The Law by Steven Brill

Making Justice Just

Can a government lawyer in charge of 40,000 civil cases make a difference?

Every day thousands of government lawyers go into court to argue cases ranging from a suit over a mail truck accident to the suit against CIA man turned author Frank Snepp. In theory, these lawyers speak and act for *us*. But their conduct and the positions they take are often at odds not only with what we'd expect from our government but also with what their own bosses expect from them.

For example, in 1975, a Washington D.C. law student named Kathleen Bishop filed a suit against the U.S. claiming that a job offer as a Justice Department intern had been revoked when she'd revealed in a routine questionnaire that she was living with a man to whom she was not married. In September of 1977, the United States filed a defense brief in the case. Citing the "high moral standards required by government employers," our Justice Department declared that even if Bishop had been unhired for being an unmarried cohabitant, this was an appropriate decision because "Department of Justice attorneys have high visibility in their communities . . . and the personal habits of Department attorneys should always be a credit to the reputation of the Department."

If this seems like a strange position for our government to be taking in late 1977, it's a stranger one still for Barbara Babcock—the lawyer whose signature appears first among the government attorneys who signed the brief.

Babcock's February 1977 appointment by President Carter and Attorney General Bell as Assistant Attorney General in charge of the Civil Division was hailed by liberals and public interest lawyers as the perfect choice. Her résumé is a model of commitment to civil rights and public interest law.

So at first glance, Babcock's signing the Kathleen Bishop brief (which Fred Graham of CBS News first reported) seems to be the classic Washington tale: good liberal lawyer gets co-opted by powerful government job. A closer look finds a different story.

Babcock's name as the lead lawyer goes on all papers filed in the 40,000 civil cases that involve the government each year. She can't read everything that she signs (or that is signed for her by aides), let alone write everything herself. This is done by her 279 Civil Division attorneys in Washington, plus thousands more under her ultimate supervision who handle civil cases in the district offices of U.S. Attorneys throughout the country.

Civil divison chief Babcock.

"When I heard about that brief from Fred Graham," Babcock says, referring to the Bishop memo, "I had it brought to me and I read it. Obviously, I was upset, and I immediately filed with the court to have it withdrawn. . . . But I don't doubt that you could find dozens of briefs out there that are just as troubling. I'm always getting calls from friends saying, 'You'll never believe what I just saw with your name on it.'"

One way she's trying to change that, she explains, is "by jawboning—trying to make it clear to lawyers in the division what our principles are and stressing that my deputies or I should have any interesting questions brought to our attention. . . . You'd be surprised. The message seems to be seeping down."

It's not all as simple as Babcock's personal views seeping down. In many respects, she's a functionary—a lawyer in charge of arguing government positions with which she may not agree. For example, she tried to persuade Bell that Frank Snepp should not be sued for allegedly violating his "secrecy oath" by writing his CIA memoir, *Decent Interval*. When her boss decided otherwise, she signed the papers and is now running the case.

Similarly, as the lawyer for the hundreds of other government agencies outside the Justice Department, much of Babcock's power is limited to persuasion. Thus, she has been able to talk the Civil Service Commission into abandoning a defense that conditioning the promotion of a subordinate on her agreement to have sex with her supervisor did *not* constitute sex discrimination. But she hasn't yet persuaded the Treasury Department and its Bureau of Alcohol, Tobacco & Firearms to end its seemingly untenable opposition to a Freedom of Information Act request (she handles all FOIA suits) by a gun control group to obtain information on how many guns are sold each year by the major firearm companies.

Policy issues like these are important, and Babcock's involvement in making the decisions, or persuading those who do, is significant. But the most exciting aspect of her job is in an area that is less involved with publicly visible big issues but is one where she has more than the power to persuade. It has to do with her supervision of the conduct of the government lawyers who come up against the rest of us in noncriminal cases.

Early in May, President Carter attacked lawyers for engaging in unnecessary delays and resorting to the adversary system as "an end in itself" rather than a way to serve justice. He might have cited his own Justice Department lawyers as an example of the worst offenders.

"One thing I can do," Babcock explains, "is improve how our government conducts itself in court. We should be model litigators, not lawyers who use delay for the sake of delay or raise frivolous defenses. I keep trying to explain to our people that we are special lawyers: yes, our client is the government, but the people we litigate against are our constituents."

The most important result of that attitude is that Babcock has spread the word that "all cases are to be reached on the merits when it is just to do so." For example, she has "no problems with us

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not raising a narrow statute of limitations defense [a defense saying the suit was filed too late] in a case of a guy who's been butchered in a veterans hospital."

"We can win a lot of cases that on the merits we shouldn't win," says William Schaffer, a Babcock deputy who's overseeing her "model litigator" effort.

"We can bury a plaintiff in depositions [pretrial questioning sessions] and make it impossible for him to go on. Or we can raise trivial issues, such as 'You didn't file your brief in double-spaced type.' What lawyers usually do is atrocious," he continues. "That's what we're trying not to do. If a mail truck runs someone over, we're not some insurance company lawyers whose job is to win, win, win."

Schaffer conceded that if I got hit by a mail truck tomorrow, I might still find "delays and the rest of it. But we're trying to root these things out. . . . Sometimes I find out about horror stories when I'm signing an expense voucher and ask what our guy was making the trip for. Last week I caught us using a trivial argument [about the way a plaintiff's name had been listed on a complaint] to defend a case against a baby who'd been turned into a vegetable through apparent malpractice at a military hospital. So I asked the lawyer why we weren't settling the case."

An underlying question is how much leeway government lawyers can have in deciding where justice lies.

On occasion Schaffer sniffs out trouble when reviewing routine letters drafted for Babcock's signature replying to citizens who have written, often just in their own handwriting, to the President or Attorney General complaining about the government's handling of their cases. "I'll see some typical bureaucratic response," he explains, "like 'The Justice Department does not give legal advice.' And I'll check and find out the citizen is right."

This is not to say that Babcock, Schaffer, and the others are busy throwing cases. By and large they fight the government's battles as good lawyers. Thus, while I'd bet Babcock's sympathies are elsewhere, the Bishop case is still being defended (on the grounds that it's all moot since she got another job).

But even in just trying to curb lawyers' traditional tactics of delay and obfuscation and in avoiding the most narrow defenses and hardhearted positions (as in the baby-malpractice case), Babcock and her aides are bound to get some criticism. After all, the adversary system is based on lawyers' doing everything they can that's legal and proper to win for their clients. And if winning through attrition by delaying or complicating a case isn't proper (and many lawyers argue that it is), technical defenses certainly are. Besides, should Babcock be able to spend the taxpayers' money by deciding on her own that the statute of limitations or some other defense wouldn't be right? If it's not right, shouldn't Congress be the one to change the law, and not Babcock?

"That's a troubling issue and we're struggling with it," Babcock concedes. "But I guess I'd say that I assume a taxpayer also wants his government to be just."

How far Babcock gets in establishing that standard for the lawyer bureaucracy she now runs will be an interesting test of whether one good person in government can make a difference.

BRIEFS

A New Form of Federal Aid?

Another of the cases that Babcock's office is handling is the Air Force plane crash in April of 1975 that killed seventy-six Vietnamese infant orphans. Lawyers who were retained by the adoption agency that had planned to place the orphans, and are supposedly representing them and their heirs, are now suing the government and Lockheed, the company that built the plane.

There's one catch: any tort claim for wrongful death must be paid to an heir of the person killed. Since these are infant orphans and since any relatives they left behind when they fled are unknown (and unavailable anyway), there aren't any heirs around.

Lockheed has pointed out that the law requires that court awards to heirs who can't be found must be forwarded to the treasury of the state where the people killed are judged to have "resided." Therefore, the only result of letting the lawsuit continue (with the adoption agency acting as a stand-in plaintiff), the company says, will be that the plaintiffs' lawyers will make their percentage of the $3 million or $4 million that might be awarded while the rest will go to some state governments. (Figuring out which state gets what will be another matter; it could all go to Colorado, where the adoption agency is located, or it might go to the state where each infant was supposed to have been placed, if that's known.)

For its part, the United States has taken one of those positions (see above) that goes against its narrow courtroom interests. Schaffer, Babcock's deputy, told District Judge Louis Oberdorfer three weeks ago that the U.S. is willing to attempt to help find the orphans' heirs. Although Lockheed was not pleased, Schaffer's offer may have helped them, too, since it encouraged the judge to push the opposing lawyers to come back soon and tell him why they should proceed if it appears that no heirs can be found.

Right from Wrong

American Bar Association president William Spann Jr. recently delivered an interesting speech on the growing tendency of people to claim various benefits and pleasures as "rights" to be won in court. Disturbed at the trend, Spann cited as a prime example a man who "lost a finger operating his power lawn mower and sued the manufacturer." Spann explained, "It didn't matter to him—and it apparently didn't matter to the jury, either—that his injury occurred when he was using the lawn mower to cut a hedge."

Intrigued by the case, I asked the ABA for a citation. "We don't know where it came from," explained spokeswoman Lynn Taylor. "You know, you hear a story from a friend who's heard it from someone else. It's a hearsay type of thing. I'll check it." The next day Taylor assured me that "even if that case isn't real or if we can't find it, I'll be happy to give examples of other horror stories that we *know* are true." Two days later she reported that the ABA's researchers had traced the lawn mower case to a pamphlet printed in 1971 attacking trial lawyers but that they still had no cite for a real case, nor could the group that wrote the pamphlet find one.

Spann's speech was entitled "Telling 'Rights' from Wrong."

Reuben's Revenge

Three weeks ago the Chicago legal community was rocked by the news that Don Reuben, the star partner at Kirkland & Ellis, had been kicked out of the white-shoe firm founded in 1908. As the *Chicago Sun Times* noted in an excellent postmortem, Reuben's political involvements and generally aggressive high profile didn't match the pinstriped sensibilities of the firm's other leading partners. So, while he was on a vacation, they met and decided to ask him to leave.

So far, it looks as if they made a mistake. Within days of the anti-Reuben cabal, he'd corralled two of the firm's leading clients—the Chicago Tribune Company and the Chicago Archdiocese—and about twenty K&E lawyers to go with him to the new office he's starting. (Reuben is telling friends that the Archdiocese has decided to divide its business: its prayers are going to stay with K&E and its account is going to Reuben.)

Now I've learned he has also landed at least twenty more Kirkland & Ellis clients. "It's a war," one Chicago lawyer says. "And Don will win it. Within three years his firm will be *the* law power in Chicago." ‡‡