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The Other Government

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THE OTHER GOVERNMENT. By *Mark J. Green.* New York: Viking Press. 1975. Pp. xii, 318. $12.50

I. THE GREENING OF AMERIKA

> *As Karl Rossmann, a poor boy of sixteen who had been packed off to America by his parents . . . stood on the liner slowly entering the harbour of New York, a sudden burst of sunshine seemed to illumine the Statue of Liberty, so that he saw it in a new light, although he had sighted it long before. The arm with the sword rose up as if newly stretched aloft . . . .*
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> F. KAFKA, *Amerika* 3 (1938)

The Other Government is about the power Washington lawyers wield over the government of the United States. Author Mark Green sets the scene for us:

> As the Washington, D.C., Tourline bus creeps along Rock Creek Parkway, the guide diligently points out the Lincoln and Jefferson memorials, . . . Congress, the Supreme Court, the White House. But a bus guide knowledgeable in the reality rather than the formality of Washington could have taken his visitors by the other government—those thirty-five large law firms, of more than twenty attorneys each, which practice powerlaw. [P. 3.]

This is a particularly felicitous beginning for *The Other Government.* The Tourline bus company is fictional, and none of the many Washington tour bus companies has a route that follows Rock Creek Parkway.[1] In short, Mark Green's Washington could be the capital city of Franz Kafka's Amerika. Each book, in its own way, raises genuine and difficult questions about the human condition. But, in the course of dealing with these questions, each subtly shifts the relationship between truth and fantasy, the real and the unreal.

The Other Government in essence raises two questions. First, do ethical principles require a lawyer to temper zeal for his client's interest with concern for the public good? And, second, do lawyers practicing in the national capital have any special responsibilities to the public interest? These are hardly novel questions, and they can-

1. Commercial vehicles or common carriers are prohibited by regulation from operating on roadways in the National Capital Parks except by order of the Superintendent of National Capital Parks. 36 C.F.R. § 50.36(a) (1975).

not be properly elucidated here. But brief consideration of the questions may help in analyzing how Green handles them.

A response to the first question is found in the official posture of the American Bar Association:[2] that a lawyer is not a mere instrumentality of his client's interests but is, above all, the guardian of our law and democratic principles. While this high-toned idea may not have an objective correlative in the day-to-day practice of most lawyers, it at least articulates a norm that most lawyers accept: the obligation to the client is secondary to the obligation to society. But is there a conflict between this principle and the lawyer's chief function in our society, zealously to represent the interests of his client within the bounds of law?

There is, I think, no real conflict between these principles. Our legal system presupposes a process dominated not by interested parties but by a disinterested decision maker who is free and competent to decide between opposing contentions. It is the existence of this neutral decision maker that harmonizes the potential dissonance between the interests of the client and the interests of society. But this proposition, of course, has a corollary: If the decision maker is incompetent or corrupt, the lawyer's moral role is drastically different. An essential but unspoken assumption of *The Other Government* is that the corollary fits the facts. But the proof Green tenders on the subject tells the opposite tale.[3]

The second major question raised by *The Other Government* is whether Washington lawyers should be subject to any distinctive ethical considerations. I think the answer is clearly yes. If the Washington lawyer is involved with business decisions of large clients, if his work may affect many people and many interests, obviously his ethical considerations are broader than those of a lawyer whose work touches few. Likewise, the legislative and quasi-legislative processes—areas in which Washington counsel are often helpful to clients—may present ethical concerns that differ from those raised in the course of civil litigation. While litigation archetypically involves what has already occurred and touches only the parties before the court, legislation theoretically is forward-looking and is generally binding. To the extent that real cases resemble the archetypes, the Washington practitioner's ethical concerns should be atypically broad.

The principles, as usual, are clear enough; few are likely to quarrel with the utilitarian postulate that no lawyer can properly represent a client if the lawyer calculates that the social cost of that representation will outweigh the social benefit. The hard part is apply-

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY, preamble.

3. *See* text at notes 7-14 *infra*.

ing this principle to the facts.[4] Lawyers may disagree on how the calculation comes out in a given case depending on (1) differing perceptions about the merits of the case; (2) differences in various lawyers' need for money, work, or other epiphenomena of representing clients; and (3) perceptions about the social value of allowing an individual to hire a lawyer to represent him, or, stated another way, the social cost of a legal system in which a lawyer functions as advocate of his client's cause rather than as society's ombudsman.

The factual thesis of *The Other Government* is simple: that "Washington lawyers are among the most powerful people in the country today" (p. 4); that they are "earthshakers and lawmakers" (p. 9), a shadow government of lawlords (p. 15) who function, not merely as conventional advocates, but as decision makers in their own right, actually giving orders to agency bureaucrats (p. 9). The work of these lawyers is based on "ten commandments": reputation, brains, information, interlocking interests, preferential access, lobbying, law-writing, inundation, delay, and corruption (pp. 12-15). These skills, says Green, are especially the tools of the famous law firm of Covington and Burling, and of my former associate Lloyd Cutler.[5] An examination of Green's own tale of their exploits, however, shows how tenuous is the ground upon which the thesis rests.[6]

Manifestations of Covington and Burling power-lawyering do not appear until page seventy-five, but then several are mentioned seriatim. It is first retold how in 1956 Gerhard Gesell, then the firm's premier antitrust litigator, successfully defended du Pont in Sherman Act litigation that went to the Supreme Court (pp. 75-76).[7] The essential question, as Green explains it, was whether there existed any economic substitutes for cellophane. Gesell convinced the Court that foil, glassine, and other packing materials did compete with cellophane. Score one for the lawlords. But there follows immediately a curious passage (p. 76) that I find difficult to reconcile with the putative theme of the book: "Government lawyers were aghast at the decision. But the Covington team . . . had won what was to be, until the 1970's, the last major antitrust victory of a private

4. *See* J. FRANK, COURTS ON TRIAL 14-15 (1949).

5. It would be more usual in law firm parlance to say that I was Cutler's associate and he my employer, but if associateness is not a reciprocal relationship, what fun is it? It is important to stress this connection with Wilmer, Cutler, and Pickering at the outset, so that the reader can evaluate my criticisms of *The Other Government* with this possible source of bias in mind.

6. I have been content, for the most part, to rely on the facts as Green gives them; I do not mean, by repeating them, to warrant their accuracy. On the contrary, the book is filled with mistakes large and small, and I do not doubt that the facts I did not check are as snarled as the ones I did. Some of the latter I note through the body of this review.

7. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

corporation against the government in the Supreme Court."[8] If Gesell in fact never won another major antitrust case in the Supreme Court[9] one would suppose an explanation to be in order. Had Gesell lost his touch?

The next bit of "evidence" also involves du Pont, this time represented by Covington's Hugh Cox. The government sought to force a divestiture of du Pont's approximately $3 billion worth of General Motors stock and at length succeeded (pp. 77-79). "Cox had lost his biggest case," Green tells us (p. 79).

Further evidence of the lawlords' mighty sway is found in Covington's representation of General Electric in the electrical industry price-fixing conspiracy trial (pp. 80-83). Gesell pleaded his client guilty and fines totalling $400,000 were levied. Several executives of the corporation served thirty-day jail terms, an extremely rare occurrence in antitrust prosecutions. "Eight years passed before another American businessman went to jail for antitrust crime," Green solemnly relates, "and again a Covington lawyer was involved, deeply involved" (p. 83).

Then, "[i]n 1967 and 1968, the federal government brought seven antitrust cases against [ITT's baking subsidiary], three criminal and four civil; the government won all seven" (p. 88). Green sums up: "Whatever Covington's role in these Justice Department cases, no one can doubt their significance" (p. 96). I, for one, do not doubt their significance. What they signify is that Covington and Burling's much-vaunted "power" does not appear to include the power to manipulate the outcomes of important cases. Virtually all the evidence Green tenders on this subject shows that the "earth-shaker-lawmaker" picture lacks verisimilitude.

Lloyd Cutler fares little better in Green's hands. Cutler appears to hold a strange fascination for Green, who compares him to Mao Tse-tung (p. 55) but leaves it open whether Cutler is an "evil genius" (p. 169)[10] or a "guiding genius" (p. 252).[11] Green gives Cut-

8. Whether this assertion is true, I suppose, turns on what you think a major case is. *See, e.g.*, United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963); FTC v. National Cas. Co., 357 U.S. 560 (1958); FTC v. Standard Oil Co., 355 U.S. 396 (1958).

9. Gesell was appointed judge of the District Court for the District of Columbia in 1967. I have no idea what Gesell's box score was between 1956 and 1967. *See* note 6 *supra*.

10. Deadpans Green: "Not surprisingly, Cutler is sensitive to such criticisms" (p. 169).

11. Green's Cutler is definitely, however, "hardworking and hustling" (p. 49), even to the point, we are told, of a bit of discreet self-promotion. In connection with the American Airlines campaign contribution scandal, for example, Cutler reportedly advised the airline, his client, to "come clean," and as part of his strategy spread the word of American's confession through the news media. According to Green, "Cutler called *Washington Post* executive editor Benjamin Bradlee to elaborate on American's admission and his own role in the episode. Bradlee thought this

ler credit for a "polished demeanor" (p. 61) and bushy eyebrows (p. 58). But does Cutler lawmake and earthshake? Can Cutler part the waters of bureaucracy so that his rich clients might cross on dry land? As with Covington, the proof fails to meaure up to the pleading. For example, Cutler participated on behalf of CBS in the FCC's hearings on the so-called fifty-fifty rule, proposed to prohibit networks from supplying their affiliates with more than fifty percent of regularly scheduled prime time series programming (pp. 223-24). Cutler argued, Green tells us, that there were not enough sponsors willing to assume the risk of underwriting non-network shows and that CBS was supplying the public with the programming they wanted anyway. But the Commission nevertheless went ahead with a version of the fifty-fifty rule, now called the prime time access rule, which prevents the networks from programming one of the four prime time hours nightly.[12] An individual's perception about whether this rule is in the public interest will almost certainly turn on whether he likes the game shows that have largely filled the void that the networks have been obliged to leave in the evening schedule.[13]

Green tenders another example of Cutler's extraordinary influence: the 1970 merger plans of American and Western Airlines

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excessive self-promotion, but the *Post* story did laud" American's candor in the incident (p. 48). Curious about how Green could tell what Bradlee thinks, I called the *Washington Post* for clarification. I read Bradlee the entire paragraph in which the excerpted sentence appeared and asked him: "How does Mark Green know what you think?" "Beats the shit out of me," he explained. Elaborating, Bradlee told me that he remembers having a conversation with Green but denies the thought about Cutler that Green attributes to him. Telephone conversation, July 23, 1975.

To illustrate the unusual services Cutler can supply to his clients, Green writes: "After Cutler spoke to his friend James Reston about corporate contributions, Reston produced a *Times* column urging firms which had made illegal gifts to admit their guilt" (p. 48). Since the implication is clear that Cutler can induce Reston to write columns favorable to Wilmer, Cutler, and Pickering clients, I called the Washington bureau of the *New York Times* for confirmation. Reston was indignant at the suggestion that Cutler or anyone else could cause him to produce a column. "It's a calumny on Cutler, really," Reston told me, and added, "I've known him for 25 years, and never once has he suggested to me what I should write in a column." Telephone conversation, Aug. 11, 1975.

12. 47 C.F.R. § 73.658(k) (1974).

13. Surveys consistently show that Americans do enjoy watching television. *See generally* R. BOWER, TELEVISION AND THE PUBLIC (1973).

The prime time access rule will probably be with us for a long time to come. *See* National Assn. of Independent Television Producers & Directors v. FCC, 516 F.2d 526 (2d Cir. 1975); National Assn. of Independent Television Producers & Directors v. FCC, 502 F.2d 249 (2d Cir. 1974); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). The ostensible purpose of the rule is to promote diversity but, in essence, it is simply a welfare benefit for the producers of game shows, who would otherwise have insurmountable difficulties in competing with the producers of regular prime time fare. The entire subject, together with an explanation of why the prime time access rule will never work, is discussed with exceptional wit and learning (if I do say so myself) in Second Report and Order in Docket No. 19622, 50 FCC 2d 829, 889 (1975) (Robinson, Commr., dissenting).

(pp. 200-06). To secure this result, says Green, Cutler and his client "launched a lobbying campaign impressive even for the well-traveled corridors of Washington agencies" (p. 201). They visited with four of the five members of the Civil Aeronautics Board, the head of the Justice Department's Antitrust Division, officials in the White House and the Department of Transportation, and Treasury Secretary Connally; their "drumfire succeeded in inspiring transportation summitry" (p. 204). The Antitrust Division opposed the merger, however, and in the subsequent face-off between the government and The Other Government, the former, as usual, prevailed.

These tales of lost lawsuits and disappointed hopes are not meant to imply that Washington lawyers do not deliver a worthwhile service to their clients. I intend only to suggest that they cannot deliver particular results unless they can persuade The Original Government —the one I work for—to see things their clients' way. This persuasion, in my experience, has essentially involved straight lawyering —reasoned argument, on the merits, with the relevant private interests fully disclosed. Green's own showing decisively points to the conclusion that The Original Government is quite up to its task of refereeing the revenue-producing activities of business. In short, *The Other Government* appears to confirm the assumption that there exists a disinterested decision maker that is free and competent to choose the public interest from among opposing contentions. The verification of this assumption, in turn, has an important bearing on the morality of representing a client with whose views the lawyer does not necessarily agree.[14]

II. Of Peanut Butter, Insanity, Airbags, and the Public Interest

The chief intellectual shortcoming of *The Other Government* is its many facile assumptions about the public interest. Green appears to believe that good and evil go around unmasked, equally obvious to all, and that only greed and perversity can explain differences among people about the identity of each. But most practicing lawyers find themselves at work in a far more complex world.

14. I strongly suspect that Green and many other members of the bar overrate the efficacy of Washington counsel in influencing policy. Many Washington firms, it is true, have talented and energetic people working for them; but agencies also have such people, and the agency people, in the last analysis, are the ones who have the say about how things are going to be. In many cases, lawyers or lobbyists give the illusion of influence by making personal contacts with government officials that any half-resourceful person could easily arrange for himself. How and whether such personal contacts affect policy formation is another question, and one that doubtless has a great many different answers. However, after a year's personal experience in government, I am deeply skeptical of claims that the special access and charisma of super-lawyers exert much influence on government policy. The boring truth seems to be that for the most part policy is generated by staff bureaucrats.

Safe cars and safe drugs, for example, are undeniable goods, but the question is never presented whether, *ceteris paribus*, society would rather have safe drugs and cars or unsafe drugs and cars. The question is always how much each attainable increment of safety is going to cost. The cost of producing an automobile or a drug that *could not* injure a human being would be so high that no one would be able to get any benefit from either.[15] Whether one believes that an increment of benefit is worth the cost increment is a value choice about which people may differ. Society therefore needs political institutions designed to mediate differences between people in particular cases. The lawyer's special province is to administer one of the more important of these mediating institutions—the judicial system. But one of the necessary conditions of this trusteeship is a degree of professional detachment about which substantive policies shall be adopted in any given case. If lawyers are not prepared to tolerate institutions that are capable of generating policy results to which they cannot personally subscribe, then lawyers become priests and the law a sort of theology that exalts the correctness of substantive outcomes over fair procedures for reaching them.

There is nothing absurd about the lawyer-as-priest. Theocracies, in one form or another, have probably been the dominant form of government since civilization began. But intolerance of substantive policies fairly arrived at, just because they are contrary to one's own view, is inconsistent with democratic theory and is, more often than not, based on some doubtful assumptions about the nature of the public interest. The public interest simply does not occur in the wild, *sub specie aeternitatis*, independent of anyone's values.

The fugitive character of the public interest is illustrated by one of the examples Green uses for just the opposite purpose—the peanut butter rule-making, in which Covington and Burling participated at great and laborious length (pp. 132-40). When, in 1959, the Food and Drug Administration considered what recipe should be prescribed in the peanut butter food standard,[16] it had no access to the Platonic Caves wherein the Idea of Peanut Butterness is kept. Green, one gathers from the book, practically lives in the Platonic Caves and could probably tell you right offhand the maximum percentage of partially hardened vegetable oil that may be added to ground peanuts before the concoction stops being peanut butter and starts being something else (p. 133-34).[17] But the FDA was required to make its deter-

15. *See generally* G. CALABRESI, THE COSTS OF ACCIDENTS 17-20 (1970).

16. 21 U.S.C. § 341 (1970), provides: "Whenever in the judgment of the [FDA] such action will promote honesty and fair dealing in the interest of consumers, [it] shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practical, a reasonable definition and standard of identity. . . ."

17. One bit of information that is evidently not kept in the caves is the distinction

mination on the basis of record evidence compiled at a hearing. That this was no easy task can be illustrated by an experiment. Pulverize two cups of peanuts in a blender; the result will be a thick, syrupy substance like that sold in some stores as "old fashioned peanut butter." It is a good, inexpensive substitute for *tahini* paste if you are making *hommos*,[18] but it tastes chalky and coats the inside of your mouth like tar. In order to make a product that most people will find acceptable as peanut butter, some hydrogenated vegetable oil must be added. Green implies that the industry had only one goal: getting FDA permission to use the smallest possible proportion of peanuts to the cheaper vegetable oil.

Assuming that peanut butter manufacturers are profit maximizers, it is questionable whether it is in their best interest constantly to cheapen the product without lowering the price. While each manufacturer will cut costs all it can, its highest priority will be to increase its market share. This, in turn, will require that the product be formulated with continuing reference to consumer tastes. In a relatively competitive line of commerce like peanut butter, a maximum-flexibility standard would allow for widely different peanut butters, and the preferences of consumers, rather than the authoritative pronouncement of the Commissioner of Food and Drugs, would decide which was the "real" peanut butter and which were either (1) too much like tan Crisco, or (2) too much like *tahini* paste.

I do not know that the FDA standard does not, in fact, allow for sufficient variation in the product to make such competition feasible. But I have a suspicion, based on three years' experience as a group worker with children, that it does not. At least half of my former charges preferred butter or margarine on their peanut butter sandwiches. Putting margarine on peanut butter sandwiches has the same effect as increasing the percentage of vegetable oil in the peanut butter. Yet manufacturers that want to sell a product more nearly in accord with the tastes of these consumers must sell it as "peanut spread" or "imitation peanut butter." Either of these nomenclatures might present a difficult obstacle to the marketing of a new product,[19] and, as a result, many consumers must do without a peanut

between vegetable oil and lard. The latter is the rendered fat of animals, especially swine. Vegetable oil is not lard. *See* J. ROMBAUER & M. ROMBAUER, JOY OF COOKING 510 (2d ed. 1964). Compare, however, Green's assertion to the contrary on p. 134.

18. *Hommos* (sometimes spelled "hummus") is made by homogenizing chick peas, lemon juice, sesame paste (*tahini* or *tahina*) and a couple of tablespoons of olive oil with garlic.

19. We shall see. About a year-and-a-half ago, Kraftco Corporation introduced a nonstandard product called Koogle, which is sold as "peanut spread." It cannot be sold as peanut butter because it has flavoring added—chocolate, vanilla, cinnamon, and banana. According to Dr. J.B. Stein of the Kraft Foods Division of Kraftco, with whom I spoke on Aug. 4, 1975, the amount of fat in Koogle does not exceed that allowed in the peanut butter standard. Whether Koogle will survive in

spread they can enjoy without doctoring it with margarine. The great food processing conglomerates, of course, lose little: they make margarine as well as peanut butter.

Even where the public interest seems clear at one time, later events may show it is not so. One of the greatest public interest triumphs of the young Abe Fortas was persuading the United States Court of Appeals for the District of Columbia Circuit in 1954 to adopt the *Durham* rule for insanity—that a person is not responsible for criminal misconduct that is the product of a "mental disease or mental defect."[20] At the time, it was widely considered a progressive, forward-looking rule.[21] But almost immediately, problems began to arise. What is a "mental disease or defect" for the purposes of the test?[22] What connection between the mental illness and the criminal act is necessary in order to characterize the latter as the "product" of the former?[23] How can psychiatrists be permitted to testify on these matters without foreclosing the very issue the jury is supposed to decide?[24] Finally, in 1972, the D.C. Circuit scrapped *Durham* for the American Law Institute's definition of insanity.[25]

Fortas probably never undertook a matter for a paying client that

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the marketplace remains to be seen. The FDA has recently announced plans to "establish a common or usual name for spreadable peanut products that fail to meet the standard of identity for peanut butter." 40 Fed. Reg. 51,052 (1975).

20. Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954).

21. *See, e.g.*, deGrazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339 (1955); Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320 (1955).

22. *See* Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957); McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962).

23. *See* Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957). One senses a court near despair in the following passage:

> When we say that the defense of insanity requires that the act be a "product of" a disease, we mean that the facts on the record are such that the trier of the facts is enabled to draw a reasonable inference that the accused would not have committed the act he did commit if he had not been diseased as he was. There must be a relationship between the disease and the act, and that relationship, whatever it may be in degree, must be, as we have already said, critical in its effect in respect to the act. By "critical" we mean decisive, determinative, causal; we mean to convey the idea inherent in the phrases "because of," "except for," "without which," "but for," "effect of," "result of," "causative factor." . . .

252 F.2d at 617.

24. *See* Blocker v. United States, 288 F.2d 853, 862-64 (D.C. Cir. 1961) (Burger, J., concurring); Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967). *See also* United States v. Eichberg, 439 F.2d 620, 623 (D.C. Cir. 1971) (Bazelon, C.J., concurring). In 1961, then Circuit Judge Burger wrote: "[I]n the short span since 1954 this court has written some 70 opinions growing directly out of the 'disease-product' test. In large part . . . the inordinate number of appeals and appellate opinions in this jurisdiction stems from the vagueness, lack of clarity, and the psychiatric orientation of that test and from its departure from accepted legal concepts in the jury instruction." Blocker v. United States, 288 F.2d 853, 864 (D.C. Cir. 1961) (Burger, J., concurring).

25. *See* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). *Brawner* recounts the history of the insanity defense in the Circuit since *Durham*.

produced more unfortunate results. *Durham* was an unmitigated disaster for the courts and probably never eased the plight of a single insane person in the District of Columbia through its seventeen years of life. But that is precisely the point about good and evil: it is often terribly hard to tell them apart ahead of time. While careful reflection on the policy options and competing concerns may not improve outcomes in every case, it seems prudent to behave as if it would. Such reflection is best promoted by the adversary process, which in turn suggests that a party should not have to win his case before he can get a lawyer.

In other situations the alternatives and concerns are not hidden, but the morally "right" result may nevertheless be difficult to reach. Green discusses the "air bag" matter (pp. 183-85), for example, which, though he does not recognize it, involves competition between incommensurable values. In 1972, Ford Motor Company and several other automobile manufacturers went to court to overturn standard 208 of the National Highway Traffic Administration (NHTA).[26] This standard required that automobiles, beginning with the 1974 model year, be equipped with passive occupant-restraint devices with specified performance characteristics.[27] As a practical matter, this standard required crash-inflated airbags. According to Green (p. 183), "The idea is that when a car stops dead, the passengers won't."[28] John H. Pickering, Lloyd Cutler's partner, argued on behalf of Ford that, among other things, the standard's performance specifications were not sufficiently objective to allow compliance because of defects in NHTA's own testing procedures. Green saw this as "a typical public interest-private interest battle" (p. 184) in which there was no doubt where the public interest lay: he claimed that any delay in instituting the air bag standard would cause "thousands of people . . . needlessly [to] die" (p. 185). But the court saw it differently:

> The importance of objectivity in safety standards cannot be overemphasized. The Act puts the burden on the manufacturer to assure that his vehicles comply under pain of substantial penalties. In the absence of objectively defined performance requirements and test procedures, a manufacturer has no assurance that his own test results will be duplicated in tests conducted by the Agency. Accordingly, such objective criteria are absolutely necessary so that "the question of whether there is compliance with the standard can be answered by

26. Chrysler Corp. v. Department of Transp., 472 F.2d 659, 663 (6th Cir. 1972).

27. 472 F.2d at 664.

28. When I read that sentence, I thought that I would at least have to give Green credit for having turned a clever phrase. Then I read the opinion of Peck, J., in Chrysler Corp. v. Department of Transp., 472 F.2d 659, 663 (6th Cir. 1972), where the following explanation of occupant-restraint devices appears: "The idea is to assure that when the car stops dead, the passengers don't."

objective measurement and without recourse to any subjective determination."[29]

What is the "right" result? On the one hand is the contention that manufacturers' resistance to the use of air bags will cause the loss of many lives. The competing contention is that the conduct supposedly required by the rule has not been declared with the clarity demanded by what Professor Fuller calls the "inner morality of law."[30] Partisanship aside,[31] it seems to me that the issue is one of genuine difficulty. Green, ironically, is correct in calling this case "typical":[32] the court's conclusion is typical of what one would expect where a high value is placed on regularity of government action. A similar question is before an appellate court every time a convicted defendant asks for a retrial because crucial evidence was unreasonably seized or the jury was improperly instructed. In such cases, we pretermit (or even assume) the substantive correctness of the result and ask whether the process was fair.

III. THE BROWNING OF THE PUBLIC INTEREST[33]

Would you have your songs endure?
Build on the human heart.

R. Browning, *Sordello* (1840)

The failures of *The Other Government* are not limited to intellectual ones. It also suffers from failures of the heart, and these are by far its most serious flaws. First, there is a studied evasiveness about the prose as though Green were somehow ambivalent about standing behind many of the things he wishes us to understand: "To admirers, [John W.] Davis's soaring response remains the classic explanation of the lawyer's role. But others wonder exactly what

29. Chrysler Corp. v. Department of Transp., 472 F.2d 659, 675 (6th Cir. 1972).

30. L. FULLER, THE MORALITY OF LAW 42 (1964).

31. This case was argued and decided when I was a Wilmer, Cutler, and Pickering associate. I suppose that makes me an *ex officio* partisan, although I had nothing to do with the case.

32. As always, Green's analysis of the problem is contemptuous and cavalier: "What is good enough for GM engineering should be good enough for Cutler. But he supported instead a client (Ford) who didn't believe in air bags, even though his other client (GM) did. As Lloyd Cutler once said with firmness in an interview, he believes in the arguments he makes" (p. 185). I cannot understand why Lloyd Cutler ought to be bound by what GM engineers think, although if Green would agree to be bound by the same criterion I should not wonder if a deal of some sort could be worked out. In the meantime, however, it is silly to suggest that Cutler is guilty of hypocrisy because his firm's clients do not all have identical interests. No issue of professional ethics arises where full disclosure is made to clients with potentially conflicting interests and their assent to their lawyer's proposed representation is obtained. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105. I leave to one side whether it is correct to treat Pickering as merely Cutler's alter ego.

33. This pun is borrowed from Professor Philip B. Kurland's address to the *Minnesota Law Review* dinner in May of 1971.

philosophy it was that required Davis to devote his professional life to the House of Morgan" (pp. 268-69). "To his admirers, [Cutler] is the model of the modern lawyer, but his critics would sentence him to the eclectic chair" (p. 45). Peter Hutt's "food lawyering, his *pro bono* work, his boyish looks and disarming openness made him a [Covington] *wunderkind*," but when he became chief counsel for FDA and refused to publish the firm's client list, he "greatly upset public-interest lawyer Anita Johnson, who wondered how the public could tell whether Hutt should take himself off future cases." (pp. 30-31). This technique might be called the Nixon euphuism: criticisms are advanced *ex nihilo* or by third persons and seldom supported with reasons. The Nixon euphuism gives an author "plausible deniability" for the things that he writes and frustrates reasoned debate. It is a technique best avoided.

Another failure of the heart is reflected in the incoherence of the book's organization; it suggests an unsettling contempt for the whole undertaking. Despite the author's assurance that the book had a gestation period of five years (p. vii), there is strong textual evidence that *The Other Government* was rushed into print.[34] Nor is the evidence of perfunctory craftsmanship formal only. Substantively, *The Other Government* wanders around in a wilderness of trivia, confusion, and malice. For example, as chapter one ends we are still awaiting evidence that Washington lawyers are "earthshakers and lawmakers." But chapter two has quite a different purpose —anthropology. Its mission is to show that Covington and Burling is "a culture as well as a law firm" (p. 31). But this is curious anthropology; rather, it is an odd ragbag of facts, nonfacts, gossip, and opinions. Thus, we start with the assertion that the firm is the city's most influential—the Everest of Washington practice (pp. 16-24). Next is a short historical sketch, beginning with the firm's origins during the Wilson Administration (pp. 20-25) and ending with the assertion that the firm is "very much an institution in flux" (p. 25). Following this assertion are biographies of three firm lawyers, Dean Acheson, H. Thomas Austern, and Peter B. Hutt (pp. 25-31), that appear to illustrate just the opposite point.[35] There fol-

34. In addition to many apparent proofing errors, *see, e.g.*, pp. 37 note, 138, 166, are assorted giddy howlers like: "[Washington lawyers] are to all lawyers and citizens what the heart is to the body: by dint of central location and essential function, both are the reigning organs of their respective body politic" (p. 4) and "Is [*pro bono* work] built into the law firm's structure or merely random events?" (p. 244). Such defects, to my mind, are autoptical proof of insouciance at least.

35. From Acheson to Austern to Hutt, the firm has shown a consistent preference for graduates of the Harvard Law School who have stamina, brains, and a taste for representing business corporations.

Green does eventually get around to proffering some evidence of Covington in flux; he says the firm's representation of airline clients has dropped off in recent years (p. 200). I cannot say whether this is true or not. *See* note 6 *supra*.

lows the fact that the firm has a large support staff (p. 37) and the nonfact that associates are expected to bill eighty hours every two weeks (p. 38). We are also given some soft-core gossip: certain Covington lawyers have known drinking problems (p. 31), and a lawyer there was discovered one Saturday morning rolling on the office floor with his secretary (pp. 31-32). Finally, we come to a passage tinted with the sunset, which suggests that Covington may, in fact, be over the hill: "Great institutions come, peak and decline, from the British East India Trade Company to *Life* magazine to the New York Yankees, and it is only in retrospect that we learn that moment in time when events conspired to undo institutional inevitability" (p. 44).

Well, which is it to be? Tenzings on the Everest of powerlaw, or the Yankees on their way to the cellar? Since both propositions are expounded and neither is anywhere illustrated, it presumably does not matter. Although both assertions could be false, they could not both be true.

Another failure of the heart—this, I think, the most objectionable of all—is found in Green's positive tropism toward malicious innuendo. Take, for example, what Green calls "the Fazzano episode." "Exactly who is Joseph Fazzano?" asks Green (p. 89). Unfortunately, *The Other Government* never answers this question, although it is clear that Green sees a menacing aura round him. All we are told about Fazzano is that he is a Hartford lawyer who was hired by ITT, apparently for the purpose of representing ITT's interest before the Connecticut Insurance Commission, when the conglomerate was attempting to acquire the Hartford Fire Insurance Company. ITT had also retained Covington as well as a large Hartford law firm in connection with this acquisition. Henry Sailer, a Covington lawyer on the case, did not know who Fazzano was (pp. 89-90). Does this suggest the existence of impropriety? To me, it suggests nothing at all; yet by the time we get to the last chapter, Fazzano's name is inexplicably linked with Dita Beard and the overthrow of the Allende government in Chile as evidence of ITT's bad character, and Covington's (p. 273).

And then there are times where innuendo gives way to outright accusations of personally and professionally disgraceful behavior. Did you know, for example, that a certain Covington partner—Green names him, though I shall not—"does not particularly like black people"? This, according to Green, is "obvious to fellow lawyers" (p. 199). Or did you know that another (unnamed) Covington lawyer destroyed unidentified evidence of a client's criminal conduct (p. 70)? And how about H. Thomas Austern's unethical behavior in citing precedents to government officials? At least four times Austern is in effect called a knave, a bully, or worse for this

offense.[36] And what of the "ex parte" contacts Washington counsel so frequently have with public officials? Well—what about them? In his dark references to private (p. 201) or "ex parte" (p. 202) meetings between businessmen or their lawyers and government officials, Green muddles the distinction between contacts that are forbidden by agency rules and those that are not and leaves the reader who does not know better with a sinister, and inaccurate, impression. Administrative agencies, whether inside the executive branch or independent, are not courts and are not supposed to conduct their business in an ivory tower, aloof from the teeming and intricate commerce they were established to regulate. On the contrary, agencies have a special expertise in the matters under their superintendence and do not, as a rule, go to pieces when people in the regulated industries seek to express their desires. Bureaucrats find many such meetings useful and constructive and are at least as available to members of the general public, including self-styled representatives of the public interest, as to businessmen and their lawyers.

IV. The Ethics of Powerlaw and the Ethics of Decency

Certitude is not the test of certainty. We have been cock-sure of many things that were not so.

Holmes, *Natural Law*, 32 Harv. L. Rev. 40 (1918)

In connection with its various difficulties in advertising its products, the tobacco industry hired Covington and Burling's Austern and a former Senator named Earle Clements. According to *The Other Government*, Clements was to specialize in communications with Congress, while Austern was to handle other matters. To Green "this raises the difficult issue of whether lawyers can or should ethically compartmentalize their advocacy, and not assume responsibility for client advocacy from which they are carefully insulated. Involved is a contradiction of clichés: Does the right hand not know what the left hand is doing? Or does one hand wash the other?" (pp. 152-53).

I leave it to the reader to sort out the meaning of this meditation, and mention only that it typifies the clarity of Green's thinking on legal ethics. The last chapter of *The Other Government* is entitled "The Ethics of Powerlaw," and its burden is to propose "a new lawyers' ethic": that a lawyer ought in every case to "make a judgment about the likely impact [of his representation] on the public, and if the client desires tactics based on political influence or seeks a demonstrable though avoidable public harm, he should quit the account" (p. 287; italics omitted). Green quotes a Wilmer, Cutler,

36. *See* p. 135 (knave); pp. 97, 273 (bully); p. 145 (worse).

and Pickering recruiting memorandum that expresses the same thought: "We decline to represent clients whose objectives or tactics we find unacceptable, or who ask us to represent a position on any basis other than its merits" (p. 282). Both of these statements accord with the utilitarian calculus laid down as a truism at the beginning of this book review.[37]

It is a comfort to know that there is at least one thing about which both Cutler and Green can agree, even if it is only a truism. Unfortunately, as Green recognizes (pp. 287-88), this truism leaves intact all the problems. Where Green and many other lawyers—I, for one—would disagree most radically is on the value to be assigned to giving even a bad client the benefit of process before deciding what should be done with him. We see the existence of process as so important to the idea of justice, both in a theoretical and in a practical sense, that we are even willing to tolerate injustice in particular cases in order to maintain the integrity of governmental processes over the long pull. For Green, however, the axis of decision is always substantive right and wrong; his conception of right is usually vivid and seldom alloyed by doubt. Accordingly, the whole idea of regular process seems senseless to him. It is worth reflecting, however, that the same logic that makes nonsense of giving General Motors the benefit of process[38] also makes nonsense of the idea of democracy. Why give General Motors a fair trial if its guilt is self-evident? Why ask people who ought to be President if the answer is indisputable? It is a rather totalitarian world view that assumes that "true" public policy can be extracted from the raw material of experience, dialectical argument, or a leader's vision without some mediating political process.

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37. *See* text at note 4 *supra*.

38. Green generally objects to equating the rights of juridical and biological persons. On the subject of guilty clients, he quotes Austern's question to a law student, "Would you represent Sirhan Sirhan?" (p. 279). Green turns this question aside with a very dark and difficult argument: "[I]t seems odd to compare Sirhan Sirhan . . . with General Motors. The former is alone, impecunious, without political entree, and capable of being victimized unless stoutly defended. General Motors has more assets than most countries and cannot be similarly outclassed or victimized by a government it can influence in numerous ways" (p. 279). Green does put his finger, of course, on a number of undeniable differences between General Motors and Sirhan Sirhan. But surely Austern was aiming at a different point: how one justifies defending a client one knows to be guilty (or evil). Money has nothing to do with that question, unless the argument is that only the poor and lonely are entitled to process. I had understood Green's argument hitherto to have been that it is immoral to defend bad clients, not rich ones.

The point about "victimization" is still harder to understand. Sirhan was defended not merely by able counsel but by several famous lawyers through a long, costly, and vigorously contested trial. Even so, he was convicted of murder and sentenced to death. I have difficulty seeing what further indignity "victimization" could have imposed on Sirhan. Sirhan's death sentence was transformed into a life term because of the California supreme court's decision in California v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972). *See* California v. Sirhan, 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972), *cert. denied*, 410 U.S. 947 (1973).

I do not, however, accuse Green of being totalitarian. He might become so if he reasoned some of his premises through to a conclusion, but his allergy to process extends to logic as much as to law. He is a demagogue, though, and his unsystematic style hardly excuses the short shrift he gives to the very serious matters that *The Other Government* should have treated. Instead of accepting the challenge of discussing the ethical problems of a law practice at the seat of national government, Green just wrote up the notes of his legion interviews and turned them adrift in a sea of nonsense.

What makes his result the more embarrassing is the sound advice Green received from H. Thomas Austern. Early in chapter two, Green quotes Austern as asking whether Green had read Brandeis and Warren's famous 1890 article, "The Right to Privacy" (p. 28). No, Green replied. One wishes Green had taken the hint before *The Other Government* went to press. If he had—assuming Green's oft-repeated words of praise for Justice Brandeis[39] were sincerely meant—he surely would have written a very different book. He would, among other things, have attempted to get his facts straight, collect his thoughts, marshal his arguments, and exclude from consideration the bratty, gratuitous attacks on other people that, I surmise, constitute *The Other Government*'s chief commercial appeal. Brandeis, for one, would have been repulsed by a treatise containing so little discussion of the merits. He and Samuel D. Warren wrote:

> Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip . . . . Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts . . . . No enthusiasm can flourish, no generous impulse can survive under its blighting influence.[40]

These words are eighty-five years old. And they still ring true.

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39. *See, e.g.*, pp. viii, 281, 284.

40. Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).