

HIRED GUNS AND MINISTERS OF JUSTICE: THE ROLE OF GOVERNMENT ATTORNEYS IN THE UNITED STATES AND ISRAEL

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

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1. INTRODUCTION

A comparison between the administrative law systems of the United States (US) and Israel reveals many interesting differences,¹ one of which 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 who are 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 this approach as the 'minister of justice'

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¹ Some of these differences are discussed in Michael Asimow and Yoav Dotan, 'Open and Closed Judicial Review of Agency Action: The Conflicting US and Israeli Approaches' (2016) *American Journal of Comparative Law* (forthcoming).

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

2. THE HIRED GUN MODEL IN THE US

2.1. JUDICIAL REVIEW OF AGENCY ACTION IN THE US

Federal agency actions are normally subject to judicial review.² Most cases are heard initially in the federal District Court (with decisions reviewable in one of the eleven federal Courts of Appeal), although some administrative law cases are required by statute to be heard initially by a federal Court of Appeals. The US Supreme Court has discretionary power of review 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, a high-ranking official of the DoJ, represents nearly all agencies before the Supreme Court.

2.2. THE HIRED GUN MODEL IN US ACADEMIC LITERATURE

The hired gun model is deeply rooted in the adversarial system as it is practised 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 on third parties.⁶

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 28 USC s 516 (1966) (US), which reserves representation of the US 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: James R Harvey III, 'Loyalty in Government Litigation: Department of Justice Representation of Agency Clients' (1996) 37 *William & Mary Law Review* 1569, 1573–76; David E Lewis and Jennifer L Selin, *Sourcebook of United States Executive Agencies* (Administrative Conference of the US 2012) 115–16.

⁵ American Bar Association (ABA), 'Model Rules of Professional Conduct' (1983) r 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': *ibid*, r 1.3, Comment.

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 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, representing a government client is no different from representing a private client. According to 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 favour of the hired gun approach, Catherine Lanctot puts the ‘three hardest questions’ for government attorneys and provides her answers to these questions:⁹

1. 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 to deny 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 defence. G must do so even though G believes it would be unjust to prevent P from obtaining judicial review.
2. J is a federal District Court judge reviewing an action taken by Agency A, which 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 realise that J’s decision was erroneous. Hence, L has no plans to appeal against 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 would like to do so.

⁷ For discussion of the identification of the client of a government lawyer, see Harvey (n 4). See also Robert P Lawry, ‘Who Is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question’ (1978) 37 *Federal Bar Journal* 61 (the identity of the client is not helpful in resolving confidentiality issues); Yoav Dotan, *Lawying for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel* (Cambridge University Press 2014) 121–24 (doubting whether it is methodologically useful to frame these issues by discussion of the identity of the client).

⁸ Catherine J Lanctot, ‘The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions’ (1991) 64 *Southern California Law Review* 951; Geoffrey P Miller, ‘Government Lawyers’ Ethics in a System of Checks and Balances’ (1987) 54 *University of Chicago Law Review* 1293; Jonathan R Macey and Geoffrey P Miller, ‘Reflections on Professional Responsibility in a Regulatory State’ (1995) 63 *George Washington Law Review* 1105, 1115–20; Peter L Strauss, ‘The Internal Relations of Government: Cautionary Tales from Inside the Black Box’ (1998) 61(2) *Law and Contemporary Problems* 155. Similarly, government lawyers in Canada are widely regarded as having the same ethical duties as private lawyers: Adam Dodek, ‘The “Unique Role” of Government Lawyers in Canada’ (2016) 49 *Israel Law Review* 23 (criticising this conception).

⁹ Lanctot, *ibid.* Each of Lanctot’s three questions is framed in the context of a social security case, although we have generalised them so that they apply to the representation of any agency. Lanctot’s three-question approach was inspired by a famous article: Monroe Friedman, ‘Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions’ (1966) 64 *Michigan Law Review* 1469. Friedman took the unflinching view that a criminal defence lawyer must present the strongest possible defence case (including the 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.

3. Agency A's decision adversely affected P, but the procedure used by Agency A probably violated the rules of constitutional due process. In accordance with Supreme Court precedent, there is a 90 per cent probability that A's decision would be reversed. G wishes 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, (a) government attorneys are not in a position to determine the public interest because the concept of public interest is indeterminate; and (b) 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.

(a) The 'public interest' is indeterminate

Lanctot argues that concepts like 'justice' or the 'public interest' are indeterminate or incoherent.¹¹ For instance, in the first hypothetical example, 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. However, 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 limitation. In addition, people in the latter group might differ as to whether it would be equitable to assert limitation in P's case. If this determination is made on a case-by-case basis, government lawyers will arrive at different decisions in cases similar to P's.

Similarly, in the second example, reasonable people might disagree over whether justice requires G to bring 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 adversarial system. Finally, in the third example reasonable people might disagree over the ethicality of making a weak but non-frivolous argument if the client wishes to make that argument. In short, in all three examples the 'public interest' is nothing more than an individual preference and thus the concept lacks coherence.

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 maximise their own political preferences or their self-interest rather than asserting some vague public interest.¹²

¹⁰ n 8.

¹¹ Similarly, see Fred C Zacharias, 'Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice' (1991) 41 *Vanderbilt Law Review* 45. Zacharias argues that the rule calling on prosecutors to do 'justice' (see text at n 65) is incoherent. He argues that the standard means that prosecutors must not prosecute someone whom they believe to be innocent and must ensure that the adversarial system is functioning properly, but no more than that.

¹² Macey and Miller (n 8) 1116–18; Michael Selmi, 'Public v. Private Enforcement of Civil Rights: The Case of Housing and Employment' (1998) 45 *UCLA Law Review* 1401. These authors suggest that government attorneys

(b) Agencies rather than attorneys should make judgment calls

Lanctot argues that, even if the attorney is able to 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 the first example 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 favour, 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 examples 2 and 3, G wants to disregard the instructions of agency officials in respect of litigation strategy. Lanctot again argues that agency lawyers should be bound by the judgments of politically responsible agency officials. This argument is rooted in the separation of powers. If the agency is part of 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 examples 2 and 3 call for making difficult prudential and policy judgments, which 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, Lanctot (and those who agree with her) would strike the balance closer to the accountability end.

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

might choose strategies that would furnish them with litigation experience, maximise 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 the 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 was passed in 1935, a key provision gave the National Labor Relations Board (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* (Princeton University Press 1982) 11–13, 228.

¹³ See ABA Formal Ethics Opinion 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).

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

2.3. 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 which appears in some ethics codes, judicial opinions and academic discussions. According to 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. Another way of expressing this idea is that the DoJ's client should be considered the US government as a whole, rather than the agency that is a party to the case.

2.3.1. 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 American Bar Association (ABA) ‘Model Code’ provided:¹⁵

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.

2.3.2. JUDICIAL OPINIONS

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

¹⁴ Strauss (n 8), recounting an incident during his tenure as General Counsel of the Nuclear Regulatory Commission (NRC), 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 ABA, ‘Model Code of Professional Responsibility’ (1983) EC 7–14.

¹⁶ Steven K Berenson, ‘The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers’ General Duty to Serve the Public Interest’ (2003) 42 *Brandeis Law Journal* 13 (discussing a large number of judicial opinions that impose higher duties on government than on private counsel). See, eg, *In re Lindsey* 148 F 3d 1100, 1109 (DC Circuit 1998) (‘The obligation of a government lawyer to uphold the public trust reposed in him

initiative to settle a case that had become moot. The lawyer argued that he had no greater duty than a private lawyer would have in the same position. The court remarked:¹⁷

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.

However, the precedential value of such statements is unclear. The *Freeport McMoRan* opinion is often cited in law review articles but has not been cited in 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 the directions of authorised superiors.¹⁸

2.3.3. ACADEMIC LITERATURE

A number of articles in the US academic literature support a minister of justice model for DoJ lawyers representing agency clients. Steven Berenson has written the most prominent paper,¹⁹

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 (DC Circuit 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 Board of Medical Examiners* 520 P 2d 10 (Calif Supr Ct 1974) (the 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 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 (DC Circuit 1992).

¹⁸ Restatement of the Law Governing Lawyers, s 97, Comment 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 Steven K Berenson, 'Public Lawyers, Private Values: Can, Should and Will Government Lawyers Serve the Public Interest?' (2000) 41 *Boston College Law Review* 789; also Patricia M Wald, "'For the United States": Government Lawyers in Court' (1998) 61 *Law and Contemporary Problems* 107; Bruce A Green, 'Must Government Lawyers "Seek Justice" in Civil Litigation?' (2000) 9 *Widener Journal of Public Law* 235; Jack B Weinstein and Gay A Crosthwait, 'Some Reflections on Conflicts Between Government Attorneys and Clients' (1985) 1 *Touro Law Review* 1. In subsequent articles, Berenson has supplied more specific guidance on how government attorneys should vindicate the public interest in their representation of government clients: Berenson (n 16); Steven K Berenson, 'Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Governmental Lawyer Ethics' (2005) 56 *Case Western Law Review* 345. Also William H Simon, 'Ethical Discretion in Lawyering' (1988) 101 *Harvard Law Review* 1083. 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: Note, 'Rethinking the Professional Responsibilities of Federal Government Lawyers' (2002) 115 *Harvard Law Review* 1170.

and he challenges each of Lanctot's arguments. Berenson believes that the public interest is not always indeterminate; government lawyers should derive their views on the public interest in a given case from established principles set out in constitutional, statutory and judicial sources, rather than broader philosophical notions of justice.²⁰ Berenson does not directly address Lanctot's three hypothetical examples,²¹ although his approach suggests that with respect to her second scenario, G should be permitted to notify L of the error in J's decision. Faced with her third example, Berenson would support G's decision to decline to argue the weak but non-frivolous legal position that A wishes G to argue. It is less clear ascertaining Berenson's approach with regard to Lanctot's first scenario as in such a 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 office of the agency's general counsel, 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 attorney works for the Attorney General who is also appointed by and is politically accountable to the President.

2.4. THE ACTUAL PRACTICE OF US GOVERNMENT ATTORNEYS

We conducted interviews with a number of former government lawyers (both in executive branch agencies and with the DoJ) 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 with whom we spoke 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 attempt to persuade the Assistant or Deputy Attorney General of the correctness of its position. The two sides will attempt to negotiate their differences and such negotiations are usually successful in resolving conflicts. 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, the DoJ decides on the litigation or settlement strategy to be pursued.

²⁰ Berenson, 'Public Lawyers, Private Values' (n 19) 814–18.

²¹ See text following n 9.

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 the 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 wish to keep their jobs.

It is our understanding that defiance of an agency's strategic or tactical decision does not occur often because DoJ attorneys rarely 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, they would rarely challenge agency instructions in any of Lanctot's hypothetical situations, despite their personal reservations. Following the client's orders is obviously the path of least resistance, it 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 have challenged the instructions of agency personnel concerning litigation or settlement strategy. If these lawyers were supported by their superiors, they might refuse to defend a weak case, or would present 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 jeopardise 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 decide to assist the clueless private attorney in Lanctot's second example and refuse to defend a weak case as in the third scenario. However, the attorneys believed that the DoJ would not waive the statute of limitations against the agency's wishes (Lanctot's first example), given the clear statutory articulation of public purpose.

3. THE MINISTER OF JUSTICE MODEL IN ISRAEL

3.1. ISRAELI JUDICIAL REVIEW

We begin with a brief summary of the unique roles played by the Israeli Supreme Court, which 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 offences 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

²³ See, eg, Nicholas S Zeppos, 'Department of Justice Litigation: Externalizing Costs and Searching for Subsidies' (1998) 61 *Law and Contemporary Problems* 171.

of the more important administrative law cases as a trial court, which means 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 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*.

The Supreme Court of Israel 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

3.2. THE ATTORNEY GENERAL AND THE HIGH COURT OF JUSTICE DEPARTMENT

In Israel, the Attorney General is appointed by the government and serves as its legal adviser. Unlike the United Kingdom (UK) or the US, the Attorney General is not a member of the Cabinet. Also unlike the US, the appointment of the Attorney General should not be influenced by partisan affiliations or ideological inclinations but rather the position should be considered the unbiased guardian of the rule of law, answerable to constitutional principles alone. One unusual aspect of the Attorney General's power and influence is that the government is legally required to follow his or her 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 around thirty lawyers.²⁷ All units of 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 per cent of the administrative law cases decided by the HCJ.²⁸

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 of 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: Dotan (n 7) 23–25.

²⁵ Administrative Affairs Courts Law, 2000 (Israel)

²⁶ Yitzhak Zamir, 'Rule of Law and Civil Liberties in Israel' (January 1988) *Civil Justice Quarterly* 64, 73; Dotan (n 7) 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', paper presented at the Research Workshop on 'The Scope of Judicial Review and the Dilemma of the Administrative Record in Comparative Perspective', The Hebrew University of Jerusalem, December 2014, 26 (on file with authors).

²⁷ For discussion of the functions and practices of the HCJD, see Dotan (n 7) 71–86. See also Itay Ravid, "'Sleeping with the Enemy": On Government Lawyers and Their Role in Promoting Social Change – The Israeli Example' (2014) 50 *Stanford Journal of International Law* 185, 194–99.

²⁸ Dotan (n 7) 71–73. The HCJD does not represent municipalities or public corporations, which are represented by their own lawyers.

Lawyers in the HCJD are career officials within the Ministry of Justice. The appointments system within the Ministry is meritocratic and based on professional skills, with little involvement by the political branches. Ministry of Justice lawyers are subject only to the supervision and directives of the Attorney General. 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

The consequence of this bureaucratic structure is that the HCJD enjoys considerable autonomy and independence in its relationships with 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 on almost 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. 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, 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 activities; 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

3.3. 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 Attorney General and his or her subordinates enjoy considerable latitude

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

³⁰ Dotan (n 7) Ch II.

³¹ *ibid* Ch III.

³² *ibid* Chs V and VI.

³³ *ibid* 124-32.

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 party to the case. The Attorney General and subordinates are fully authorised to develop their own perception of the 'public interest' under the principle of the rule of law. This is understood to mean that the Attorney General 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 Attorney General 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 Attorney General to assert his own conception of the public interest.³⁶

The Office of the Attorney General represented [the] one and only client – the Prime Minister. [It] 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-à-vis the executive.

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 its legislative history) that favours the opposing party when that party is unaware of it, or to reveal facts unknown to the adversary that are detrimental to the client agency's case.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 defences (such as statutes of limitation), or to drop a case which 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

³⁴ See references at n 36.

³⁵ Dotan (n 7) 132.

³⁶ HCJ 4267/93 *Amitai – Citizens for Judicial Watch v The Government of Israel* 1993 PD 47(5) 441, 475. See also Dotan (n 7) 56–59; Levontin (n 26) 28–31. As noted above, the legal opinions of the Attorney General (AG) are binding on the government (n 26 and accompanying text). Of course, one may wonder how the AG can represent the Prime Minister (PM) in court if the AG adopts a legal position contrary to the views of the PM. 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 whom the PM would hire. Even in those (rare) cases, the PM's decision to hire a private lawyer requires the AG's consent: *Amitai*, *ibid* 17. For a critique of this ruling of the Court see Eitan Levontin, 'Representation of the State in Court', PhD Thesis, Hebrew University, 2009, 98–109 (in Hebrew).

³⁷ Dotan (n 7) 127–28.

³⁸ *ibid* 129–32.

government action in question seems to offend norms of fairness, equality, proportionality, democratic values, or public policies which have been articulated in earlier 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 of these characteristics of the minister of justice model are realised by HCJD lawyers (at least to some extent) when representing the Israeli government before the HCJD.³⁹

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 before 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 chooses 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 withdrew his original decision.⁴⁰

3.4. 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 of which is the structure of representation. As explained above, all central government agencies in Israel are represented in judicial review proceedings by one organ: the Office of the Attorney General (OAG), rather than by their own lawyers. The lawyers of the OAG are career government employees, subject to the authority of the Attorney General. Since the Attorney General is not a political appointee, the whole machinery that represents the government before the courts enjoys considerable autonomy vis-à-vis its client agencies.⁴¹

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

A third reason has to do with the Supreme Court's caseload. As mentioned above, the principal court for judicial review in Israel is the Supreme Court sitting as the HCJ.⁴³ The unusual fact that the HCJ is a trial court in many judicial review cases has created serious caseload pressures.

³⁹ *ibid.*

⁴⁰ Peter Beaumont, 'Israel Prize Judges Resign after Benyamin Netanyahu's "Political" Intervention', *The Guardian*, 12 February 2015, <http://www.theguardian.com/world/2015/feb/12/israel-prize-judges-resign-binyamin-netanyahu-political-intervention>; 'Netanyahu in U-Turn on Ban of Israel Prize', *i24 News*, 13 February 2015, <http://www.i24news.tv/en/news/israel/society/61001-150213-netanyahu-in-u-turn-on-ban-of-israel-prize-judges>.

⁴¹ See text at nn 26–29.

⁴² *Ganor v Attorney General* (n 29).

⁴³ The creation of the Courts for Administrative Affairs in 2000 alleviated caseload pressures to some extent, although such caseload pressures on the HCJ are still enormous: see text at n 25.

These pressures increased when the Court expanded its judicial review caseload during the 1980s to numerous areas of governmental activity (including, in particular, decisions by the military with regard to the Occupied Territories).⁴⁴

One way by which the Court manages its caseload is to informally delegate some of its functions to HCJD lawyers. It assigns them the task of investigating the actions of their clients and reporting 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 government lawyers is not compatible 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 have supported the evolution of this model. Since the members of the HCJD belong to a relatively small group of career public servants who 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 members of the HCJD is to be appointed to the bench. As a result, it is understandable that for HCJD members serving the interests of the court is no less important than winning the 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 but, on the other hand, demonstrates a relatively high level of trust in the judiciary and in the legal bureaucracy.⁴⁷ While this level of trust has been significantly eroded over the last two decades,⁴⁸ there is still 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 Attorney General and his or her office as professional, apolitical and impartial. The minister of justice model fits well into this political and cultural environment.

3.5. OPEN AND CLOSED RECORDS

Another explanation for the conflicting US and Israeli conceptions of the proper role of government attorneys lies in the differences in practice in the judicial review employed in the two

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

⁴⁵ Dotan (n 7) 157–71; Dotan, *ibid*.

⁴⁶ Dotan (n 7) 71–75.

⁴⁷ For example, Gad Barzilai, Ephraim Yuchtman-Yaar and Zeev Segal, 'Supreme Courts and Public Opinion: General Paradigms and the Israeli Case' (1994) 4(3) *Law and Courts* 3–6. While the level of public trust in the judiciary has been eroded over the last two decades, it is still significantly relatively higher than the level of trust in political institutions: see, eg, Tamar Herman, 'The Israeli Democracy Index: A Periodic Check-Up', *The Israeli Institute for Democracy*, 9 October 2013, <http://en.idi.org.il/analysis/articles/the-israeli-democracy-index-a-periodic-check-up>.

⁴⁸ Dotan (n 7) 45–49.

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 may justify its decision only on the basis of the reasons stated at the time it made the decision under review (‘closed reasons’).⁵¹ The private party is not permitted to introduce arguments in court that it failed to present before the agency (‘closed arguments’).⁵² Closed review is justified on the ground of concerns over efficiency and separation of powers, as well as the need to preserve deference to the agency’s decisions of fact, law or discretion.

A further justification for closed review arises from the fact that, at least in formal adjudication and in rule making, the law requires a structured, adversarial, and quite costly decision-making process. This process provides ample opportunity for private parties to introduce evidence and to present arguments. The procedures require the agency to prepare a detailed statement of reasons. The US invests substantial resources in this initial decision-making phase in the expectation that it will 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 practised in the US arise from this fundamental decision to concentrate resources at the initial decision-making stage rather than the judicial review phase.⁵³

In contrast to the US, Israel embraces open judicial review, which means that the courts frequently allow the parties to present new evidence,⁵⁴ new arguments⁵⁵ 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 not reviewable in the US because of doctrines relating to standing or justiciability.⁵⁸ Thus, for example, in Israel it is possible to secure judicial review of decisions to appoint or refrain from dismissing senior government officials, and even Cabinet ministers, as well as prosecutorial decisions and policy-

⁴⁹ This difference is discussed in Asimow and Dotan (n 1).

⁵⁰ *Camp v Pitts* 411 US 138 (1973); Asimow and Dotan (n 1).

⁵¹ *SEC v Chenery Corporation* 318 US 80 (1942); Asimow and Dotan (n 1).

⁵² *Unemployment Compensation Commission of Alaska v Aragon* 329 US 143 (1946).

⁵³ Michael Asimow, ‘Five Models of Administrative Adjudication’ (2015) 63 *American Journal of Comparative Law* 3, 7, 13–14. As pointed out in Asimow and Dotan (n 1), the arguments for closed review procedure are much less persuasive in the case of review of informal adjudication and policy implementation, since in such cases there is no well-structured initial decision procedure.

⁵⁴ HCJ 76-77/63 and 79/63 *Trudler v Election Officer* 1963 PD 17(2503); Asimow and Dotan (n 1).

⁵⁵ HCJ 75/76 *Hiron v Fruit Council* 1976 PD 30(3) 645; Asimow and Dotan (n 1).

⁵⁶ Asimow and Dotan (n 1).

⁵⁷ *ibid.*

⁵⁸ *ibid.*

implementation decisions such as the provision of air-raid shelters in public schools.⁵⁹ In such proceedings, the petitioner (often a public action organisation) is not a party to the earlier phases of the administrative dispute resolution. Obviously, such third party petitioners have no opportunity to present evidence before the agency and cannot be confined to the evidence or legal arguments that are presented at that stage. Accordingly, judicial review, as practised in Israel, cannot function under the rules of closed review.⁶⁰

The US system of closed review promotes the hired gun approach 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 reinvestigate 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 rationalisations.

In Israel, however, the extensive role of government lawyers at the pre-litigation stage is consistent with the 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 ensure 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 on the facts and law.⁶² The open record approach seems to be 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 arrive at the correct decision in administrative review, which means that it will consider new reasons to justify a poorly supported agency decision. An HCJD attorney is expected to ascertain these reasons from the agency and bring them to the court's attention. This also resonates well with the minister of justice approach for government lawyers.

⁵⁹ HCJ 6163/92 *Eizenberg v Minister of Building and Housing* 1993 PD 47(2) 229, available in English at http://elyon1.court.gov.il/files_eng/92/630/061/Z01/92061630.z01.pdf; HCJ 1284/99 *X v Chief of Staff* 1999 PD 53(2) 62; HCJ 3094/93 *The Movement for Quality in Government in Israel v State of Israel* 1993 PD 47(5) 404, available in English at http://elyon1.court.gov.il/files_eng/93/940/030/Z01/93030940.z01.pdf; Amitai (n 36); HCJ 5853/07 *Emuna v Prime Minister* 2007 PD 62(3), available in English at <http://versa.cardozo.yu.edu/opinions/emunah-v-prime-minister>; HJC 8397/06 *Advocate Eduardo Wasser v Minister of Defense* 2007 PD 62(2) 198, available in English at <http://versa.cardozo.yu.edu/opinions/wasser-v-minister-defense>.

⁶⁰ Asimow and Dotan (n 1).

⁶¹ *ibid.*

⁶² In this respect the function of the HCJD to some extent resembles the French model of judicial review, which is based on reports made to the courts by the *Rapporteur* and the *Commissaire du Gouvernement*: L Neville Brown and John S Bell, *French Administrative Law* (4th edn, Oxford University Press 1994) 102–03. For a comprehensive discussion of the quasi-inquisitorial Israeli model see Dotan (n 7) 134–36.

4. 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 roles of DoJ attorneys and HCJD attorneys are not readily comparable. Nevertheless, 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 the 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 of the appropriate role of US government lawyers.⁶⁴

One way by which to approach the issue is to recognise 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 the role of the prosecution. 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 authorise an appeal of a lower court decision against an agency, regardless of the agency's strong feelings to the contrary. Thus the Solicitor General (SG) may decline to accede to the agency's wish that the government should appeal against a District Court decision to the Court of Appeals or seek reconsideration *en banc* from a Court of Appeals. The SG may refuse to petition the Supreme Court for *certiorari* despite agency entreaties that review be sought. Before the Supreme Court, the SG sometimes admits to error or otherwise takes an independent position that differs from that of the agency that the SG is representing. Solicitors General 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

⁶³ See text following n 22.

⁶⁴ See Section 2.2 above.

⁶⁵ 'Model Rules of Professional Conduct' (n 5), r 3.8, Comment 1: 'A prosecutor has the responsibility of a minister of justice and not simply that of an advocate'; ABA, 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'. Bruce A Green, 'Why Should Prosecutors "Seek Justice"' (1999) 26 *Fordham Urban Law Journal* 607–08. But see Zacharias (n 11), arguing that the 'minister of justice' standard is incoherent.

⁶⁶ Ryan C Black and Ryan J Owens, *The Solicitor General and the United States Supreme Court* (Cambridge University Press 2012) 32–34 (The 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' (1998) 61 *Law and Contemporary Problems* 165, 169–74 (The SG usually represents the government's institutional interests rather than the political views of the administration in order to preserve the SG's credibility with the Court). See also Lincoln Kaplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (Vintage Books 1987) 33–50 (The SG enjoys considerable independence vis-à-vis the President and the Attorney General).

branch officials; state courts generally uphold their power to do so.⁶⁷ Like prosecutors, the SG, and 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.

At 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 resolve a controversy between private parties and government agencies, but also to ascertain the legality of 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 who 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 ensure the legality and reasonableness of the decision, and to ensure that the public interest is protected. The framework of the adversarial model should be adapted to better enable the court to fulfil 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 ensure 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 the judicial review process. Private parties in dispute with the government may be at a great tactical disadvantage: they may, for example, be compelled to settle cases on inequitable terms because the cost of litigating the case is more than they can afford. 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 who challenge the government often represent themselves; both government lawyers and judges should be allowed to assist litigants-in-person. All of 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 as the agency enjoys delegated power from Congress to make policy in executing the statute, it 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 Attorney General⁶⁹ who, together with other politically appointed officials of the DoJ below him, are no less

⁶⁷ William P Marshall, 'Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive' (2006) 115 *Yale Law Journal* 2446, 2453–55.

⁶⁸ Michael Asimow, 'Popular Culture and the American Adversarial Ideology' in Michael Freeman, *Law and Popular Culture* (Oxford University Press 2005) 606.

⁶⁹ See n 3.

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 in judicial review proceedings 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.

5. CONCLUSION

This article has highlighted a striking difference in the legal cultures 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 the instructions of their agency clients on litigation or settlement strategy in the same way that private lawyers are obligated to follow the instructions of private clients. This is the hired gun model. However, there is significant academic dissent and judicial criticism of this model. Moreover, many government lawyers disagree with it.

In Israel, on the other hand, the practice of government lawyers by and large follows 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 depart 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 heard initially 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 to promote justice and the public interest, rather than in the executive or legislative branches.

While the judicial review practices of the US and Israel 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 recognising that government attorneys (with the consent of their superiors) should be allowed to assert their own visions of public interest when representing agency clients in the judicial review process.