

THE ETHICS OF REPRESENTING ELECTED REPRESENTATIVES

KATHLEEN CLARK*

I

INTRODUCTION

Capitol Hill used to be referred to as “the last plantation.”¹ For the purposes of this symposium, however, I believe that it is more useful to think of Capitol Hill not in terms of the antebellum South but rather in terms of medieval Europe. Congress consists of a series of fiefdoms. To understand any particular lawyer’s role in Congress, it is important to know which fiefdom the lawyer is part of, and who is its head.²

This essay is an attempt to sketch out in a preliminary way the work of several different types of legislative lawyers.³ It suggests that the role of lawyers

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* Associate Professor of Law, Washington University.

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1. “Capitol Hill came to be known as ‘the last plantation,’ as Sen. John Glenn (D-Ohio) characterized it as long ago as 1978,” because Congress would routinely exempt itself from the employment and other laws that it enacted for the rest of the country. Helen Dewar, *Senate Joins in Lifting Hill’s Worker Law Exemptions*, WASH. POST, Jan. 12, 1995, at A1. This reputation is probably no longer deserved, for in early 1995, Congress imposed on itself for the first time antidiscrimination, safety, and other workplace laws through passage of the Congressional Accountability Act of 1995, Pub. L. 104-1, 109 Stat. 3 (codified at 2 U.S.C. §§ 1301-1438 (Supp. II. 1996)).

2. See Christine DeGregorio, *Professionals in the U.S. Congress: An Analysis of Working Styles*, 13 LEGIS. STUD. Q. 458, 462 (1988) (“Knowing the extent to which aides work for one patron or many patrons tells us something about the distribution of power among elected officials within Congress.”).

3. This article is an attempt to describe the reality of lawyer-client relations that I observed in the Senate, rather than an attempt to proscribe what those relations ought to be like. Compare Keith W. Donahoe, Note, *The Model Rules and the Government Lawyer, A Sword or Shield? A Response to the D.C. Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct*, 2 GEO. J. LEGAL ETHICS 987 (1989) (arguing that government lawyers ought to view their role as pursuing the public interest), with Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 299 (1991) (“[T]he public interest approach invites each government lawyer to analyze and define the public interest, a task that no individual lawyer can hope to perform on his own.”); William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539 (1986) (criticizing the public interest approach as a way for government lawyers to resolve conflicts between clients and concluding that “[s]uch a lawyer is not a lawyer representing a client but a lawyer repre-

who work for individual legislators may actually be quite similar to that of certain lawyers in the Executive Branch. The essay also examines the moral choices faced by legislative lawyers, and the degree to which their professional roles may insulate them from moral responsibility for the consequences wrought by the legislation on which they work. It is based primarily on my own experiences and observations as a lawyer on Capitol Hill as well as my conversations with other congressional lawyers.⁴

II

THE STRUCTURE OF AUTHORITY FOR SENATE STAFF

When I tell people that I used to work at the Senate Judiciary Committee, most of them respond with the following question: "Did you work for the Committee itself, or for a particular Senator?" To the uninitiated, that may seem like a reasonable question,⁵ but it displays how little the questioner knows about the Committee. Those more familiar with its workings would know that, for the purposes of identifying the employer of a staff lawyer, there is essentially no such thing as "the Senate Judiciary Committee itself."

To explain this, it is perhaps best to start with a basic explanation of some of the different types of lawyers who work in the Senate. Some lawyers, such as the Senate Legal Counsel, who represents the Senate in court proceedings, work for the Senate as a whole.⁶ At first blush, this might seem like an impossibly difficult arrangement. Who, after all, can speak for the Senate as a

senting herself."); Jennifer Wang, Note, *Raising the Stakes at the White House: Legal and Ethical Duties of the White House Counsel*, 8 GEO. J. LEGAL ETHICS 115, 121-23 (1994).

4. I worked as a lawyer at the Senate Judiciary Committee from 1991 to 1993. This was an eventful time for the Committee, including multiple attempts to pass an omnibus crime bill that included more than 50 new death penalty provisions, the notorious hearings on Clarence Thomas's nomination to the Supreme Court and Anita Hill's allegations against Thomas, and the confirmation hearings of two successful Attorney General nominees (William Barr and Janet Reno) and one also-ran (Zoë Baird). I was primarily responsible for dealing with issues of white collar crime, including the sentencing guidelines for organizations, the federal government's booming forfeiture program, and health care fraud, but I also assisted in the Committee's major nomination and oversight hearings.

The exact parameters of a former government lawyer's continuing duty of confidentiality are by no means clear. Compare Richard W. Painter, *A Law Clerk Betrays the Supreme Court*, WALL ST. J., Apr. 13, 1998, at A23, with Edward Lazarus, *The Supreme Court Must Bear Scrutiny*, WASH. POST, July 6, 1998, at A19; see also Rita M. Glavin, Note, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 66 FORDHAM L. REV. 1809 (1995). It is at least arguable that the portions of this essay based on my own experiences are subject to the duty of confidentiality. I therefore sought and obtained consent for publication from my former client, the former Chairman of the Senate Judiciary Committee, through his administrative assistant.

5. In fact, Congress seems to foster this misunderstanding by listing the names of Committee staff generically in phone directories and committee reports, without any indication with which Senator each staff member is associated. But see REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. No. 100-433, app. B, vol. 4, at xi (identifying particular associate staff of the Select Committee to Investigate Covert Arms Transactions with Iran with specific Committee members).

6. See 2 U.S.C. §§ 288-288n (1994); Rebecca Mae Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 CONGRESS & PRESIDENCY 131 (1993) (discussing the Office of Senate Legal Counsel and the General Counsel in the House of Representatives).

whole?⁷ Fortunately, the statute that created the Office of Senate Legal Counsel also defines precisely when the Legal Counsel may act on behalf of the Senate, requiring a vote of the Senate as a whole, the Legal Counsel's bipartisan advisory committee, or the relevant committee.⁸ Another high-profile example of a lawyer working for the Senate as a whole was Peter Fleming, the Temporary Special Independent Counsel who was appointed to investigate leaks in connection with the Keating Five investigation and the Anita Hill/Clarence Thomas hearings.⁹ A Senate Resolution authorized the appointment of a lawyer to conduct the leak investigation, but explicitly constrained his ability to contest witnesses' privilege claims.¹⁰ The Rules Committee Chair and Ranking Member vetoed Fleming's request to seek a court order for journalists to testify about the sources of their information.¹¹ Ultimately, those constraints prevented Fleming from completing the investigation to his satisfaction.¹² As these two examples show, when the Senate seeks legal representation as an institution, it well understands its need to maintain control of that representation through decisionmaking by Senators, rather than deferring to the judgment of its lawyers.¹³

Other lawyers make their services generally available to any Senator, in much the way that the Congressional Research Service makes its services available to all Members of Congress.¹⁴ For example, the Office of the Legislative

7. There is a vast literature about the difficulties involved in representing an entity, such as a corporation. See, e.g., Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation: Toward a Realistic Ethic*, 74 CORNELL L. REV. 466 (1989); Nancy J. Moore, *Expanding Duties of Attorneys to "Non-clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659 (1994).

8. Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1877, §§ 702, 703 (codified at 2 U.S.C. §§ 288a, 288b (1994)).

9. See S. DOC. 102-20, Pt. 1 (1992).

10. See S. Res. 202, 102d Cong. (1991). The resolution authorizing this special appointment also ensured that the Rules Committee or the Senate as a whole, rather than the Temporary Special Independent Counsel himself, would decide whether to accept any witness's claim that a privilege exempted them from testifying. See *id.* §§ 6(d), (e).

11. See S. DOC. 102-20, Pt. 2, at 22 (1992).

12. See S. DOC. 102-20, Pt. 1, at 78-80 (1992). Fleming concluded his report as follows:

[T]here exists a tension between a journalist's choice of silence and the rule of law which governs all citizens. This tension cannot and should not be eased or resolved by accommodation. . . . Senate . . . acquiescence in the media's claim of a superior right . . . will sanction the continued ability . . . of senators and staff persons to disclose confidential information with a certainty that their anonymity will be secure. . . . [W]hen we consider the needs of this institution, it is difficult to find a policy consideration which can justify anonymity. . . .

Id. at 79-80.

13. In many other contexts, lawyers may assume their clients' right to make significant decisions about the representation. See DOUGLAS ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* (1974), cf. AMERICAN BAR ASS'N, *MODEL RULES OF PROFESSIONAL CONDUCT*, Rule 1.2 cmt. [hereinafter ABA Model Rule(s)] ("The client has ultimate authority to determine the purposes to be served by legal representation. . .").

14. See 2 U.S.C. § 166(d) (1994) ("It shall be the duty of the Congressional Research Service, without *partisan bias*, . . . to prepare and provide information, research, and reference materials and services to committees and Members of the Senate and House of Representatives . . . to assist them in their legislative and representative functions.") (emphasis added). A manual for new Congressional Research Service employees states: "We work equally for *all* Congressmen and Senators, their staff,

Counsel provides technical advice on the drafting of legislation to “any committee of the Senate.”¹⁵ Thus, before advising the chairman of the Senate Judiciary Committee to introduce a particular bill, I consulted a lawyer in the Office of Legislative Counsel to ensure that the bill was drafted properly and that it would be referred back to the Judiciary Committee.¹⁶ Legislative Counsel lawyers provide advice to Senators’ staff, who may in some cases reject that advice. Some of their proposed revisions may be insufficiently sensitive to political issues. For example, they may propose the clarification of language that the Senator prefers to remain ambiguous.¹⁷ One finds in the Office of Legislative Counsel the kind of professionalism and attention to detail and consistency described by one commentator as necessary for careful legislative drafting.¹⁸ These lawyers seem to be both nonpartisan and nonpolitical. They seem to see themselves more as technicians than as political operators.¹⁹

At times, the Senate Legal Counsel plays this kind of role as well, such as when it advises a committee on its investigative powers.²⁰ For example, when the Senate Judiciary Committee was holding its hearings on Anita Hill’s allegations against Clarence Thomas, the Senate Legal Counsel himself was either sitting directly behind the Chairman or waiting in the anteroom in the event that any questions arose about the legality of the Committee’s subpoenas.²¹

A third category of legislative lawyer works for a particular Senator. I refer to this third type as a “political lawyer” because she owes her loyalty and her job to an individual senator, and must be particularly sensitive to that Senator’s

and committee staff and all must have confidence that when you assist them, you do so with your knowledge of your field, not from your convictions of ‘what ought to be done.’” C. GOODRUM, YOUR WORK IN THE CONGRESSIONAL RESEARCH SERVICE: AN INTRODUCTORY OPERATING MANUAL 5-6 (1977) (emphasis in original) (quoted in *Keeffe v. Library of Congress*, 777 F.2d 1573, 1580 (D.C. Cir. 1985)).

15. 2 U.S.C. § 275 (1994).

16. It is important that the bill be referred back to the Judiciary Committee so that the Chairman-sponsor could ensure that the bill would progress out of Committee, from arranging for a hearing on the bill to seeing it through a mark-up session. See David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 TUL. L. REV. 2437, 2451-52 (1996).

17. For a discussion of Congress’s deliberate ambiguity in drafting the 1991 Civil Rights Act, see, e.g., Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035 (1992); Charles B. HERNICZ, *The Civil Rights Act of 1991: From Conciliation to Litigation—How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1 (1993).

18. See Roger Purdy, *Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems*, 11 SETON HALL LEGIS. J. 67 (1987).

19. Cf. DeGregorio, *supra* note 2, at 465 (identifying a subset of professional staff on Capitol Hill who act as “technicians” and feel detached from policy outcomes).

20. One of the responsibilities of the Senate Legal Counsel is to advise investigative committees regarding subpoena procedures. See 2 U.S.C. § 288g(a) (1994) (“The Counsel shall advise, consult, and cooperate with . . . any committee or subcommittee of the Senate in promulgating and revising their rules and procedures for the use of congressional investigative powers with respect to questions which may arise in the course of any investigation.”). In so doing, the role is similar to that of the Senate Legislative Counsel: providing objective, technical advice to a particular constituency within the Senate.

21. The Senate Legal Counsel also has the authority to bring a civil action to enforce a subpoena when directed to do so by a Senate resolution. See 2 U.S.C. § 288b(b) (1994).

political goals and interests.²² These lawyers can be further divided into two categories: those who work in the Senator's "personal office," and those who work as part of his "committee staff."²³ Personal office staff tend to have responsibility for quite a wide range of issues, and therefore do not usually have the opportunity to develop expertise in a particular subject area.²⁴ Many, although by no means all, Senate staffers are lawyers. Except for lawyers in the Office of the Senate Legal Counsel,²⁵ there is no formal requirement that lawyers working in the Senate actually be licensed to practice law.²⁶ In fact, the Chief Counsel of the Senate Judiciary Committee during the early 1990s had never taken a bar exam. Nevertheless, some Senate staff who are not lawyers engage in lawyer-like work, such as drafting legislation.

In general, committee staff are hired by an individual Senator to handle his work on a particular committee. The size of a Senator's committee staff depends on the Senator's seniority on the committee and on whether he is in the majority or the minority party. The longer the Senator's tenure on the committee, the larger his budget. Also, majority party Senators receive a larger budget than those of the minority party. Most committee staff tend to have less personal contact with the Senator, but have more of an opportunity to specialize in a particular substantive area. The Senate Judiciary Committee staff with whom I worked—like personal office staff—acted as though they owed loyalty to the particular Senator for whom they worked, rather than to "the Committee itself."²⁷ In the case of the Senate Judiciary Committee, staffers describe their

22. It may be useful to contrast the situation of congressional lawyers with that of corporate lawyers. The standard legal analysis is that lawyers who work for corporations represent the corporation itself rather than any of the individuals who run the corporation. See *infra* notes 30-31 and accompanying text (discussing ABA Model Rule 1.13).

23. I use the male pronoun for Senators intentionally. During most of my time on Capitol Hill, there were no women members of the Senate Judiciary Committee. In the wake of the 1991 hearings on Anita Hill's allegations against Clarence Thomas, and the 1992 elections that brought four additional women into the Senate, Senator Biden convinced two of the newly elected women, Diane Feinstein and Carol Mosely-Braun, to join the Committee. See *Hearings Before the Committee on the Judiciary, United States Senate, on the Nomination of Zoë E. Baird of Connecticut to Be Attorney General of the United States*, 103d Cong. 1-2 (1993) (statement of Chairman Joseph Biden):

If confirmed Zoë E. Baird will be the first woman to serve the nation as Attorney General. Moreover, her confirmation is being heard by a committee that welcomes its first two elected women members, and I want to formally welcome the senator from California and the senator from Illinois. You have no idea how happy I am you are voting on this panel (Laughter/Applause).

24. See DeGregorio, *supra* note 2, at 462 (noting that committee staff are more involved in policy formulation than are personal office staff).

25. See 2 U.S.C. § 288(a)(2) (1994).

26. Cf. 28 C.F.R. 50.14 (1998) (requiring that Justice Department lawyers be licensed by at least one state or the District of Columbia).

27. Compare this description of how corporate managers experience their own work environments:

[Corporate m]anagers do not see or experience authority in any abstract way; instead, authority is embodied in their personal relationships with their immediate bosses and in their perceptions of similar links between other managers up and down the hierarchy. When managers describe their work to an outsider, they almost always first say: "I work for [Bill James]" or "I report to [Harry Mills]" or "I'm in [Joe Bell's] group," and only then proceed to describe their actual work functions. Such a personalized statement of authority relation-

work not in terms of their immediate bosses, but in terms of their ultimate boss—the Senator for whom both they and their immediate bosses work.

III

THE IDENTITY OF A CAPITOL HILL LAWYER'S CLIENT

Surprisingly little has been written about the role of lawyers in the legislative branch.²⁸ Lawyers in the Executive Branch have reflected much more about their professional and institutional roles. Fewer legislative branch lawyers have gone into law teaching, as contrasted with the well-worn path from the Justice Department's Office of Legal Counsel into legal academia.²⁹ The work culture of Capitol Hill is less reflective, and places more emphasis on pragmatic concerns. For whatever reason, there is not yet a well-developed theory on the ethics of legislative lawyering.

If a legislative lawyer looked to the American Bar Association's Model Rules of Professional Conduct for guidance, she could be led very badly astray. For example, an official comment to Model Rule 1.13 states that a government lawyer's client "is generally the government as a whole," although in some circumstances the client may be a specific agency.³⁰ Under this analysis, a lawyer working for the Senate Judiciary Committee could have several possible clients: the federal government "as a whole," the legislative branch of government, the Senate as an institution, or the Senate Judiciary Committee itself. As a matter of practice, however, none of these is the lawyer's actual client. Instead, the

ships . . . exactly reflects the way authority is structured, exercised, and experienced in corporate hierarchies.

ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* 17 (1988) (citations omitted).

28. See Steven Pressman, *Ethics Rules Urged for Attorneys on Capitol Hill Staffs—Lack of Guidance Seen*, L.A. DAILY J., Aug. 3, 1982, at 1; Marcello, *supra* note 16; Purdy, *supra* note 18. A few commentators have addressed issues faced by lawyers who act as legislators rather than legislative staff. See Dennis Mitchell Henry, Note, *Lawyer-Legislator Conflicts of Interest*, 17 J. LEGAL PROF. 261 (1992); Thomas M. Kellenberg, *When Lawyers Become Legislators: An Essay and a Proposal*, 76 MARQ. L. REV. 343 (1993). By contrast, there is a much richer political science literature about the activities of congressional staff. See, e.g., HARRISON W. FOX, JR. & SUSAN WEBB HAMMOND, *CONGRESSIONAL STAFFS: THE INVISIBLE FORCE IN AMERICAN LAWMAKING* (1977); MICHAEL J. MALBIN, *UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT* (1980); Christine DeGregorio, *Professional Committee Staff as Policy-making Partners in the U.S. Congress*, 21 CONGRESS & PRESIDENCY 49 (1994); DeGregorio, *supra* note 2; Susan Webb Hammond, *Recent Research on Legislative Staffs*, 21 LEGIS. STUD. Q. 543 (1996) (reviewing academic literature since 1983).

29. See, e.g., Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513 (1993) (referring to Cardozo Law School's symposium, *Executive Branch Interpretation of Law*, as a "symposium of Office of Legal Counsel ("OLC") alumni"). Eight of the 13 academics participating in that symposium were OLC alumni. See John O. McGinnis, *Introduction*, 15 CARDOZO L. REV. 21 (1993) (listing the contributors); see also THE AALS DIRECTORY OF LAW TEACHERS 1997-98 (listing faculty biographies).

30. ABA MODEL RULE 1.13. Cf. D.C. RULES OF PROFESSIONAL CONDUCT, Rule 1.3 cmt. ("Because the government agency that employs the government lawyer is the lawyer's client, the lawyer represents the agency acting through its duly authorized constituents.").

Judiciary Committee lawyer has as her client a specific Member of Congress to whom she owes her job and her professional loyalty.³¹

The typical political lawyer on Capitol Hill does not see her role as the promotion of the public interest, except as her client/legislator defines for himself the public interest.³² There are limits to the kind of activities a political lawyer can engage in, just as there are limits to what any lawyer in private practice can do. It would be improper for a political lawyer to work on a legislator's purely personal legal problems, such as estate planning.³³ Nor can the lawyer engage in the legislator's campaign work—at least not on government time—or assist a legislator in illegal activity.³⁴ Beyond that, political lawyers act as

31. Some committees operate in a different way. In other committees, lawyers who are hired by the Chairman are supposed to provide advice to other members, including subcommittee chairs and even members from the minority party. The conflicts of loyalty that these lawyers face are daunting, as discussed in Michael J. Glennon, *Who's the Client? Legislative Lawyering Through the Rear-View Mirror*, 61 LAW & CONT. PROB. 21 (Spring 1998). See also David E. Price, *Professionals and Entrepreneurs: Staff Orientations and Policy-Making on Three Senate Committees*, 33 J. POLITICS 316, 335 (1971) (“[T]he ‘professional,’ . . . saw himself as contributing to the legislative acumen of all committee members, though he considered it his particular responsibility to give the chairman expert guidance.”); Rules of Procedure, Senate Ethics Committee, Rule 16 (indicating that Ethics Committee staff “shall perform all official duties in a nonpartisan manner” and that the appointment of all staff must be approved by both the majority-party Chairman and the minority-party Vice Chairman of the Ethics Committee).

Similarly in the corporate context, while a lawyer may owe her job to a particular corporate officer or employee, she owes her professional loyalty to the corporation as an entity. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (“A lawyer employed or retained by an organization *represents the organization* acting through its duly authorized constituents.”) (emphasis added). For an interesting argument that the Model Rules conception of entity representation should not be applied to executive branch lawyers, see Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

32. See DeGregorio, *supra* note 2, at 465 (“The aide does not advance a personal agenda that undermines or conflicts with those of the legislators. Rather, the staffer uses ingenuity and expertise to search for initiatives that advance personal interests and at the same time serve the interests of the superiors.”).

33. See GREGORY S. WALDEN, ON BEST BEHAVIOR: THE CLINTON ADMINISTRATION AND ETHICS IN GOVERNMENT 274-77 (1996) (criticizing the Clintons for having Deputy White House Counsel Vince Foster handle some of their personal legal matters, such as working to create a blind trust for their assets, preparing their tax returns for 1992, and helping prepare the delinquent tax returns for the Whitewater Development Corporation).

The line between personal and official work may be somewhat blurred. Consider the example of a Senator who spoke out against Zoë Baird's failure to comply with the tax laws. If, before speaking out, the Senator asked a staff lawyer to check whether he himself had complied with those laws when he hired household help, would that be considered purely personal?

34. See 18 U.S.C. § 2 (1994) (“Whoever . . . aids, abets, counsels, commands, induces or procures [the] commission [of an offense against the United States] is punishable as a principal.”); ABA MODEL RULE 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . .”).

While the Hatch Act does not apply to employees of the legislative branch, see 5 U.S.C. §§ 7324(a), 7322(1) (1994), the Senate has prohibited its employees from engaging in campaign activity while on government time. See SENATE SELECT COMM. ON ETHICS, SENATE ETHICS MANUAL 179-82 (1996), S. DOC. NO. 104-25 (1996); Senate Select Comm. on Ethics, Interpretive Rulings No. 402 (Oct. 18, 1985) & No. 357 (Dec. 16, 1982), *reprinted in* INTERPRETATIVE RULINGS OF THE SELECT COMM. ON ETHICS 194-95, 239-40 (1993). On the other hand, it may not always be clear where the line is between political activity that is appropriate for the government-paid staff of an elected official and campaign activity that is inappropriate for such staff. See Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 89-92 (noting that the Senate Ethics Committee

though they have no particular obligation to the committee, to the legislative branch, to the Senate, to the United States, and certainly not to the public in general.

For example, in the spring of 1992, when the Chief Counsel for the Senate Judiciary Committee asked me to draft legislation addressing health care fraud, he did so only after reviewing the results of an opinion poll indicating that a majority of Americans believed that a good way of ameliorating the high cost of health care would be to increase the penalties for doctors who commit fraud.³⁵ I do not know whether he believed that increased penalties would deter crime or benefit the public. But I suspect he saw this as an opportunity to increase the profile of the Chairman in the area of health care, which at the time was a key issue in the presidential election campaign. Such a bill would also reinforce the Chairman's reputation for being "tough on crime."

The lawyers and other staff who worked for the Chairman of the Judiciary Committee acted as though they owed loyalty to him rather than to any other member of the Committee. They were hired by him or by his Chief Counsel. There was close coordination between his Committee staff and his personal office staff for priority setting and scheduling. In thinking about policy initiatives, the committee lawyers and other staff kept in mind the Chairman's past positions on issues and how new policy stands would fit in with his future political campaigns. When meeting with interest groups, it was clear that staffers represented the Chairman. Our personal views on the issues were irrelevant. Our role, like the role of an advocate in a courtroom or elsewhere, was to explain and defend the Chairman's positions.

The Chairman's political lawyers would work on behalf of another Senator only at the direction of the Chairman himself. This particular Chairman was well-known for his cooperative relationships with other members of the Committee, even members from the opposing party. So when a minority member

found no impropriety occurred when a member of Senator Frank Lautenberg's congressional staff wrote memos to his campaign fundraising staff, "mention[ing] several individuals for whom the senator had recently done favors and urg[ing] the fundraisers to invite these individuals to make contributions to the senator's reelection campaign.")

35. On the question "[g]iven the high cost of health care insurance, which of the following steps would you favor in order to reduce costs," the results were as follows:

	Favor	Oppose	Not Sure
Limiting the awards of malpractice suits	73%	20%	7%
Setting limits on physician fees	83%	14%	3%
Fining or imprisoning physicians and other health care professionals who commit fraud	90%	7%	3%
Surcharges for smokers and other high risk individuals who engage in high risk behavior	57%	37%	6%
Limiting the amount spent on the terminally ill	28%	65%	7%
Limiting coverage on the elderly	13%	84%	3%

Telephone survey of 1000 adults conducted by Yankelovich Clancy Shulman, Aug. 27-28, 1991, released Dec. 11, 1991, sponsored by Time & CNN (available on WESTLAW, POLL database, Question ID: USYANKCS.AUG91 R12A-G).

was facing a tough reelection battle and wanted to hold field hearings in several locations within his state, the Chairman authorized the hearings, and I attended the hearings as the Chairman's representative. (The minority-party Senator was the only member present at these hearings, and the full Committee did not pursue further action on this Senator's legislative proposal.)

Thus, in the legislative branch, the political lawyer's role is to promote the substantive agenda of the elected official, protect his political interests, and make him look good. Is this an accurate description of the work of any lawyers in the Executive Branch? It seems to me that it may well describe the work of the White House Counsel.

Much has been written about lawyering for the President—certainly much more than has been written about lawyering for a legislator.³⁶ Former White House Counsel Bernard Nussbaum was accused of making the mistake of thinking that his client was President Clinton rather than “the office of the President.”³⁷ But it is not entirely clear how “representing the office of the President” would differ from “representing the President.” Under either formulation, the lawyer faces the same kinds of limitations faced by lawyers in private practice.³⁸ She must not assist the client in wrongdoing. In other words, John Dean's mistake was not that he thought that President Nixon was his client; his mistake was assisting his client in obstructing justice.

Perhaps representing the office of the President implies some requirement to balance a particular President's personal political desires against the long-term interests of the institution.³⁹ But it is unclear why an unelected lawyer rather than the elected official for whom the lawyer works should make such a decision.⁴⁰

36. For a description of how the White House Counsel's office has changed over time, see Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 *LAW & CONTEMP. PROBS.* 63, 65-71 (Autumn 1993). See also Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 *BYU L. REV.* 17; Jeremy Rabkin, *White House Lawyering: Law, Ethics, and Political Judgments*, in *GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS* 107 (Cornell W. Clayton ed., 1995); Michael Strine, *Counsels to the President: The Rise of Organizational Competition*, in *GOVERNMENT LAWYERS*, *supra*, at 257; Wang, *supra* note 3.

37. See Jackson R. Sharman III, *The White House's "Personal" Lawyers*, *WASH. POST*, Jan. 17, 1996, at A17 (“[F]or a White House lawyer, the client is the office of the president. . . . [T]he role of the White House lawyer is not to save the president's personal bacon but to protect the integrity of the office.”).

38. See Lund, *supra* note 36, at 24-29.

39. See *id.*

40. See Miller, *supra* note 31; see also John K. Carlock, *The Lawyer in Government*, in *LISTEN TO LEADERS IN LAW* 255, 268-69 (Albert Love & James Saxon Childers eds., 1963), quoted in Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 *FED. B.J.* 61, 69 (1978):

I do not believe that the ritual of becoming a member of the bar invests a government lawyer with a power of life and death over the agency he serves. The agency head takes his own oath of office, and he is also subject to the inscrutable forces of public opinion. . . . No lawyer is wise enough to decide that his concept of legal principle can never give way to the course of action which a responsible administrator, charged with a legal duty and clothed with a constitutional responsibility, thinks is wise.

On the other hand, most executive branch lawyers are not “political lawyers” representing individual politicians. Instead, they represent an institution, whether that institution is an agency, the Executive Branch, or “the United States,” as Justice Department lawyers proclaim when they go to court.⁴¹ It may well be appropriate, then, that with this institutional representation comes an independent obligation to do justice, an obligation apparently not recognized by political lawyers.⁴²

IV

THE MORALITY OF THE POLITICAL LAWYER’S ROLE

To what degree is a lawyer responsible for the actions that her client takes with the lawyer’s assistance? If the action is illegal, the lawyer can be held legally responsible.⁴³ Suppose, however, that the client’s action is legally permissible but morally repugnant.⁴⁴ In such a case, should the lawyer feel morally responsible or implicated because of her own participation in the client’s wrongdoing?⁴⁵

The dominant ideology of the American legal profession seems to answer this question in the negative. Professor Stephen Pepper described this ideology as follows:

Once a lawyer has entered into the professional relationship with a client, the notion is that conduct by the lawyer in service to the client is judged by a different moral

41. These lawyers have statutory authority for their claim to represent the United States. See 28 U.S.C. § 517 (1994) (“[A]ny officer of the Department of Justice . . . may be sent by the Attorney General . . . to attend to the interests of the United States in a suit pending in a court of the United States. . .”). While a prosecutor’s client is the government, I have heard at least one former Assistant U.S. Attorney explain that she preferred the prosecutor’s job to private practice because, in her words, “It was great. I didn’t have a client.”

For an interesting discussion of whether an Independent Counsel may make that same claim to “represent the United States,” see John Q. Barrett, *All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct, and Judgment in Relation to the Work of an Independent Counsel*, 49 MERCER L. REV. 519, 521-23 (1998).

42. See Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 169-72 (1966) (discussing several examples of a government attorney deciding to temper the government’s negotiating or litigating position in order to promote justice).

43. For an example of a lawyer being held criminally liable, see *United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998). For an excellent overview of these issues, see GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* 65-74 (2d ed. 1994). For an example of lawyers being held civilly liable, see Notice of Charges filed by the Office of Thrift Supervision Against Kaye, Scholer, Fierman, Hays & Handler, reprinted in *REGULATION OF LAWYERS: STATUTES AND STANDARDS-1993*, at 734-78 (Stephen Gillers & Roy D. Simon, Jr., eds., 1994).

44. See Stephen Pepper, *Access to What?*, 2 J. INST. STUD. LEGAL ETHICS (forthcoming 1998) (“Legal rights mark off an area of individual autonomy; how the individual uses that autonomy may or may not be morally justifiable. . . . A lawyer who enables a client to achieve or actualize her legal rights—to act within that area of autonomy—does not necessarily enable a morally justifiable result.”).

45. Cf. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1144-45 (1988) (The “premise that the legal enforceability or permissibility of a client’s claim or course of action is an ethically sufficient reason for assisting the client . . . ignores important legal values competing with those that favor client autonomy and ignores that decisions may be legally permissible and yet not best vindicate relevant legal merits.”).

standard than the same conduct by a layperson. . . . As long as what lawyer and client do is lawful, it is the client who is morally accountable, not the lawyer.

The ABA's Model Rules themselves, which otherwise instruct lawyers about when they can be held legally responsible, seem to assert that lawyers should not be held morally responsible for their work on behalf of clients.⁴⁷

The argument that a lawyer is "morally insulated" from responsibility for a client's wrongdoing is quite strong, and perhaps at its zenith, in the criminal defense context.⁴⁸ A criminal defendant has a constitutional right to put the prosecution to its proof; otherwise, the presumption of innocence would be meaningless. Even apart from this constitutional rights-based argument, however, there are at least two other reasons that "moral insulation" is appropriate in this context. First, when representing a criminal defendant, a lawyer is assured that the adverse party (the state) is present at the proceeding, is represented by counsel, and often has substantial resources to make its case. It is therefore reasonable for a criminal defense lawyer to have faith that the adversary system itself will ensure that justice will be done.⁴⁹ Second, a criminal defense lawyer's work is retrospective rather than prospective in nature. The lawyer is attempting to defend the client against a charge of past wrongdoing. No matter how horrible the client's past actions, a lawyer's defense of the client does not directly assist a client in causing any future harm to others.⁵⁰ Thus, it

46. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 614. The opposite view has been described by Professor Geoffrey Hazard:

[T]he probity of a lawyer can be deduced from the conduct of his clients. If the client has engaged in misconduct, his lawyer is prima facie guilty also, either because his advice was followed but was morally insufficient, or because his advice was not followed and he has shown himself willing to continue in the service of a morally deficient master.

GEOFFREY C. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 143 (1978).

47. See ABA MODEL RULE 1.2(b) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."). See also HAZARD, *supra* note 46, at 136 (referring to "the professional dogma that the client's conduct is never morally imputable to his legal adviser").

48. What I refer to as "moral insulation" has also been called "nonaccountability," DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 52 (1988), and "independence," Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507 (1994). See also the related literature on "role-differentiated morality," for example, ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 1-7 (1980); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 3 (1975).

For more extensive arguments regarding the special position of criminal defense lawyers, see David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993); William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense*, 91 MICH. L. REV. 1767 (1993).

49. See Simon, *supra* note 45, at 1097-98 ("[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she need assume for substantive justice."); cf. Weinstein, *supra* note 42, at 169 ("The private lawyer can, within broad limits, attempt to get the best possible result—from his single client's point of view—letting the adversary system provide justice. What, however, of the public attorney?").

50. The distinction between criminal defense lawyers and other lawyers may be more one of degree than dichotomy. For example, a public defender who wins acquittal for a client who has repeatedly beaten his wife might in some sense feel responsible if that client continues his violence after acquittal. That lawyer is not actually assisting the client in his harmful conduct, but is helping to make

would be unfair to tar Michael Tigar with moral responsibility for the deaths and suffering caused by his clients, such as Terry Nichols and John Demjanjuk.⁵¹

But is this “moral insulation” equally appropriate where the lawyer is assisting a client outside the adversary process in actions that will have effect in the future? When I worked on Capitol Hill, I felt torn by concern about the consequences of my actions, such as assisting in the negotiation of a conference report on an omnibus crime bill that would create more than fifty new death penalty provisions.⁵² In fact, it appears that the drafters of the Democratic crime bill deliberately crafted many narrow death penalty provisions rather than a few broad provisions. It may have been their goal to give the appearance of greatly expanding the federal death penalty while only moderately expanding the number of potential defendants who would be subject to it.⁵³ My role in this process was peripheral, and a filibuster prevented the bill from becoming law.⁵⁴ After I left Capitol Hill, a later crime bill, which contained sixty death penalty provisions, was passed by the Congress and became law.⁵⁵ Even

that harmful conduct possible. In a more extreme case, a criminal defense lawyer who is on retainer to represent members of a drug cartel or an organized crime family who become criminal defendants may actually be assisting the cartel or crime family to continue its harmful conduct. See Jan Hoffman, *At the Office with Bruce Cutler; Even Mob Lawyers Get the Blues*, N.Y. TIMES, April 7, 1993, at C1 (describing government’s recording of conversation where John “Gotti seemed to be ordering [his lawyer] Mr. Cutler to tell a Gotti associate to take a contempt charge rather than appear before a grand jury. Mr. Cutler replied: ‘I understand.’ Five days later, the associate refused to testify.”). See also HAZARD, *supra* note 46, at 144 (“[I]t is one thing to represent a sometime murderer, quite another to be on retainer to the Mafia.”).

51. See Monroe Freedman, *Must You Be the Devil’s Advocate?*, LEGAL TIMES, Aug. 23, 1993, at 19; Michael E. Tigar, *Setting the Record Straight on the Defense of John Demjanjuk*, LEGAL TIMES, Sept. 6, 1993, at 22; Morroe Freedman, *The Morality of Lawyering*, LEGAL TIMES, Sept. 20, 1993, at 22.

52. The Senate-passed crime bill contained 51 new death penalty provisions—three more than President Bush had proposed in his crime bill. The conference report contained two additional death penalty provisions that had been in the House-passed bill, for a total of 53. For a discussion of death penalty politics, see Helen Dewar, *On Capitol Hill, Symbols Triumph; Substance Suffers Amid Frustrating Fiscal Pressures, Political Fears*, WASH. POST, Nov. 26, 1991, at A1 (“[L]awmakers from both parties boasted repeatedly [about the number of death penalty provisions in their crime bills] in what Sen. Howard M. Metzenbaum (D-Ohio) described as a contest to show who is ‘the toughest kid on the block.’”); Michael Isikoff, *House Democrats Offer Crime Bill Emphasizing Prevention*, WASH. POST, July 26, 1991, at A6 (“‘It’s just a bidding war,’ said one [House] Democratic aide of the new death penalty crimes included in the bill. Senate Judiciary Committee Chairman Joseph R. Biden Jr. (D-Del.) ‘had to have more than the president, so we had to have more than the Senate.’”)

53. See David Von Drehle, *A Broader Federal Death Penalty: Prelude to Bloodbath or Paper Tiger?*, WASH. POST, Nov. 29, 1991, at A29 (“The list of 53 crimes includes a variety of . . . hardly ever prosecuted [] murder subspecies—such as murder in the course of destroying a maritime platform; murder of a member of Congress, the Cabinet or the Supreme Court; murder during deprivation of religious rights; murder by genocide; murder in the course of a skyjacking; murder of a horse, poultry, egg-products, meat or nuclear regulatory inspector.”).

54. See 137 CONG. REC. 36128 (Nov. 27, 1991). The crime bill was actually stopped by a stealth filibuster rather than the kind rarely seen except for screenings of the Jimmy Stewart movie, MR. SMITH GOES TO WASHINGTON (Columbia 1939). For an excellent discussion of stealth filibusters, see Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 200-09 (1997).

55. See Pub. L. No. 103-322, 108 Stat. 1796 (1994); 140 CONG. REC. 12427 (Aug. 24, 1994) (statement of Sen. Biden).

an opponent of the death penalty might have been able to justify support for the legislation because it contained other laudable provisions.⁵⁶

This kind of political compromise is a fundamental part of life in a legislature, if not of political life in any institution. Thus, a person who opposes the death penalty might dissent to its imposition in his role as justice on the Supreme Court, but in the role of Senator, that same person could reasonably choose to vote for legislation that included the death penalty if he favored other provisions. A person who cannot make this kind of compromise might be able to manage in a judicial position—particularly on a single-member court—but would find quite uncomfortable life in a legislature, where accomplishing some goals almost always requires compromising other goals or principles.⁵⁷ Nonetheless, I am troubled by the death penalty, and was concerned about my own participation in expanding its availability. How would I feel years on when I learned of a criminal defendant who had been executed under these provisions? Would I feel implicated in that death?

Are such moral second-thoughts appropriate for a lawyer?⁵⁸ From what I could discern, they are uncommon among the political lawyers on Capitol Hill.⁵⁹ It may be that most political lawyers agree with the policy goals of leg-

56. See 137 CONG. REC. S9816 (daily ed. Nov. 27, 1991) (statement of Sen. Chafee):

As my colleagues well know, I long have opposed the death penalty, and have stated my opinion on capital punishment before this body many times. . . . On this bill, I voted against each and every death penalty amendment offered, and supported an amendment by my colleague from Illinois [Sen. Simon] to substitute mandatory life imprisonment for the death penalty. To my mind, we in this body have begun to apply the death penalty to everything except school truancy. . . . But . . . a clear majority of the Senate has indicated by roll call votes that they do not agree with my view. This bill does contain other provisions that I feel strongly—and positively—about: limitations on assault weapons, and a national five day waiting period for the purchase of handguns. . . . The law enforcement community wants these gun provisions and have lobbied long and hard for them. . . . They need our help and we should give it. I therefore will be supporting the overall omnibus crime bill. As I have said many times, I do not support the death penalty. . . . But the Senate has spoken repeatedly, and it is clear I can do nothing—at least for now—to change its mind. The assault weapons ban and the waiting period are two provisions, however, that are major steps forward and are worth saving. For that reason, I will support this bill.

57. For a very interesting discussion touching on the role of principle in a politician's life, see ANDREW STARK, *PUBLIC POSTURES, PRIVATE ARRANGEMENTS: CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE* 246 (forthcoming 1999) ("We will continually seek evidence that [a politician] is willing to sacrifice office, understood as [self-]interest, for his subjectively-constitutive principles; and that he is prepared to sacrifice his selfish interests or indulgences for office, understood as an outlet for the official's most subjectively-harbored beliefs or commitments.").

58. See Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS, 19, 38 (1997) ("A lawyer who could not put aside personal beliefs that conflicted with the client's objectives would therefore have a conflict of interest that would foreclose undertaking or continuing the representation.").

59. Cf. Carlock, *supra* note 40 (long-time government lawyer commenting on the fact that he did not spend much time on "the sort of introspection out of which" his essay on government lawyers' ethics was actually produced).

Anyone considering working as a political lawyer, whether on Capitol Hill, in the Executive Branch of the federal government, in a state or local government, or on a campaign, would be well-advised to clarify for herself the identity of her client and consider these questions prior to accepting the job. Especially where the client is an incumbent politician, she will likely have ample information about that politician's policy positions.

islators they represent, or that they believe their work generally furthers the public good even if it does some harm as well.⁶⁰ Or it may be that they, perhaps like most lawyers, feel that they are “morally insulated” from the client’s actions.

Political lawyers are in a more difficult position than at least some lawyers in private practice because a greater portion of their work is morally charged. I have heard more than one lawyer explain that she prefers to work on private commercial disputes where the only thing at stake is whether Corporation A or Corporation B walks away from the dispute with a pile of money. The outcome of such commercial disputes is less morally salient than policy questions about mandatory minimum sentences for drug crimes, abortion rights, and welfare policy. Political lawyers who see moral issues lurking in many if not all public policy questions may find professional life on Wall Street much easier personally than professional life on Capitol Hill, unless they substantially share the moral and political views of the politician for whom they work.

On the one hand, political lawyers can take some solace in the reasoning of Professor Geoffrey Miller that they are mere advisers to elected officials.⁶¹ It is the elected officials who appropriately have the responsibility to determine which policy choice to make. Their legitimacy is derived not from the soundness of their reasoning but from their status as elected representatives.

On the other hand, where a political lawyer disagrees with the policy choice on moral grounds, should she defer her moral judgment to that of the elected official? Is the “moral insulation” approach adopted by so many lawyers in private practice appropriate for political lawyers? We need not look very far in the history of this century to see how government officials can cause massive harm. Not every policy disagreement constitutes a moral disagreement. Yet where it does, I am troubled by the notion that political lawyers should hide behind their deference to the elected representatives for whom they work.⁶²

It may be instructive to keep in mind the example of the Manhattan Project scientists, and the responsibility they felt after the U.S. government dropped the atomic bombs that these scientists had created on civilians in Hiroshima and Nagasaki. Rather than defer to the president who made the ultimate decision to drop the bombs, or to the military commanders who carried out the task, many of these physicists went through a wrenching, soul-searching experience regarding their own moral responsibility for the 100,000 deaths and the many more serious injuries. No one was claiming that these scientists were le-

60. See DeGregorio, *supra* note 28, at 462.

61. See generally Miller, *supra* note 31.

62. Professor Robert Tuttle’s examination of the moral and legal obligations of attorneys who represent fiduciaries may provide useful guidance—at least where the political lawyer believes that her government official-client is betraying the public trust. See Robert W. Tuttle, *The Fiduciary’s Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 339; see also Geoffrey C. Hazard, *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987); Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 FORDHAM L. REV. 1319 (1994).

gally responsible for these deaths. But the scientists on their own attempted to explore their moral responsibility.⁶³

Fortunately for all of us, lawyers do not design nuclear weapons. The harm caused by lawyers is not of the same order of magnitude as that caused by weapons of mass destruction. But lawyers can and do assist their clients in causing harm. Yet I have not heard much soul-searching by the practicing lawyers whose legal work has caused harm, such as those whose work for Charles Keating and others cost the public billions of dollars.⁶⁴

IV

CONCLUSION

Unlike the physicists involved in the Manhattan Project, most lawyers have yet to grapple significantly with their moral responsibility for the future consequences of their actions. This seems especially true for lawyers, such as those working on Capitol Hill, who function outside the adversary system and contribute to outcomes whose impact is largely prospective, rather than retrospective. The varied descriptions of legislative lawyering contained in this symposium suggest that we need a broader and more rigorous empirical examination of the behavior and attitudes of the different types of Capitol Hill lawyers.⁶⁵ This symposium is a step in that direction. I hope that it generates more attention to these ethical issues and more research on these empirical questions.

63. Cf. Wasserstrom, *supra* note 48, at 4:

The dominant view, although it was not the unanimous one, in the scientific community was that the role of the scientist was to expand the limits of human knowledge. . . . And it was simply no part of one's role as a scientist to forego inquiry, or divert one's scientific explorations because of the fact that the fruits of the investigation could be or would be put to improper, immoral, or even catastrophic uses.

64. The involvement of lawyers in the savings and loan crisis has prompted judges and academics to think long and hard about the degree to which lawyers contributed to the harm. See, e.g., *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 905-06 (D.D.C. 1990) (Sporkin, J.) ("Where were these professionals . . . when these clearly improper transactions were being consummated? Why didn't any of them speak up or dissociate themselves from these transactions?"); Symposium, *From the Trenches and Towers: The Kaye Scholer Affair*, 23 LAW & SOC. INQUIRY 243 (1998); Symposium, *In the Matter of Kaye, Scholer, Fierman, Hays & Handler: A Symposium on Government Regulation, Lawyers' Ethics, and the Rule of Law*, 66 S. CAL. L. REV. 977 (1993).

65. See Glennon, *supra* note 31; Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROBS. 47 (Spring 1998); John C. Yoo, *Lawyers in Congress*, 61 LAW & CONTEMP. PROBS. 1 (Spring 1998).