether G should assert the statute of limitations, G should not place his or her own judgment of public interest ahead of the Congressional judgment as to which claims should be barred. Congress has decided that stale claims should not be paid and established an arbitrary dividing line to determine which claims are stale. G's decision not to assert the statute of limitations might lead to a court decision in P's favor, thus requiring the expenditure of federal funds contrary to the will of Congress. Such policy decisions should rest with elected legislators, not with attorneys who are hired to defend the government's interests.

In Hypo 2 and 3, G wants to disregard the instructions of agency officials about litigation strategy. Lancot again argues that agency lawyers should be bound by the judgments of politically responsible agency officials. This argument is rooted in separation of powers. If the agency is in the executive branch, its officials are accountable to the president. Even if the agency is independent, its heads are appointed by the president and, in any event, are accountable for agency decisions made on their watch. Litigation decisions such as those described in hypotheses 2 and 3 call for making difficult prudential and policy judgments and such calls should be made by the most politically accountable agency officials, not by their lawyers who lack political accountability. In other words, on a scale in which lawyer accountability is at one end and lawyer independence is at the other end, Lancot and others who agree with her would strike the balance closer to the accountability end.

In addition, in all three hypotheses, Lancot argues that a basic element of the adversary system is that such decisions should be made by clients, not by lawyers. A government client should have no less control over important litigation decisions than a private client.¹³ After all, the private lawyer will not hesitate to exploit any available advantage such as an error by government counsel; shouldn't the government lawyers play by the same rules as private lawyers do? Indeed, this principle is particularly salient in government litigation, because the agency

attorneys might choose strategies that would furnish them with litigation experience, maximize their winning percentages, expand agency powers, enhance their reputation, or please future private employers. A fascinating historical account of the turf battles between DOJ lawyers and agency officials during the New Deal discusses the constant political, strategic and tactical conflicts between the two. A continuing refrain was DOJ's desire to control the government litigation process. Often DOJ lawyers, including the Attorney General, were politically opposed to more radical agency lawyers and other agency officials. When the Wagner Act passed in 1935, a key provision gave the NLRB control over its own litigation, thus precluding the DOJ from interfering with the NLRB's litigation decisions. Peter H. Irons, *THE NEW DEAL LAWYERS* 11-13, 228 (1982).

¹³ See ABA Formal Ethics Op. 94-387 (neither government nor private lawyer should disclose that the statute of limitations has run on a client's claim if opposing counsel missed the issue).

client represented by a DOJ attorney cannot discharge its lawyer in the same way that a private client can.¹⁴

C. CONFLICTING VIEWS OF THE HIRED GUN MODEL

The hired gun model for government lawyers appears to be the prevailing academic view in the US. However, there is a conflicting approach to this issue that appears in some ethics codes, judicial opinions, and academic discussions. Under the opposing view, government attorneys who represent agencies in the judicial review process should have discretion to act in ways that serve the public interest, as the attorney defines it, even over agency objections. One way to express this idea is that DOJ's client should be considered as the US government as a whole, rather than the agency that is a party to the case.

1. Ethics Code

At least one rather carefully hedged ethical code indicated that government lawyers should take account of the public interest in representing the government in civil litigation. The non-binding "ethical considerations" of the now-superseded Model Code provided: "A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to the lawyer should so advise his or her superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and should not use his or her position or the economic power of the government to harass parties or bring about unjust settlements or results."¹⁵

2. Judicial Opinions

Judicial opinions in numerous cases decided by federal and state courts articulate a higher standard of ethical conduct for government lawyers in civil cases than is applicable to private lawyers.¹⁶ In *Freeport McMoRan*, the D.C. Circuit rebuked agency counsel for failing to take

¹⁴ See Strauss, *supra* note 8, recounting an incident during his tenure as General Counsel of the Nuclear Regulatory Commission, in which a DOJ attorney whom the NRC could not control or persuade made a bad litigation decision that proved costly to the NRC's regulatory mission.

¹⁵ MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-14 (emphasis added).

¹⁶ See Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L. J. 13 (2003) (hereinafter *Berenson, Brandeis*) (discussing a large number of judicial opinions that impose higher duties on government than private counsel). See, e.g., *In re Lindsey*, 148 F.3d 1100, 1109 (D.C. Cir. 1998) ("The obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of the criminal offenses within the government"); *Gray Panthers v. Schweiker*, 716 F.2d 23, 33 (D.C. Cir. 1983) ("government counsel have a higher duty to uphold [than private lawyers] because their client is not only the agency they represent but also the public at large"); *D'Amico v. Bd. of Med. Exam.*, 520 P.2d 10 (Calif. Supr. Ct. 1974) (Attorney General has power to concede constitutional fact issues despite opposition of agency client); *Los Angeles v. Decker*, 558 P.2d 545 (Cal. Supr. Ct. 1977) ("A government lawyer in a civil action has the responsibility to seek justice and to develop a full

the initiative to settle a case that had become moot. The lawyer argued that he had no greater duty than a private lawyer would have. The court remarked: “We stress, to conclude, that we are concerned not so much with the failings of FERC's counsel in this case, but with the underlying view of a government lawyer's responsibilities that counsel revealed at oral argument. We find it astonishing that an attorney for a federal administrative agency could so unblushingly deny that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission.”¹⁷ However, the precedential value of such statements is unclear. The *Freeport McMoRan* opinion is often cited in law review articles but not by subsequent judicial opinions. Moreover, the Restatement of the Law Governing Lawyers regards such statements as “hortatory rather than definitional...” and states that government lawyers must follow directions of authorized superiors.¹⁸

3. Academic Literature

A number of articles in the US academic literature support a minister of justice model for DOJ lawyers representing agency clients. Steven K. Berenson wrote the most prominent paper,¹⁹ and he challenges each of Lancot's arguments. Berenson believes that the public interest is not always indeterminate; government lawyers should derive their views about the public interest in a given case from established principles set forth in constitutional, statutory and judicial sources, rather than broader philosophical notions of justice.²⁰ Berenson does not directly address Lancot's three hypotheticals.²¹ However, his approach suggests that with respect to her second hypothetical, G should be permitted to tell L about the error in J's decision. Faced with her third hypo, Berenson would support G's decision declining to argue the weak but

and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results”).

¹⁷ *Freeport McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992).

¹⁸ RESTATEMENT OF THE LAW GOVERNING LAWYERS, §97, Cmt. f (“Courts have stressed that a lawyer representing a governmental client must seek to advance the public interest in the representation and not merely the partisan or personal interests of the government entity or officer involved...In many instances, the factor is stressed for hortatory rather than definitional purposes. A government lawyer must follow lawful directions of authorized superiors with respect to the scope and implementation of the representation...”)

¹⁹ See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should and Will Government Lawyers Serve the Public Interest?* 41 BOST. C. L. REV. 789 (2000) (hereinafter *Berenson, Boston*); see also Patricia M. Wald, “*For the United States: Government Lawyers in Court*,” 61 LAW & CONTEMP. PROBS. 107 (1998); Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?* 9 WIDENER J. PUB. L. 235 (2000); Jack B. Weinstein & Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, 1 Touro L. REV. 1 (1985). In subsequent articles, Berenson supplied more specific guidance about how government attorneys should vindicate the public interest in their representation of government clients. *Berenson, Brandeis*, *supra* note 16; Steven K. Berenson, *Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Governmental Lawyer Ethics*, 56 CASE WEST. L. REV. 345 (2005). See also William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988). Simon argues that private lawyers should have discretion to defy client wishes in order to promote justice if such decision is economically realistic for the lawyer. Simon would certainly extend that analysis to government lawyers representing agencies. See Note, *Rethinking the Professional Responsibilities of Federal Government Lawyers*, 115 HARV. L. REV. 1170 (2002)..

²⁰ See *Berenson, Boston*, *supra* note 19 at 814-18.

²¹ See text following note 9, *supra*..

non-frivolous legal position that A wishes G to argue. It is less clear what Berenson's approach entails with regards to Lanctot's first hypo, since in that case Congress has established the statute of limitations as clear national policy.

Berenson disagrees with Lanctot that lawyer autonomy is inconsistent with separation of powers. In most cases, the agency official who disagrees with the DOJ lawyer is a career bureaucratic official or a lawyer in the agency's general counsel's office, rather than a high-level politically appointee responsible to the President or closer to the electorate. Consequently, the DOJ attorney often has as much political legitimacy as that of the agency official who instructs the lawyer, given that the DOJ attorney works for the Attorney General who is also appointed by and is politically accountable to the president.

D. THE ACTUAL PRACTICE OF US GOVERNMENT ATTORNEYS

We conducted interviews with a number of past government lawyers (both in executive branch agencies and with the Department of Justice) about their experience with the situation in which a DOJ lawyer disagrees with positions taken by a client executive-branch agency concerning pending litigation or settlement.²²

The lawyers we spoke to made it clear that a decision by a DOJ lawyer to challenge a client agency's views on litigation strategy or settlement would not be made by the lawyer alone but would result from a consultative process. The lawyer who questions an agency's instructions would discuss the matter with his or her superior and seek the superior's approval. The staff of the client agency (such as its general counsel) often tries to persuade the Assistant or Deputy Attorney General of the rightness of its position. The two sides will attempt to negotiate their differences and such negotiations are usually successful in resolving differences. In some cases, the DOJ's Office of Legal Counsel (OLC) will referee the dispute. Ultimately, however, if the matter is not negotiated to the satisfaction of both sides, DOJ makes the decision about what litigation or settlement strategy will be pursued.

It is our understanding that defiance of an agency's strategic or tactical decision does not occur often because DOJ attorneys seldom challenge the instructions of their clients.. According to most of our interviewees, DOJ lawyers normally follow the client's instructions despite having reservations about whether those instructions are contrary to justice or the public interest. These lawyers believe that the hard calls should be up to the client, as they would be in the case of representing a private client. As one interviewee put it, DOJ attorneys "go to war" for their client. They may discuss their reservations with the client, but once the client has made the decision, DOJ lawyers usually follow it. Thus, in practice, DOJ lawyers would seldom challenge

²² Interviews with Mariano-Florentino Cuellar, Walter Dellinger, E. Donald Elliott, William Funk, David Hayes, Gretchen Jacobs, Heather Kennealy, John Leshy, Michael Rappaport, and Debby Sivas. We also interviewed other former government attorneys who asked that their names not be used. Notes of the interviews are with authors. We did not interview attorneys with independent agencies that represent themselves in court. Attorneys who work for the client agency are unlikely to openly defy the wishes of that agency if they want to keep their jobs.

agency instructions in any of Lancot's hypothetical situations, despite their personal reservations. Following the client's orders is obviously the path of least resistance, would cause the least trouble, consume the least amount of a busy lawyer's time, and would be the course least likely to trigger negative career implications.

However, several of our interviewees told us that they were familiar with instances in which DOJ lawyers challenged the instructions of agency personnel concerning litigation or settlement strategy. If the DOJ lawyers were supported by their superiors, they might refuse to defend a weak case or would make arguments in court with which the agency disagrees or insist on negotiating a settlement opposed by the agency. The DOJ attorneys would be particularly likely to do so if the disputed issue turns on legal interpretation or if they believe the agency's strategy might jeopardize the interest of the government in other cases or in which other agencies disagreed with the client agency.²³ These attorneys said that DOJ lawyers might well decide to assist the clueless private attorney in Lancot's second hypo and refuse to defend a weak case as in Lancot's third hypo. However, the attorneys believed that DOJ would not waive the statute of limitations against the agency's wishes (Lancot's first hypo), given the clear statutory articulation of public purpose.

II. THE MINISTER OF JUSTICE MODEL IN ISRAEL

A. ISRAELI JUDICIAL REVIEW

We begin with a brief summary of the unique roles played by the Israeli Supreme Court. The Supreme Court has three distinct functions. First, when a civil or criminal dispute arises in Israel, it normally makes its way to a Magistrate Court. Magistrate Court decisions may be appealed to the District Court. A handful of such cases reach the Supreme Court, which considers only questions of law raised by the case, a function referred to as "cassation." Second, the Supreme Court sits as an appellate court for cases involving certain serious criminal offenses or significant civil disputes. Such cases are tried by the District Court and heard on appeal by the Supreme Court. Third, the Supreme Court, sitting as the High Court of Justice (HCJ), decides a large number of the more important administrative law cases as a trial court, meaning that it is the court of first and last resort.²⁴ In serving as the court of first instance in large numbers of important administrative cases, the Israel Supreme Court may be unique in the world. The Supreme Court has an overwhelming caseload, including but not limited to its administrative law responsibilities. As a result, its fifteen members usually sit in panels of three, unlike the US where the Supreme Court always sits en banc.

²³ See, e.g., Nicholas S. Zeppos, *Department of Justice Litigation: Externalizing Costs and Searching for Subsidies*, 61 LAW & CONTEMP. PROBS. 171 (1998).

²⁴ For example, in 1993, the Supreme Court dealt with over 1,400 appellate cases, a similar number of cassation cases, and over 1,000 other law suits, *apart from* the 1,171 HCJ petitions that it disposed of during that year. The number of HCJ cases has been steadily increasing. In 1997 the Court disposed off 1,463 HCJ petitions as part of an overall docket of over 6,800 files. In 2003 the Court disposed of almost 1,700 HCJ petitions and the overall number of files exceeded 11,000. See Dotan 2014 at 23-25.

The Israel Supreme Court does not provide the initial level of review in less important administrative law cases or when reviewing the decisions of administrative tribunals. That function is carried out by the administrative courts, which are district courts sitting in administrative cases. When the initial review function is discharged by the administrative courts, the decisions of those courts are subject to appeal before the HCJ.²⁵

B. THE ATTORNEY GENERAL AND THE HIGH COURT OF JUSTICE DEPARTMENT (HCJD)

In Israel, the Attorney General (AG) is appointed by the government and serves as its legal advisor. Unlike England or the US, the AG is not a member of the Cabinet. Also unlike the US, the appointment of the Attorney General is not supposed to be influenced by partisan affiliations or ideological inclinations. Rather, the Attorney General is considered the unbiased guardian of the rule of law and is answerable to constitutional principles alone. One unusual aspect of the AG's power and influence is that the government is legally required to follow the AG's advice.²⁶

The government of Israel is represented before the HCJ by a special department in the Office of the Attorney General (OAG) known as the High Court of Justice Department (HCJD). The HCJD consists of about 30 lawyers.²⁷ All units of the central government, including the cabinet, ministries and other government units, are represented by the HCJD before the HCJ. The HCJD represents the respondent in almost 80% of the administrative law cases decided by the HCJ.²⁸

The HCJD lawyers are career officials within the Ministry of Justice. The appointments system within the Ministry is meritocratic and based on professional skills with little involvement of the political branches. Ministry of Justice lawyers are subject only to the supervision and directives of the AG. On the other hand, all decisions of the OAG (as well as other prosecutorial agencies in Israel) are subject to judicial review by the HCJ, including prosecutorial and enforcement decisions.²⁹

²⁵ See the Administrative Affairs Courts Law, 5760-2000 (2000)

²⁶ See Yitzhak Zamir, *Rule of Law and Civil Liberties in Israel*, CIVIL JUSTICE QUARTERLY (January 1988) 64, 73; Dotan 2014 at 54-64. The Attorney General of Israel has acquired "extraordinary powers that are perhaps unparalleled in any comparable jurisdiction," including the power to issue rulings that bind the government. Eitan Levontin, *Serving Both the State and the Public: A Brief Introduction and Catalog of Solutions to the Attorney General's Divided Loyalties*, p. 26 (Paper presented at the Research Workshop on *The Scope of Judicial Review and the Dilemma of the Administrative Record in Comparative Perspective* held at The Hebrew University in December 2014, at file with authors).

²⁷ For discussion of the functions and practices of HCJD, see Dotan 2014 at 71-86. See also Itay Ravid, "Sleeping with the Enemy": *On Government Lawyers and Their Role in Promoting Social Change: The Israeli Example*, 50 STAN. J. INT'L L. 185, 194-99 (2014).

²⁸ See Dotan 2014, 71-73. The HCJD does not represent municipalities or public corporations which are represented by their own lawyers.

²⁹ See HCJ 935/89, *Ganor v. Attorney General* [1990] 44(2) P.D. 485. In the US, on the other hand, prosecutorial and non-enforcement decisions normally enjoy immunity from judicial review. See *Heckler v. Chaney*, 470 U.S. 821 (1985).

The consequence of this bureaucratic structure is that the HCJD enjoys considerable autonomy and independence *vis-à-vis* the client agencies because its lawyers have a monopoly over the representation of central government agencies. In addition, like their US counterparts at the DOJ, they are not part of the hierarchy of the client agency and are answerable only to the direction of the Attorney General.

Another notable characteristic of the HCJD is its close relationship with the HCJ. The HCJD is composed of a relatively small group of elite lawyers who appear almost on a daily basis before the justices of the HCJ. Their work is closely supervised by the Court. This interaction is probably the principal explanation for their special status and their extraordinary responsibilities, which go far beyond the role of private attorneys.³⁰

The Court uses the HCJD as one of the principal mechanisms to ease its caseload pressures. The HCJD lawyers are expected to take a hard look at their client agencies' decisions and positions and to negotiate settlements in order to save the Court from unnecessarily spending precious judicial resources on these cases.³¹

In addition, the HCJD lawyers carry out many extraordinary functions. They gather data and conduct investigations in order to provide the court with accurate and comprehensive information about government actions; they coordinate policy revisions (under the direction of the HCJ justices); and they sometimes even function as quasi-arbitrators between the petitioners and their client agencies.³² To sum up this point, government lawyers who represent agencies before the HCJ function as *gatekeepers* committed to the principle of the rule of law and the public interest at large, no less than serving as a representative of the client agencies and safeguarding the scarce resources of the HCJ.³³

C. THE MINISTER OF JUSTICE MODEL

In Israel, the prevailing view in academic writing, as well as the actual practice of government attorneys, is that government lawyers apply the minister of justice model. HCJ case law makes clear that the AG and his subordinates enjoy considerable latitude in their decision whether to represent the government in a given case, whether to settle the case, or what position to take on any matter.³⁴

Their client is the government of Israel, not the particular agency that is a party to the case. The AG and his or her subordinates are fully authorized to develop their own perception of the "public interest" under the principle of the rule of law. This is understood to mean that the

³⁰ See Dotan 2014, chapter II.

³¹ See Dotan 2014, chapter III.

³² See Dotan 2014, chapters V and VI.

³³ See Dotan 2014, 124-132.

³⁴ See references at note 36 *infra*.

AG derives his or her view of the public interest from principles developed by the Supreme Court.³⁵

The leading *Amitai* case confirmed that the Attorney General should develop his or her own theory of the public interest. In that case, the petitioners sought a writ to order Prime-Minister Yitzhak Rabin to terminate the tenure of a junior minister who had been indicted for corruption. The AG decided to support the petitioners against the position of the Prime-Minister whom he represented before the Court. The HCJ supported the power of the AG to assert his own conception of the public interest. “The Office of the Attorney General represented one and only client—the Prime Minister. [They] did so as the agent of the Attorney General...Indeed, the position of the Attorney General was different than the position of the Prime Minister...in such a case, the Attorney General should represent the Government according to his own legal perception. The reason for this principle is the concept that the Attorney General is the authorized interpreter of the law *vis a vis* the Executive.”³⁶

A government attorney who is guided by the minister of justice model is expected to inform the court or the opposing party of a legal provision (or of legislative history) that favors the opposing party when that party is unaware of it or to reveal facts unknown to the adversary that are detrimental to the case of the client agency.³⁷ A government attorney might decline to use all available tactics in litigation (in order not to exhaust the limited resources of a private opponent). The attorney might decide not to assert all available defenses (such as statutes of limitation), or to drop a case that offends the attorney’s concept of justice. The government attorney might decline to assert a position in litigation that is unlikely to prevail (even though the position is not frivolous).³⁸ The attorney might choose not to represent the agency’s position when the government action in question seems to offend norms of fairness, equality, proportionality, democratic values, or public policies that have been articulated in previous court decisions or statutory materials. Obviously, government lawyers who operate under the hired gun approach would find it inappropriate to make any of these moves. All these characteristics of the minister of justice model are realized by the HCJD lawyers (at least to some extent) when representing the Israeli government before the HCJD.³⁹

³⁵ See Dotan 2014 at 132.

³⁶ See HCJ 4267/93 *Amitai-Citizens for Judicial Watch v. The Government of Israel* (1993) IsrSC 47(5) 441 at 475. See also Dotan-2014 at 56-59; Levontin, *supra* note 26. P. 28-31. As above noted, the legal opinions of the AG are binding on the government, see note 26, *supra*. Of course, one may wonder how the AG can represent the Prime-minister in court if the AG adopts a legal position contrary to the PM's views. The HCJ in the *Amitai* case did not provide a full answer to this question except to indicate that in some cases the PM may be represented by a private lawyer that the PM would hire. Even in those (rare) cases the PM's decision to hire a private lawyer requires the AG's consent, see HCJ 4267/93. at p. xxx. For a critique of this ruling of the Court see *e.g.* Eitan Levontin, *Representation of the State in Court* (Ph.D Thesis, Hebrew University, 2009 p. 98-109 (Hebrew).

³⁷ See Dotan 2014 at 127-28.

³⁸ See Dotan 2014 at 129-32.

³⁹ See Dotan 2014, *id.*

In fact, the Attorney General often uses such powers even before the pertinent governmental decision is attacked in court. For example, early in 2015, a few weeks prior to the general election, Prime Minister Netanyahu (who then served as Minister for Education) decided to remove from office two prominent members of the committee that decides the nominees for the Israel Prize for literature studies. The decision stirred public controversy and the opposition blamed Netanyahu for injecting political considerations into the process of nominations for the Israel Prize. Shortly after Netanyahu made the announcement, the Attorney General announced that he would not defend the decision if it were challenged in the HCJ. Consequently, Netanyahu backed off and cancelled his original decision.⁴⁰

D. REASONS FOR THE EMERGENCE OF THE MINISTER OF JUSTICE MODEL IN ISRAEL

The evolution of the “minister of justice” model in Israel can be traced to several factors. The first factor is the structure of representation. As above explained, all central government agencies in Israel are represented in judicial review by one organ: the Office of the Attorney General (OAG), rather than by their own lawyers. The OAG lawyers are career government employees, subject to the authority of the AG. Since the AG himself is not a political appointee, the whole machinery that represents the government before the courts enjoys considerable autonomy vis-à-vis their client agencies.⁴¹

Second, the AG and his or her office are subject to judicial review in all their functions. This means that the only authority that controls OAG decision-making is the judiciary (and particularly the HCJ in judicial review).⁴²

A third reason has to do with the Supreme Court’s caseload. As above mentioned, the principal court for judicial review in Israel is the Supreme Court sitting as HCJ.⁴³ The unusual fact that the HCJ is a trial court in many judicial review cases created serious caseload pressures. These pressures increased when the court expanded judicial review during the 1980s to numerous areas of governmental activity (and in particular with regard to decisions by the military with regard to the Occupied Territories).⁴⁴

⁴⁰ See Peter Beaumont, Israel Prize Judges Resign after Benjamin Netanyahu's 'Political' Intervention, *The Guardian*, Feb. 12, 2015 (available at <http://www.theguardian.com/world/2015/feb/12/israel-prize-judges-resign-binyamin-netanyahu-political-intervention> (last visited Feb. 25, 2015)); "Netanyahu in U-Turn on ban of Israel Prize", I24 News, 13/2/15 (available at <http://www.i24news.tv/en/news/israel/society/61001-150213-netanyahu-in-u-turn-on-ban-of-israel-prize-judges>) (last visited Feb. 25, 2015).

⁴¹ See text at note 26-29, *supra*.

⁴² See note 29, *supra*.

⁴³ The creation of the Courts for Administrative Affairs in 2000 alleviated caseload pressures to some extent. Still, such caseload pressures on the HCJ are enormous. See text at note 25, *supra*.

⁴⁴ During the first Palestinian uprising (*Intifada*), the number of petitions to the HCJ sharply increased due to the many petitions presented by Palestinian residents of the Territories asserting violations of fundamental rights by the military. See Yoav Dotan, *Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israeli High Court of Justice during the Intifada*, 33 (2) *Law and Society Review* 319 (1999) (hereinafter *Judicial Rhetoric*).

One way by which the Court manages its caseload is to informally delegate some of its functions to HCJD lawyers. It assigns them to investigate the actions of their clients and report their findings to the justices. Such findings serve, in practice, as the principal factual basis for the process of judicial review.⁴⁵ Obviously, the assignment of such functions to the government lawyers is not congruent with the adversarial model of litigation, because the lawyers function as affiliates of the court as well as advocates for their clients.

Fourth, various social and cultural factors supported the evolution of this model. Since the members of the HCJD belong to a relatively small group of career public servants that appear before the same justices on a daily basis, it is only natural that a relationship of affinity and mutual trust would develop between those two groups of elite legal professionals.⁴⁶ Moreover, one of the main prospects for promotion for HCJD members is to be appointed to the bench. As a result, it is understandable that, to HCJD members, serving the interests of the court is no less important than winning the specific case for their clients.

Lastly, the minister of justice model resonates well with the political culture in Israel. The Israeli public tends to have a low level of trust in its elected institutions and, on the other hand, demonstrates relatively high level of trust in the judiciary and in the legal bureaucracy.⁴⁷ While this level of trust has been significantly eroded during the last two decades,⁴⁸ still there is a wide public support for the preservation of the autonomy of the judiciary and the institution of the Attorney General, which resonates well with the image of the AG and his office as professional, apolitical and impartial. The minister of justice model fits well into this political and cultural environment.

E. OPEN AND CLOSED RECORDS

A different explanation for the conflicting US and Israeli conceptions of the proper role of government attorneys lies in the different practices of judicial review employed in the two countries. We describe the US practice as “closed judicial review” and the Israeli practice as “open judicial review.”⁴⁹

Under closed review, the record is limited to whatever factual data was considered by the agency (“closed record”).⁵⁰ An agency can justify its decision only by the reasons stated at the time it made the decision under review (“closed reasons”).⁵¹ Finally, the private party is not permitted to make arguments in court that it failed to make before the agency (“closed

⁴⁵ Dotan 2014 157-171; Dotan, *Judicial Rhetoric*, *supra* note 44.

⁴⁶ Dotan 2014, 71-75.

⁴⁷ See e.g. G. Barzilai, E. Yuchtman-Yaar, and Z. Segal, “Supreme Courts and Public Opinion: General Paradigms and the Israeli Case” 4(3) *Law and Courts* (Winter, 1994):3-6.

⁴⁸ See Dotan 2014, 45-49.

⁴⁹ This difference is discussed in Asimow-Dotan 2016, *supra* note 1.

⁵⁰ See *Camp v. Pitts*, 411 U.S. 138 (1973); Asimow-Dotan 2016 at xx-xx.

⁵¹ See *SEC v. Chenery Corp.*, 318 U.S. 80 (1942); Asimow-Dotan 2016, at xx-xx.

arguments”).⁵² Closed review is justified by concerns arising out of efficiency and separation of powers, as well as the need to preserve deference to the agency’s decisions of fact, law, or discretion.

An additional justification for closed review arises from the fact that, at least in formal adjudication and in rulemaking, the law requires a structured, adversarial, and quite costly decisionmaking process. This process provides ample opportunity for private parties to introduce evidence and make arguments. The procedures require the agency to make a detailed statement of reasons. The US invests substantial resources in this initial decisionmaking phase which is expected to produce accurate and fair decisions. Relatively fewer resources are devoted to the judicial review phase which is seen as a check to filter out unreasonable agency decisions. The closed review rules practiced in the US arise from this fundamental decision to concentrate resources at the initial decision rather than the judicial review phase.⁵³

In contrast to the US, Israel embraces open judicial review, meaning the courts frequently allow the parties to present new evidence,⁵⁴ new arguments,⁵⁵ and new reasons⁵⁶ during the judicial review proceedings. Adjudicatory proceedings at the agency level are not adversarial (as in the US) and normally include only an informal and inquisitorial hearing before the investigators of the decision-making agency.⁵⁷ In the case of rulemaking and other quasi-legislative determinations, there is no required procedure at all. Accordingly, at the agency level no official “record” is created and hence no strict rule constrains the parties to the factual or legal framework created in the original administrative process.

In addition, judicial review proceedings in Israel cover many decisions that are unreviewable in the US due to standing or justiciability doctrines.⁵⁸ Thus, for example, in Israel it is possible to secure judicial review of decisions to appoint or refrain from dismissal of senior government officials and even cabinet ministers as well as prosecutorial decisions or policy-implementation decisions such as the provision of air-raid shelters in public schools.⁵⁹ In such

⁵² See *Unemployment Comp. Comm’n v. Aragon*, 329 U.S. 143 (1946).

⁵³ See Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. LAW 3, 7, 13-14 (2015). As pointed out in Asimow-Dotan 2016, the arguments for closed review procedure are much less persuasive in the case of review of informal adjudication and policy implementation, since there is no well-structured initial decision procedure in such cases.

⁵⁴ H.C. 76-77/63, 79/63 *Trudler v. Election Officer*, 17 P.D. 2503 (1963); Asimow-Dotan 2016, p. xx.

⁵⁵ H.C. 75/76 *Hilron v. Fruit Council*, 30(3) P.D. 645; Asimow-Dotan 2016;

⁵⁶ Asimow-Dotan 2016.

⁵⁷ Asimow-Dotan 2016 at xx.

⁵⁸ Asimow-Dotan 2016 at xx.

⁵⁹ *Eizenberg v. Minister of Building and Housing*, [1993] IsrSC 47(2) 229, available in English at http://elyon1.court.gov.il/files_eng/92/630/061/Z01/92061630.z01.pdf; HCJ 1284/99 *Plonit v. Chief of Staff* [1999] IsrSC 53(2) 62; HCJ 3094/93 *The Movement for Quality in Government in Israel v. State of Israel* [1993] IsrSC 47(5) 404, available in English at http://elyon1.court.gov.il/files_eng/93/940/030/Z01/93030940.z01.pdf; HCJ 4267/93 *Amitai - Citizens for Judicial Watch v. Prime Minister* [1993] IsrSC 47(5) 441; HCJ 5853/07 *Emuna v. Prime Minister* [2007] (available in English at <http://versa.cardozo.yu.edu/opinions/emunah-v-prime-minister>); H.C. 8379/06 *Eduardo v. Minister of Defense* (2007) ; available in English at <http://versa.cardozo.yu.edu/opinions/wasser-v-minister-defense>).

proceedings, the petitioner (often a public action organization) was not a party to the earlier phases of administrative dispute resolution. Obviously, such third party petitioners had no opportunity to present evidence before the agency and cannot be confined to the evidence or legal arguments that were presented at that stage. Accordingly, judicial review as practiced in Israel could not function under closed review rules.⁶⁰

The US system of closed review promotes the hired gun conception for government lawyers. A government attorney must take the case as he or she finds it, since the lawyer is not permitted to introduce new evidence, reasons, or arguments. The attorney has no reason to re-investigate the case to discover new and relevant evidence; in any event, the heavy caseload of government attorneys would preclude them from doing so. Nor does the attorney have any need to prompt the officials of the client agency to reconsider their decision and come up with new reasons, since the court will not entertain any post hoc rationalizations.

In Israel, however, the extensive role of government lawyers at the pre-litigation stage is consistent with a flexible concept of open record, open arguments, and open reasons. HCJD members in fact create the record that the Supreme Court considers in judicial review. They are expected to take a “hard look” at the administrative decisions they are called upon to defend in order to make sure that such decisions satisfy the tests of legality and “reasonableness.”⁶¹ In order to improve the probability that the decision will withstand judicial review, the lawyers thoroughly review the evidentiary basis of the decision, question the decision-makers at the client agency, and review all aspects of legality. They know that their responsibility goes well beyond representing the agency before the court. They are expected to conduct investigations, to gather data and to report to the court as to the facts and law.⁶² The open record approach seems vital to the existence of this gatekeeping mechanism, which is an important component of the whole system of judicial review in Israel and essential to the HCJ’s control of its caseload. In addition, the HCJ feels an obligation to make the correct decision in administrative review, meaning that it will consider new reasons in order to justify a poorly supported agency decision. An HCJD attorney is expected to discover these reasons from the agency and bring them to the court’s attention. This also resonates well with the “minister of justice” approach to government lawyers.

III. SHOULD US GOVERNMENT LAWYERS BE HIRED GUNS OR MINISTERS OF JUSTICE?

At this point, we take a normative turn. Obviously, the US and Israel are vastly different from each other, whether the metric is constitutional, cultural, political or demographic. As a result, the role of DOJ attorneys and HCJD attorneys are not readily comparable. Nevertheless,

⁶⁰ See Asimow-Dotan 2016 at xx.

⁶¹ See Asimow-Dotan, xx.

⁶² In this respect the function of the HCJD resembles to some extent the French model of judicial review that is based on reports made to the courts by the *Rapporteur* and the *Commissaire du Gouvernement*. See L.N. Brown & J. S. Bell, FRENCH ADMINISTRATIVE LAW 102-03 (4th ed. 1994). For a comprehensive discussion of the quasi-inquisitorial Israeli model, see Dotan 2014, 134-36.

somewhat inspired by the Israeli model, we cautiously take the position that DOJ attorneys should regard themselves not only as zealous advocates of the client agency but also, in the proper circumstances, as ministers of justice. If negotiations with the client agency fail to resolve differences,⁶³ DOJ lawyers should have discretion to follow their own view of justice or of the public interest in determining their litigation or settlement strategy. As a result, we part company with the frequently expressed (but not unanimous) academic view about the appropriate role of US government lawyers.⁶⁴

One way to approach the issue is to recognize that, in a variety of situations, US government lawyers already have discretion to substitute the lawyer's vision of the public interest for the client's vision. The most important example concerns prosecutors. Generally accepted ethics rules require prosecutors to act as ministers of justice, despite the contrary views of the police or elected officials.⁶⁵ In addition, the Solicitor General occasionally refuses to authorize an appeal of a lower court decision against an agency, regardless of the agency's strong feelings to the contrary. Thus the SG can decline to accede to the agency's wish that the government appeal a district court decision to the court of appeals or seek reconsideration en banc from a court of appeals. The SG can refuse to petition the Supreme Court for certiorari despite agency entreaties that review be sought. Before the Supreme Court, the SG sometimes confesses error or otherwise takes an independent position that differs from that of the agency that the SG is representing. SGs believe they must play this independent role in order to preserve the credibility of their office before the Court.⁶⁶ State attorneys general sometimes defy the wishes of the governor or of other executive branch officials; state courts generally uphold their power to do so.⁶⁷ Like prosecutors, the SG, or state attorneys general, DOJ lawyers (with the concurrence of their supervisors) should also have discretion to make litigation or settlement decisions that differ from those of the agency client.

On the normative level, there are a number of reasons to doubt whether the adversarial model of zealous client representation should apply to the role of US government lawyers in judicial review of agency action. The objective of judicial review is not only to decide a controversy between private parties and government agencies, but also to ascertain the legality of

⁶³ See text following note 22, *supra*.

⁶⁴ See Part I.B., *supra*.

⁶⁵ See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8, Comment 1: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate;" AMERICAN BAR ASS'N STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Std. 3-1.2(c): "The duty of the prosecutor is to seek justice, not merely to convict." See Bruce A. Green, *Why Should Prosecutors "Seek Justice,"* 26 FORDH. URB. L.J. 6078 (1999). But see Zacharias, note 11, *supra*, arguing that the "minister of justice" standard is incoherent.

⁶⁶ See Ryan C. Black & Ryan J. Owens, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT 32-34 (2012) (SG often declines to represent views of the government agency that is a party to the case); David J. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROBS. 165 (1998) (SG usually represents government's institutional interests rather than the political views of the administration in order to preserve SG's credibility with the Court). See also Lincoln Kaplan, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987) (SG enjoys considerable independence *vis-à-vis* the president and the Attorney General).

⁶⁷ See William P. Marshall, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006).

the governmental decision, to prevent abuse of power, and to achieve justice in individual cases. Governmental decisions or policies often affect not only the specific parties to the litigation but also other parties as well as the interests of a broader public. The judge that presides over the judicial review process should not be regarded purely as a “neutral” referee. Rather, it is the judge's duty to exercise a checking function over the exercise of agency discretion, to assure the legality and reasonableness of the decision, and to insure that the public interest is protected. The framework of the adversarial model should be adapted to better enable the court to fulfill this reviewing function, including recognition that DOJ lawyers should protect the public interest when they represent government agencies on judicial review.

In addition, a central premise of the adversarial model is that each lawyer possesses sufficient skill and resources to insure that the client's interest is adequately protected and that both parties have equal access to information.⁶⁸ However, this premise often fails to describe the reality of judicial review litigation. Private parties in dispute with the government may be at a great tactical disadvantage. For example, private parties may be compelled to settle cases on inequitable terms because the cost of litigating the case is more than they can pay. It may often be appropriate for the government lawyer to assist an inexperienced or out-resourced lawyer for the opposing side to make sure that the matter is fairly presented to the reviewing court. Government lawyers should seek fair and equitable settlements instead of coercing private parties into accepting inequitable settlements. Indeed, parties challenging the government often represent themselves; both government lawyers and judges should be allowed to assist self-represented parties. All these suggestions depart from a strict adversarial approach to litigation.

The proponents of the hired gun model often argue that government lawyers should not second guess litigation and settlement decisions by the client agency since the agency enjoys delegated power from Congress to make policy in executing the statute, possesses expertise in administering that policy, and is democratically accountable to the President. However, we believe that the DOJ has an equally strong claim of legitimacy in making decisions relating to the litigation process. Congress delegated the litigation function to the AG⁶⁹ and the AG or other politically appointed officials of the DOJ below the AG are no less accountable to the President than the heads of executive branch agencies. Moreover, while agencies may have a comparative advantage over lawyers on issues of regulatory policy, the lawyers can claim a comparative advantage in making wise decisions relating to the litigation process.

In short, we believe that US government lawyers representing agency clients on judicial review should be allowed greater ability to vindicate their views of the public interest than a private lawyer is allowed, even if the client agency officials assert contrary preferences.

V. CONCLUSION

⁶⁸ See Michael Asimow, *Popular Culture and the American Adversarial Ideology*, in LAW AND POPULAR CULTURE, Michael Freeman, ed. 606 (Oxford Univ. Press 2005).

⁶⁹ See note 3, *supra*.

This article has highlighted a striking difference in the legal culture of the US and Israel. The prevailing view in the US academic literature is that US government lawyers who represent administrative agencies in the judicial review process should follow instructions of their agency clients about litigation or settlement strategy in the same way that private lawyers are obligated to follow instructions of private clients. This is the hired gun model. However, there is significant academic dissent and judicial criticism of the hired gun model. Moreover, many government lawyers disagree with it.

In Israel on the other hand, the practice of government lawyers follows, by and large, the minister of justice model. This practice is supported by judicial opinion and reflects strong support in Israeli political culture. -+Israeli government lawyers can and occasionally do part from the positions of their client agencies on issues arising out of the litigation process. The minister of justice model flows logically from the fact that important judicial review cases are initially heard by the Supreme Court and the fact that the Attorney General and his office are fully subject to judicial review, as well as from other important features of the Israeli system of judicial review. Moreover, the minister of justice model is compelled by Israeli political culture which reposes unusual confidence in the courts and the Attorney General, rather than in the executive or legislative branches, to promote justice and the public interest.

While the US and Israel judicial review practices are not comparable, we believe that the US has something to learn from Israeli practice. The US should relax the normal principles of adversarialism by recognizing that government attorneys (with the consent of their superiors) should be allowed to vindicate their own visions of public interest when representing agency clients in the judicial review process.