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The Office of Legal Counsel: Legal professionals in a political system

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The Office of Legal Counsel:
Legal Professionals in a Political System

by

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Abstract

The Office of Legal Counsel (OLC) in the U.S. Department of Justice has two primary roles, resolving legal disputes among executive agencies and advising the president and the attorney general on legal matters. This study focuses on how the OLC attempted to resolve tensions between political and professional values in making policy in the changing administrative state.

Historically, executive branch lawyers balanced values of professionalism and politics in interpreting the law. Both Congress and presidents endorsed a government staffed by legal professionals responsible to the president. The emergence of the White House counsel in the late 1950's created competition among executive branch lawyers, resulting in role conflict within the OLC. An ideology of an independent Justice Department after Watergate reinforced OLC lawyers' adoption of a professionalized and principled organizational style as a means of distinguishing themselves from White House counsel.

The shift towards a highly professionalized orientation brought OLC lawyers into conflict with bureaucratic agencies, Congress, and the White House. Relying on internal memoranda, legal briefs, and interviews, I analyze the impact of the shifting norms

of professionalism and politics at the OLC. The professionalized OLC adopted an adjudicatory style toward intrabranch legal conflict, shifting disputes to courts. This style elevated the status of White House counsel, who favored negotiation between agency counsel and accommodation of competing interests. In its advisory role, the OLC pushed a principled defense of presidential prerogatives through a test-case strategy. This heightened conflict with Congress by undermining political bargaining. Though some White House officials supported the test-case strategy when it was congruent with the president's policy agenda or ideology, support for the OLC's program eroded because it damaged White House policy programs. Courts and Congress, reinforcing traditional norms of negotiation, rejected the OLC's test-case strategy and adjudicatory approach to intrabranch conflict. Their actions, along with the emergence of the White House counsel as an ideological lightning rod for the president, restored the balance of professional and politics at the OLC.

Institutional roles shape both processes and outcomes of legal interpretation by executive branch lawyers. Organization matters; personality, partisanship, and divided government are inadequate explanations of behavior by government lawyers.

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Chapter One

Explaining Legal Development: The Office of Legal Counsel in the U. S. Department of Justice

Organization matters. Institutional structures, norms, roles, and rules shape both the processes and outcomes of legal interpretation in the executive branch. Most studies of the Justice Department focus on the central tension between politics and law, or between White House and Justice Department policymakers and professional lawyers in divisions of the Justice Department. The existing literature often overstates this conflict. The distinction between politicians and lawyers belies the overlapping obligations and expectations (political and professional) that characterize the lawyers' role in the Justice

Department. In the general flow of policy, intrabranch and interbranch legal conflict infrequently escalates to a level where "politicians" wish to create conflict over legal interpretations rather than seeking political compromise. "Legal professionals" generally accept the politicians' control over central policy matters and, after offering recommendations and legal advice, defer to White House demands.

More important, the focus on conflict between politicians and legal professionals obscures the underlying consensus and climate of expectations regarding the law and politics in the executive branch. From the creation of the attorney generalship to the present, a set of implicit normative guidelines shaped the operation and reform of the federal legal bureaucracy. Government lawyers exist in part to serve the interests of the president. Congress expected and expects to encounter political control of government lawyers by the president and partisan advocacy by the attorney general.

At the same time, two other sets of norms constrain the actions of government lawyers. By statute, Justice Department lawyers must serve the interests of the United States, which suggests a representational role broader than the personal or

political lawyers for the president. Statutes further require the president to appoint an attorney general "learned in the Law." While the phrase could indicate merely a base level of legal education, an evolving series of professional norms and expectations additionally constrain the behavior of the president's lawyers. Both lawyers and politicians operate within a set of imbedded normative constraints that shape their roles and the range of legal interpretation and action. The early Congress balanced the ideal of an independent administration of the laws with recognition of the political nature of the law enforcement and the need for a presidential legal advisor.

In this study, I focus on one agency of the United States Department of Justice, the Office of Legal Counsel (OLC). The development of the OLC began with the creation of an Assistant Solicitor General in charge of the opinion writing function of the attorney general. Congress did not debate Section 16 (offered as an amendment by Senator Byrnes of South Carolina) of the Independent Offices Appropriations Act of 1934, which created this office. The reorganization of Justice Department functions had little to do with the substance of the bill.

From this organizational offshoot of the Solicitor General emerged an office charged with important and diverse responsibilities. These responsibilities range from drafting official opinions of the attorney general to rendering advice on all proposed executive orders and many legislative proposals, and mediating or adjudicating interdepartmental legal disputes in the executive branch. Little doubt remains of the centrality of the Office of Legal Counsel in the development of law in the executive branch during this century. The opinion drafting functions alone brought the office to the fore in the Lend-Lease dispute, the desegregation of schools in Little Rock, the Cuban missile crisis, and the Nixon impoundment controversy.

As the attorney general's chief legal advisors, the lawyers at the OLC operate in a structure of conflicting roles. They not only counsel the president and Chiefs of executive departments on matters of law and defend assertions of executive power, but are responsible as the nation's chief legal officers to uphold and faithfully execute the law. As the attorney general's legal advisor (hence, the president's statutory legal counsel), OLC lawyers appear before Congress to defend executive interpretations of the law

or assertions of executive privilege. The OLC simultaneously provides guidance and advice to agency counsel and serves as the president's link to executive agencies on legal matters. As the executive branch's chief legal advisors, the OLC lawyers often develop the justification for executive action that, if challenged, the Solicitor General must defend in court. OLC lawyers often assist in the preparation of briefs by the Solicitor General and have argued key cases before the Supreme Court. These many roles and contacts place the OLC at the nexus of legal policy development outside the courts. As a result, a study of the OLC provides a useful starting point for examining the process of legal reasoning and policy-making by government lawyers inside the Justice Department, the executive agencies, the White House and Congress.

For all the importance of this office, no scholar has studied legal development in the Office of Legal Counsel. Former Justice Department officials have written most studies of the Justice Department (including the only journal article specifically focused on the OLC), which are largely descriptive and historical in nature. While these works offer essential insight to social scientists and lawyers studying the Justice Department, they do not probe

adequately for explanations of legal policy development in the executive branch. Few studies attempt to investigate the relationship between political and legal values (or between "lawyers" and "politicians") through systematic social science techniques. Recent developments by scholars such as Louis Fisher, Peter Irons, and Barbara Hinkson Craig point to the necessity of further inquiry into the development of law, both constitutional and statutory, outside the courts. Investigations of the interactions of lawyers in the "political" branches holds promise for understanding: 1) the process of legal development in government outside the courts; 2) the impact of government lawyers on the judicial process by controlling and shaping the flow of legal disputes; and 3) the roles of courts and adjudication resolving intergovernmental legal disputes.

Legal Development in the Executive Branch

Writers have offered three theories to explain legal development in the executive branch. Many journalists suggest that the Reagan administration fundamentally altered the administration of law. According to this theory, conservative lawyers

politicized the Justice Department and destroyed long-standing norms of independence and adherence to the rule of law. A second approach emphasizes a shift in institutional relations between Congress and the president beginning with the Nixon administration. For these scholars, heightened legal conflict is a by-product of divided government and the post-Watergate reforms that placed many restrictions on the exercise of executive discretion. The third approach suggests that individuals shape the legal process in the executive branch. Personality typologies explain the interrelations and relative success of government lawyers.

These theories provide only a partial explanation of legal development in the Office of Legal Counsel. Each is flawed because it neglects the strong effects of long-term institutional norms. This study tests an institutional explanation of the Office of Legal Counsel's relations with other government lawyers against the success of three other factors used to explain legal development: (1) the politicization and independence of the Justice Department; (2) the era of divided government and partisanship; and (3) the personality and individuals who occupy these offices.

The Reagan Revolution at Justice--Politicization and Myth-Making

By the end of the Reagan administration, ethics investigations, unfilled appointments, and low morale crippled operations at the Justice Department. Popular accounts assailed the politicization of the Justice Department by Edwin Meese, III and the dismal civil rights record of Assistant Attorney General Bradford Reynolds. Most notably, Lincoln Caplan's New Yorker series (excerpted from The Tenth Justice) attacked the Reagan administration for disrespect of the rule of law. According to Caplan, the Solicitor General's office underwent a radical transformation during the Reagan administration that eroded traditional norms of legal interpretation and professionalism.[1] Aligning the Reagan jurisprudence with the construction of Critical Legal Studies as "anything goes," Caplan suggests:

> In this period of free-for-all in the law, when a vocal group of scholars and advocates on the left joined Meese and Reynolds on the right, believing that, without cost, they could make almost any legal claim with a straight face, it was no wonder that the Solicitor General

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[1] For a defense of his work as solicitor general, see Charles Fried, Order and Law: Arguing the Reagan Revolution (New York: Simon & Schuster, 1991).

> appeared to believe that, on behalf of the administration, he could, too.
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> However much changes in the legal culture explain the transformation of the SG's office during the Reagan years, the story carries a lesson of its own. To understand how the Reagan administration views the law, it is only necessary to know what it did to the office of Solicitor General. If there is a thing called law, with a reassuring sense of continuity despite its contradictions, a measure of stability that contributes to social order, and an integrity provided by, among other things, the careful practice of legal reasoning, then one of the great misdeeds of the Reagan Administration was to diminish the institution that, to lawyers at the highest reaches of the profession, once stood for the nation's commitment to the rule of law.[2]

For Caplan, Meese's political conception of law undermined structured norms of "Independence" and integrity of the SG's office.

The politicization thesis suffers from several fatal flaws. There is no doubt that some Reagan administration officials and their conservative supporters sought fundamental changes in the interpretation and administration of law in the executive branch. During the Reagan transition, the Heritage Foundation suggested that:

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[2] Lincoln Caplan, The Tenth Justice (New York: Alfred A. Knopf, Inc., 1987), 276-7.

> Much of the Legal Counsel's function involves esoteric matters of a highly complex nature. These have normally been accomplished under the Carter administration with a modicum of skill. However, from time to time, the Legal Counsel is called upon to render an opinion on a highly politically charged issue. In these cases, the opinions of Assistant Attorney General John Harmon have not always reached the conclusions which statutes and cases would seem to suggest. In many cases, the briefs have not been particularly well thought out.[3]

The conservative treatise highlighted the positions taken by the OLC on the political questions doctrine and the reimbursement of funds for interest group participation in regulatory hearings. The conservative attack focused more broadly and directly on reshaping civil rights and judicial appointments.

During the second term of the Reagan administration, Meese, Reynolds, and Charles Cooper did attempt to move Justice Department legal administration toward a conservative agenda. By all accounts, the Meese revolution at Justice failed. Rejected judicial nominations and adverse court decisions in Bob Jones[4] and other civil rights cases diminished the

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[3] Michael E. Hammond, "The Department of Justice," in Charles Heatherly, ed., Mandate for Leadership (Washington, DC: Heritage Foundation Press, 1981), 418.

[4] Bob Jones University v. United States, 461 U.S. 574 (1983).

administration's control over the various executive branch lawyers. The inability to confirm key Justice Department appointees are among many signs that the conservative agenda for the Justice Department faced heavy resistance. Yet, these failures reflect not a rejection of the political model of legal administration, but rather institutional resistance from within Justice, executive agencies, and Congress to the substance of the conservative agenda and the methods used to further it. Within the Justice Department, the Office of Legal Counsel was one unit that opposed much of this agenda.[5]

Caplan's theory on the independence of the Solicitor General is ahistorical and apolitical. Presidents have consistently attempted to use the Solicitor General, and the Justice Department more generally, to achieve political goals. For example, Irons amply demonstrated the Roosevelt administration's attempt to attack Supreme Court doctrine through an organized litigation strategy. The New Deal litigation

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[5] Theodore Olson expressed opposition to the administration's stance on the Bob Jones issue in a memorandum addressed to Attorney General Smith reprinted in Congress, House, Committee on Ways and Means, Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Schools, 97th Cong., 2d sess., 4 February, 1982, 596-601.

program was hardly less political at the time than the Meese's conservative agenda. In fact, Meese advocated a theory of the presidency reminiscent of Roosevelt's. The New Deal era was crucial to the creation of the role sets and the differentiation of the various offices of the Justice Department that persist today.

Historically, Congress and presidents did not endorse an apolitical model of legal administration. The revisionist conception of a neutral, apartisan Justice Department date to the Nixon era scandals involving Justice Department (particularly the ITT scandal and Watergate) and the reform proposals that followed. Congress accused Nixon of politicizing the Justice Department through appointments and exercising undue influence over litigation and legal advisory counsel. In the post-Nixon era, reformers attempted to depoliticize the Justice Department by creating barriers between Justice Department lawyers and the White House and executive agency counsel. These reforms altered the existing structure of norms and created conflicts between Justice Department and the White House, executive agencies, and Congress. Heightened conflict in the Reagan era reflect less a change in ideology or a move away from the "neutrality" of the Carter and Ford administrations, than shifts in

the organizational structures and roles of the offices following the Nixon administration.

The politicization thesis poses conceptual difficulties as well. The underlying problem for those who advance this thesis is establishing a base line from which to measure politicization. The possibility and desirability of "independent" legal reasoning are both questionable. Are the political values and organizational norms of the New Deal or Kennedy civil rights era the base line for measurement? Caplan's approach is apolitical because it defines those who seek change as political, while those reinforcing the status quo are independent and consistent with the rule of law. Reliance on an independent model of legal administration denies the essential political component to the roles of the attorney general and his staff. Caplan only defines one half of the equation, noting that the Solicitor General is the only officer required to be "learned in the law," but neglects the other elements of the role, i.e., responsibility to advocate the interests of the United States and his or her direct responsibility to the attorney general and the president.

Caplan assumes that what happened in the Solicitor General's office reflects the general trend

of the Reagan Justice Department. If we take seriously the tradition of an independent role for the Solicitor General, different offices with different mandates and institutional histories would be affected differently. Even if one accepts the premise of the Solicitor General's historical independence, Caplan provides no evidence that Reagan era politicization similarly affected other Justice Department offices. The Office of Legal Counsel is an off-shoot of the Solicitor General's office. It, too, has a fabled history of "independence." Examining the OLC during the Reagan administration provides the best test of Caplan's assertion that the "politicization" was widespread. While all Justice Department agencies exist within a context of competing political and professional norms, their roles and the roles of those with whom they interact differ substantially. Attempts to change the ideological direction of legal administration and interpretation work differently within these distinct normative climates. The interaction of government lawyers across institutional barriers demonstrates that these normative expectations provide a strong barrier against attempts at changing established legal policy.

Divided Government and the "Fettered President"

By the end of the Reagan administration, conservative critics bemoaned the growing legal limitations placed by courts and Congress on the exercise of presidential power. The increasing importance of courts and law, especially in the separation of powers area, reflects partisan attempts by Democrats to hamper implementation of the conservative agenda. Contributors to a collection of essays appropriately titled The Fettered President voiced typical concerns. The editors of the collection targeted judicial activism as the source of the problem: "Courts are not just the model but indeed the source for much of the legalization of policy making in contemporary Washington."[6] Judge Bork, one of the leading conservative voices on the bench, concluded that the blame lay with Congress: "The chapters in this volume demonstrate that the office of the president of the United States has been significantly weakened in recent years and that Congress is largely, but not

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[6] L. Gordon Crovitz and Jeremy A. Rabkin, "Introduction," in Crovitz and Rabkin, The Fettered Presidency (Washington, DC: American Enterprise Institute, 1989), 5.

entirely, responsible."[7] Through the increasing use of the legislative veto and other oversight mechanisms, statutes such as the War Powers Act, and the emergence of Congressional legal counsel, a resurgent Congress sought greater controls over executive discretion and a change in the environment of expectations and normative constraints in separation of powers law. These legal limitations shifted the focus of debate from policy programs to the legal legitimacy of executive action.

At first glance, the divided government thesis might support an institutional explanation of legal change in the post-Nixon era. The increasing contention between Congress and presidents could suggest rising institutional competitiveness over the administrative state. The creation of new legal mechanisms to control executive discretion would transcend partisan differences. For these critics, however, divided government is partisan government. As Crovitz and Rabkin assert: "The underlying reality of the Reagan years, as for most of the past two decades, has been that the president is the leader of one political party and Congress is dominated by the opposing political party. So even recharacterizing the

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[7] Robert Bork, "Foreword," in Crovitz and Rabkin, The Fettered Presidency, ix.

issue as Congress versus the president rather than law versus discretion conceals the underlying tension here --Democrats versus Republicans."[8] The divided government thesis fails to explain the legalization of politics and growing separation of powers conflicts. Partisanship cannot account for either the consistent refusals of the White House Counsel and heads of executive agencies to challenge legislative constraints on executive authority or the consistent confrontational stance taken by the OLC lawyers throughout both the Carter and Reagan administrations.

Geoffrey Miller, Professor at the University of Chicago Law School and former OLC attorney-advisor, suggests a variation of the divided government thesis. For Miller, the growth of specialized offices in Congress and the executive branch that have legal expertise and "institutional mandates" contributed to the increased number of separation of powers cases since the Nixon administration. According to Miller, these developments lead to rigidity and legalistic solutions to problems of overlapping and coexistent

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[8] Crovitz and Rabkin, "Introduction," in Crovitz and Rabkin, The Fettered Presidency, (Washington, DC: American Enterprise Institute, 1989), 6.

powers better resolved by tacit negotiation and comity.[9]

Professor Miller's thesis suggests that the legalistic orientation of the Office of Legal Counsel and the Senate and House legal counsels tends to convert political disputes into a legal process which favors adjudicated conflict over principles rather than negotiation. While Miller's analysis of redirecting conflict into the judicial forum emphasizes organizational structure, it does not explain the origins of the conflict that has occurred. The Office of Legal Counsel dates to 1925, but it is not until the last two administrations that separation of powers conflicts surged. The emergence of separate counsel in the Senate and House alone cannot explain the increased conflict. The origins of congressional counsels are symptomatic of the perceived over-politicization of the Justice Department during the Nixon years.

An analysis of litigation patterns and the norms of the various government counsels in separation of powers reveal a different cause-effect relationship from that suggested by Miller. The impetus behind the

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[9] Geoffrey Miller, "From Compromise to Confrontation: Separation of Powers in the Reagan Era," Geo. Wash. L. Rev. 57 (1989): 417.

transfer to the judicial forum was the increasing assertiveness and independence of the OLC lawyers and the erosion of professional and political norms since the Nixon administration. During that period, the Justice Department refused to defend duly enacted statutes. Creation of the Senate Legal Counsel in 1978 responded to the changing posture of the Justice Department regarding congressional-executive relations. Congress sought to use nonjudicial mechanisms, such as the legislative veto or commissions, to reach compromise in areas of shared powers. The executive branch forced the issues into courts.

Empirical evidence suggests that courts and Congress avoid resolution of political conflict in the judicial forum. Whatever legal limitations courts placed on executive power resulted not from congressional action to judicialize interbranch conflict, but from attempts to create a more independent Justice Department and to remove politics from the administration of law. Justice Department lawyers pursued confrontation and litigation rather than political solutions to interbranch conflict because they detached White House policy goals from Justice Department legal interpretation. White House Counsel consistently worked to avoid conflict, even

over partisan legal issues. A theory of legal development must account for these differences in behavior of the various lawyers in the system.

Individual and Personality Theories of Legal Development

Behavioralist studies of the 1960's suggested that individual background characteristics and personal ideologies were central to understanding the process of judicial decision-making. Some recent studies also explain legal development by reference to individual action or personality types. For example, Barbara Hinkson Craig analyzes the development of the legislative veto conflict in terms of the "stories" of the individual participants.[10] While Craig discusses bureaucratic politics involved in the dispute and shows some historical continuities in positions taken by government institutions, her case study implies that the actions of certain individuals (Elliot Levitas,

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[10] Barbara Hinkson Craig, Chadha (New York: Oxford University Press, 1988). In part, the emphasis on individuals may reflect organizational style and personalization for purposes of creating a broader audience. Craig, to her credit, discusses organizational politics throughout. However, if these stories are simply organizational style, the effect is to elevate individuals over organizational norms and politics as an explanation of the legal process.

Alan Morrison, Larry Simms) were crucial to the crystallization of the ongoing conflict.

The norms and rules of organizations involved better explain the final emergence of Chadha as a test case. As Craig notes, from the Truman administration to the present, presidents and attorneys general expressed continuous opposition to the veto mechanisms. One individual's (Simms) value choices are insufficient explanation for this sustained position. The structure of legal professionals defending presidential power better accounts for opposition to the veto. Several plausible alternatives account for the Chadha test case. White House and Justice Department lawyers in the pre-Nixon era were oriented toward negotiation of interbranch disputes or were willing to accept legislative vetoes in exchange for delegated power. More important, in the post-Nixon period of conflict, Chadha was one of many instances of vetoes that government lawyers could have challenged. Chadha reached courts because it was the only case that satisfied the Court's rules of standing. Hence, the conflict between rules and needs of one organization shaped the actions of others in the legal process.

The importance of the court's rules in the legal process itself does not negate the possible influence

of key individuals in developing or shaping test cases. For example, a study of New Deal test cases showed the importance of litigation strategy to success before the courts. Irons uses a personality classification scheme to explain the positions taken and the shaping of litigation among executive branch lawyers.

> The joint impact of politics and personality, a conjunction of influences often impossible to separate, can most fruitfully be explored in the context of federal litigation through the concept of "style" formulated by James David Barber in his studies of the American presidency. Barber's explorations of the components of presidential leadership--the distinctive handling of words, work, and people, and the balance between them--provide models of political style that have obvious corollaries in the political environment in which government lawyers operate. My conclusion that each of the New Deal general counsel...personified a distinctive legal style that shaped his agency's approach to litigation and influence agency lawyers in their handling of cases, emerged not from any preconceived model of the litigation process but rather from my examination of the decisions made by lawyers in each agency in hundreds of cases.[11]

Irons goes further and suggests that the leadership style of these agencies' general counsels shaped the work of the lawyers within the agency. If Irons is correct, Craig is correct in emphasizing the role of

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[11] Peter Irons, The New Deal Lawyers (Princeton: Princeton University Press, 1982), 5.

individuals in asserting positions and pushing the flow of litigation. Both suggest that individuals are relatively free from constraints on action and that the legal environment for government lawyers is malleable.

An alternate explanation of the litigation success is possible. The successful leadership style of the National Labor Relations Board, for example, embodied both professional and political ideals. In contrast to the strongly ideological posture of National Recovery Administration counsel and and the highly professionalist orientation of Agricultural Adjustment Agency lawyers, NLRB lawyers carefully combined professionalism with political savvy to construct a litigation program and a successful test case. While leadership was undoubtedly of greater importance during the creation of the New Deal agencies and their general counsel's office, it is important that the successful counsel reflected a leadership style that balanced the professional and political norms. It is thus conceivable that the success reflects conformity to the normative expectations of the behavior of government lawyers that predated the creation of the NLRB counsel.

The NLRB, lacking formal rule-making power, proceeded with policy through adjudication because it

was the best available remedy. Both Craig and Irons note, in the subtext, the role of competition among bureaucratic units and the role of organizational variables in shaping the outcomes. While individuals influence the government legal process, a broader historical perspective permits placing personality in the context of longer-term normative expectations and short-term organizational contexts.

New Institutionalism: Resurrecting Role Theory to Explain the Development of Law in the OLC

Personnel changes and political values of each administration are relevant, but the continuity of norms and institutions presents serious obstacles to those who seek change in legal policy or the organization of government lawyers. Existing approaches overstate the freedom, discretion, and influence that both the lawyers and politicians exercise in shaping executive branch legal policy. Tension between political norms and professionals values is an enduring constraint that hinders attempts at reforming the relationships among units in the legal administrative state or the content of legal interpretation by government lawyers. A theory of

legal development in the executive branch must explain the historical continuities that constrain behavior across eras and individual personality attributes.

Rogers Smith's adaptation of the new institutionalism to public law provides theoretical support for the thesis advanced here. This perspective addresses the short-comings of either partisan or personality-based theories of the law. For Smith, both are reductionist models which caused scholars to overlook the importance of institutions in shaping policies. Political jurisprudence reduced legal and political institutions and outputs to group struggle or individual preferences. The empirical work of the early behavioralists, including supporters of the political jurisprudence school, did not integrate normative philosophical inquiry into empirical research. As a result, they neglected how normative structures and frameworks constrain individual choice or the group struggle.

The new institutionalism provides a method to integrate the empirical study of politics and law with normative study of jurisprudence and values. Historical studies of values that shape the range of choice are the centerpiece of much of the "new institutionalism." For some "new institutionalists,"

embedded ideologies and mental frameworks provide relatively enduring and stable constraints on the freedom and discretion of government actors. Political institutions, writes Smith,

> are themselves created by past human political decisions that were in some measure discretionary . . .. They also have a kind of life of their own. They influence the self-conception of those who occupy roles defined by them in ways that can give those persons distinctively "institutional" perspectives . . ..
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> The role of institutions, moreover, goes well beyond providing the rules governing political decision-making situations. . ... It influences the relative resources and the senses of purpose and principle that political actors possess.[12]

The "new institutionalist" models explain political action by reference to cognitive structures and roles that sufficiently define the course of action to reduce the expression of personal value choices. Understanding these embedded structures requires study of their origins as well as their impact on the targeted behavior.

A second aspect of the new institutionalist methodology is careful avoidance of reducing politics to reified institutions that completely constrain

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[12] Smith, "Political Jurisprudence, The 'New Institutionalism,' and the Future of Public Law," American Political Science Review 82 (1988): 95.

thought and action.[13] The new institutionalist conception of politics highlights the interaction between stable institutional structures of norms and the choice of individuals. It is thus essential to study in greater detail individual choices with the embedded institutional structure. Yet, few theorists of the school developed theoretical propositions for testing or methodologies for systematic study and theory building. Smith's review of public law

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[13] For example, see Stephen Skowronek, Building a New American State (Cambridge: Cambridge University Press, 1982), 12. Skowronek argues that strategic competition among government elites shaped choices for the course of state development within a relatively stable context of political and social structures. "The collective action of government officials," Smith suggests,

> in responding to environmental changes is mediated by the institutional and political arrangements that define their positions and support their prerogatives within the state apparatus. As an integrated organization of institutions, procedures, and human talents, an established state structures a set of power relationships among its discretionary officers, and it provides an operating framework through which these officers attempt to maintain order.

This approach supplements Smith's focus on the constraints imposed by stable value structures by suggesting that individuals within that structure work strategically to augment their power and the legitimacy of the state. Taken together, these approaches usefully define the interaction of normative structures with organizational and personal variables influences institutional behavior.

literature is incomplete and neglects a rich source of conceptual tools for the study of legal institutions. Many public law scholars employed role theory as a means to tap the impact of institutional variables in mediating values and shaping outputs. While many early role studies integrate role into the behavioralist paradigm others pursued the relationship between structures, values, decisions, and outputs with greater sophistication. Thus, the Smith critique errs to the degree it slights a large part of public law's intellectual heritage.

Role theory in public law has much to offer for study and methodologies in the new institutionalist paradigm. Role theory and analysis is the investigation of shared values about how an incumbent should perform a job. Role definitions are fluid because they consist of the interaction of these normative expectations of behavior and the enactment by individuals filling those roles.[14] Once an organization is developed and an office created, the role concepts and rules, both formal and informal, that

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[14] See generally, Theodore Sarbin, "Role: I. Psychological Aspects," and Ralph Turner, "Role: II. Sociological Aspects," International Encyclopedia of the Social Sciences, 1st ed.

emerge define expected behavior and organizational procedures by reference to other offices and other people.[15] Both institutionalists and role theorists investigate the shared values or implicit understandings between office holders and their various publics. Role acts as an intervening variable that filters and interacts with psychological and political variables (the expression of utilitarian values or preferences).[16] As such, role theory links individuals, organizations and systems in a conceptual framework for analysis, offering, from micro to macro, progressively higher levels of generalization. Pound stated the essence of role theory more simply.

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[15] Antagonistic or collegial interaction between role alters is not essential to role differentiation. Roles instead can embody distinct sets of values that compete for representation within the system. Ralph Turner and Paul Colomy, "Role Differentiation: Orienting Principles," Advances in Group Processes 5 (1987): 11. The representation character of roles is a link between the new institutionalist emphasis on embedded values and institutional structure and the older conception of sociological role theory. Occupants of roles can distinguish themselves from alters based on a functional division of labor or on the values that the role represents.

[16] James Gibson, "Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model," 72 American Political Science Review 72 (1978): 920-921; J. Woodford Howard, Jr. Courts of Appeals in the Federal System (Princeton: Princeton University Press, 1981), 172.

Speaking of the central tension in the legal role, he wrote, "[a]lmost all of the problems of jurisprudence come down to a fundamental one of rule versus discretion, ..."[17] Role definitions provide occupants with cues when discretion is permissible.

This study incorporates existing role research into an institutionalist perspective. Values of professionalism and political responsibility provided relatively enduring institutional constraints in the growth of the Justice Department. These values evolved into a set of normative constraints and organizational roles for government lawyers like those in the OLC. Their role determines the extent of discretion that OLC lawyers have in administering the law. Thus, new institutionalist and role theories facilitate investigation of the impact of values on the behavior of lawyers in the Office of Legal Counsel.

Institutionalized values, of course, do not ensure consistency within a role set. Role strain results from ambiguous role expectations. When two roles collide or role alters (others) project conflicting expectations, role incumbents experience role conflict. Throughout the history of the Justice

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[17] Roscoe Pound, An Introduction to the Philosophy of Law, (New Haven: Yale University Press, 1965), 54.

Department, norms of politics and professionalism co-existed and overlapped. Justice Department lawyers operated in an environment of ambiguous normative constraints. Both these competing expectations allowed choice and flexibility within roles and contributed to systemic stability. The attempt to resolve conflicting norms is an important source of change, both in policy and organization. After the post-Nixon reforms, real conflict in executive branch administration of law emerged from attempts by Republican and Democratic presidents to control the structure of the federal bureaucracy and to separate through reorganization the political and professional roles performed by the Justice Department. The drive toward centralized control of the bureaucracy produced heightened separation of powers conflicts between the president's lawyers (both in the White House and Justice Department) and Congress. By treating organizations such as the Office of Legal Counsel as composed of individuals subject to psychological role strain, we can better understand the process of change in government legal administration. The attempt to resolve the internal role strain is one source of change in the Office of Legal Counsel.

The changing normative expectations of the role of government lawyers and the rise of new role competitors such as the White House Counsel and the congressional counsel combined to create role conflict and an unstable environment for Justice Department lawyers in the post-Nixon reform era. The attempt to sever political and professional norms by creating an idealized, neutral administration of law caused increased rigidity in the role of the OLC. Ultimately, it was this rigidity in behavior that led to conflict in the system. Severing political and legal functions in the Justice Department caused conflict between the departmental lawyers, executive agency counsel, and White House Counsel as well. It is not merely attempts to "politicize" the Justice Department that result in heightened conflict. Any attempt to sever the competing professional and political norms strains relations among government lawyers. Conflict within the executive branch legal system often translated into increased litigation by government lawyers. The role conflict resulting from increased competition with the White House Counsel is a second source of institutional and policy change. Refining the new institutionalist perspective with these distinctions from sociological role theory furthers our understanding of the complex

interaction of competing normative structures that operate on government lawyers in the OLC.

The Organization and Methods

Blending the new institutionalist perspective with social role theory requires an understanding of the values shaping organizational evolution. A brief history of the origins and development of the structures and duties of the attorney general and executive branch lawyers is necessary to understand the interrelationships among government organizations and the duties assigned to them. A relatively autonomous ideology of political lawyering shapes the organization and operation of the various government lawyers in the White House, the Justice Department, the executive agencies, and the Congress. The Nixon administration scandals altered the landscape of actors and approaches to legal policy development in the executive branch and Congress.

The first task of this study is to trace the development of the legal administrative state and the normative context that evolved around it. Chapter Two examines the tension between political and professional norms from the origins of the attorney general through

the post-Nixon administration reforms. Chapter Three analyzes more thoroughly the attempts to separate politics and legal administration following the Nixon administration abuses. Together, these two chapters show the continuous reaffirmation of the values of professional administration of the law counterbalanced by responsibility to political actors.

The second task of this study is to link these organizational values with the actual behavior of OLC lawyers. Section Two offers two in-depth case studies of legal development in the OLC and its interaction with other government lawyers. Each case study addresses the existing explanations of legal development in the executive branch and shows the impact of institutional variables in shaping the outcome of the legal dispute. In both cases, the behavior of OLC lawyers was inconsistent with their role expectations. The case studies show that by acting outside their institutionalized role, OLC lawyers created conflict with other participants in government legal interpretation.

The third step is to show how changes in OLC role orientations affected other institutions. Section Three analyzes the impact of the OLC's changing role and environment on courts by analyzing litigation

trends in the post-Nixon reform era. Institutionalist and role theories suggest that other actors would reinforce behavior consistent with their expectations of the OLC. Congressional counsel and courts acted together to reinforce the institutional balance. Recent events suggest that OLC lawyers are beginning to restore a balance of political and professional values.

Traditional role studies in public law research linked interview or survey data to the value structures of judges.[18] Later studies explicitly linked role conceptions constructed through interviewing with judicial decisions.[19] This study could not rely on these methods of role research. As lawyers for the president and attorney general, many OLC attorneys did not want to discuss specific cases. Interviewing was useful only to confirm inferences from documents. Access to documents itself posed severe problems for

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[18] Early studies used various techniques to measure and code judges response to questions without linking them to decisions. See e.g., John T. Wold, "Political Orientation, Social Backgrounds, and Role Perceptions of State Supreme Court Judges," Western Political Quarterly 27 (1974): 239, and Victor Flango, et al., "The Concept of Judicial Role; A Methodological Note," American Journal of Political Science 19 (1975): 277.

[19] See e.g., Gibson, "Judges Role Orientation," 72 American Political Science Review 72 (1978): 911, and Howard, The Courts of Appeals in the Federal System (Princeton: Princeton University Press, 1981).

the study of government lawyers. The Freedom of Information Act (FOIA) exempts the Office of Legal Counsel and the White House Counsel's Office from document disclosure. Upon filing a FOIA request, I received materials already available to the public. Published opinions by the Justice Department does not provide a comprehensive set of decisions. The Opinions of the Attorney General include only officially rendered opinions, which constitute a small percentage of the opinions actually given.[20] Moreover, those opinions provide no insight into the process of legal interpretation and the interaction between the attorney general and the Office of Legal Counsel. The Carter administration published some of the opinions of the OLC, but the Reagan administration halted this practice in 1982. The small percentage is insufficient to use traditional statistical methods to link role expectations to individual behavior.

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[20] The published opinions of the OLC also present a distorted picture. John Harmon, Assistant Attorney General in charge of the OLC in the Carter Administration, indicated the bias: "It's the favorable opinions, justifying a government action, that tend to be released. The other side of the equation is rarely publicized." Quoted in "In Focus: John Harmon's Opinions Carry Weight With Carter," Washington Star, 28 May, 1978, p. A3. Publication of opinions depends on the consent of both the agencies to whom OLC issued the opinion and the Attorney General.

Because of these limitations, this study relies on materials from presidential libraries, testimony and documents from congressional hearings, and interviews with members of the OLC and its outside contacts. The evidence gathered reveals a remarkable continuity of policy positions and preferences despite changes in personnel and ideology that result from new administrations. The White House Counsel files from the Johnson, Nixon, Ford, Carter libraries are a rich data source. Correspondence among agency counsel, OLC lawyers and White House counsel provides insight into these relationship and allows assessment of the role expectations and behaviors of actors in various organizations. Congressional hearings on several subjects also contained lawyers' notes and internal memoranda not otherwise available. These materials, supplemented by interview data,[21] permitted inferences into the role expectations and enactments of lawyers in

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[21] The author modified the Wahlke and Eulau interview protocol for use in this study. This schedule would allow comparison of role conceptions across organizations and institutions. Difficulties in obtaining a comprehensive list of OLC personnel and logistical limitations prevented interviewing the complete set of OLC lawyers or related others. As a result, I do not present here the interview data in comprehensive charts. Instead, this study uses interview data to supplement the documents collected for the study.

the Office of Legal Counsel in relations to other government lawyers.

Summary

Competition among legal professionals struggling with both professional and political norms furthers our understanding of the process of legal development in the executive branch supplied by existing approaches that emphasize partisanship, personality, or politicization. The tension between law and politics is not between the philosophy and ideology of Justice Department lawyers versus White House politicians. Rather the conflict between legal and political values is inherent in the organization and role definitions of all government lawyers whether inside the White House, the Justice Department, or executive agencies.

Melding of legal and political roles in Justice Department offices reduces organizational conflict through structured norms of compromise and principled adjudication. Merging these competing norms at the office level minimizes inter-organizational conflict at the cost of greater role strain within the Office of Legal Counsel itself. The organization and role orientations of government lawyers shape the flow of

legal policy and interpretation in the political branches of government.

Part I

Legal Professionals in the Executive Branch

Chapter Two

The Rise of Executive Branch Lawyers

No scholar has yet written a comprehensive history of the federal government's lawyers. To explain adequately the behavior and legal interpretations of the Office of Legal Counsel, it is essential to understand the historical antecedents that shape its role in the complex system of government lawyers. Chapters Two and Three trace the rise of lawyers and the legal administrative state from the Judiciary Act of 1789 through the post-Watergate reform era.

Most studies of the institutionalization of the presidency and executive branch date the emergence of a strong administrative state to the New Deal era. The findings of the many presidential commissions, growing

belief in bureaucratic expertise, and the creation of the Executive Office of the president ushered in the modern age of strong presidents with extensive political and administrative resources. The developments of the Roosevelt period are undoubtedly crucial to the study of the development of the modern American presidency as a political institution.

Yet, to date the origins of the institutionalized presidency in the early part of the twentieth century is to miss the historical trends, organizational precursors, and politics that shaped the evolution of current institutional arrangements. Administrative histories of the Department of Justice[1] illustrate the influence of early events and routines on subsequent growth. Expansion of the time frame for

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[1] Nearly all who have written such histories did so after service in the Department of Justice. To some extent each presents an "official" history. See, e.g., Arthur Dodge, Origin and Development of the Office of Attorney General (Washington, DC: United States Government Printing Office, 1929); Luther A. Huston, The Department of Justice New York: Praeger, 1967); Griffin Bell, "The Attorney General: The Federal Government's Chief Lawyer or One Among Many," The Sonnett Lecture, reprinted in Congress, Senate, Committee on the Judiciary, Department of Justice Authorization, 95th Cong., 2d ses., S. Doc. 95-911, 1978; and Daniel Meador, The President, the Attorney General and the Department of Justice (Charlottesville: White Miller Burkett Center, 1980).

the study of state growth is essential to the study of the evolution of institutional growth.

From the common origin of one attorney general, the president, the Senate, and the House developed different structures and procedures to perform the dual functions of legal advisement and litigation. At each stage of institutional development, and for each branch, the organization of legal administration reflected an overtly political model of bureaucracy. That is, Congress and presidents emphasized values of political responsibility and control as well as neutral competence and professionalism in constructing the legal bureaucratic state. Tracing the development of government lawyering functions shows continual reaffirmation of a political model of legal administration. From the Judiciary Act of 1789 through the post-Watergate reforms, Congress has endorsed a legal advisory and litigation system responsible to the president but has retained limited political checks on the president's ability to control the nation's legal resources. Presidents altered the balance of political and professional roles by creating and expanding a White House Counsel as a counterweight to the Justice Department lawyers and endorsing an independent Justice Department in the wake of Watergate.

Government Lawyers and Institutional Development

The development of lawyering functions in the executive branch and Congress confirms the validity of elite and sociological approaches to institutional development. Both short-term power motives of elites and long-term expectations and ideas shape the the evolution of the complex arrangements and institutional norms of government lawyers. From the creation of the attorney general to recent White House attempts to consolidate control of government lawyers, presidents and members of Congress acted to enhance their relative power over legal policy. Competition for control of the legal state does not begin with the era of partisan and institutional conflict that began during the Nixon administration.

The legal work of the government traditionally is divided into two interrelated functions, legal advice and litigation. For both, coordination of agency lawyers scattered throughout the bureaucracy further complicates efforts to manage legal opinions and litigation for the Congress and presidency. At every stage of development and in each branch, strategic calculations of power and control over

policy, detached from state growth and growing external demands, shaped the course of change.

Early studies of government lawyers were largely descriptive in nature and did not examine the forces behind expansion of the legal administrative state. The apparent assumption was that growing demands for government legal services led to the differentiation of functions and growth of staff in the Justice Department.[2] Later studies focused on the separation of powers as central to the development of the structures of the Department. Huston emphasized the "three-horned dilemma" (i.e. the three branches) of influences on the Department of Justice as the central force driving institutional change. Statutes from Congress defining the powers of the attorney general, the appointment power and executive leadership of the president, and the "watchful eye" of the judiciary, all combine to shape the day-to-day operations of the Department of Justice. Still, Huston provided no specific elaboration of the effect the arrangement had on institutional development.

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[2] Arthur J. Dodge, Origin and Development of the Office of Attorney General, Message From the President of the United States, 70th Cong., 2d sess., House of Representatives Doc. No. 510; Albert G. Langeluttig, "The Department of Justice of the United States", Ph.D. diss. The Johns Hopkins University, 1925.

Attorney General Griffin Bell, in a speech before Fordham Law School, provided the first sophisticated account of the political implications of the changing arrangements of legal functions within the Justice Department.[3] Drawing on Huston's emphasis on constraints placed by Congress, the president, and the courts, Bell showed how these controls shaped the subsequent course of political development. Similar work describes the history of Congressional legal staffs, services and procedures.

These administrative histories of the Department of Justice mirror the changing focus of studies of institutional development. Early theories of bureaucratic development stressed environmental determinants, such as domestic and international crises, industrialization and national growth, as central in developing institutional structures to handle the increasing demands of a complex society.[4] Bureaucratic organization reflected the new needs and

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[3] Griffin B. Bell, "The Attorney General: The Federal Government's Chief Lawyer and Litigator, or One Among Many," The Sonnett Lecture, March 14, 1978, reprinted in Department of Justice Authorization, 95th Cong., 2d sess., 1978, 357-68.

[4] Stephen Skowronek, Building a New American State (Cambridge: Cambridge University Press, 1982), 10-12, n. 20, and 17, n. 24.

expectations of the growing society; changes in routines and innovations in structures respond in the demands placed on the government.

Recent scholars emphasize the role of government elites in the process of institutionalization. From this second perspective, environmental changes are (perhaps) necessary but not sufficient conditions to stimulate changes in organizational arrangements and practices. Elite reactions to new demands are central to understanding the speed and form of institutionalization.[5] The short-term interests of presidents in the post-New Deal era led to centralization and politicization of White House activities. Organizing power and maintaining order are central motives as the state "routinizes and circumscribes the way government officials gain and maintain their positions, the way they relate to each other within and across institutions, and the way they relate back to social and economic groups."[6] Existing

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[5] See Terry Moe, "The Politicized Presidency," in New Directions in American Politics (Washington: Brookings Institution, 1985), 239 and n. 5, arguing the President's need for "responsive competence" in the face of rising demands on the president.

[6] Stephen Skowronek, Building A New American State (Cambridge: Cambridge University Press, 1982), 12. Yet this approach still places emphasis on elite calculations in response to rising external demands.

organizational structures and power calculations of elites in office shape the form of state responses to environmental demands.

A third approach to institutional change employs sociological models and emphasizes the range of influences on organizational development--e.g. political institutions, time, knowledge, and bureaucratic routines. The historical legacy of expectations and roles of the president interact with the more proximate goals of his staff to shape the path of change.[7] No study of government lawyers places the power calculations and motives of elites in the context of the long-term expectations of outside actors or patterns of bureaucratic behavior.[8]

The difficulty arises in how to relate motives of public officials and outside influences to change

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[7] Cary R. Covington, Pika, and Seligman, "Institutionalization of the Presidency," Paper delivered at the 1983 American Political Science Association, 18.

[8] Compare Peri Arnold "Strategic Ambition and the Institutionalized Presidency," Paper delivered at the 1989 American Political Science Association, p.2. This approach does more than simply define the context in which institutionalization occurred. The context is provided merely as background for examination of elite motives and organizational ideologies shaping the course of the changes. In each instance, the case study demonstrates "political actors making choices within the constraints of their roles." Ibid, p.5.

the organization of government lawyers. Moe and Skowronek each suggest that strategic calculations by elites occur in response to a changing environment of expectations. Institutionalization in this case is not always responsive to rising demands on government as the sociological models would suggest. Rather, elites initiate reform as much to enhance their relative power over lawyers and agencies as to handle changing external expectations and demands.[9] The president and Congress actively seek the support of organized interests in the pursuit of new institutional arrangements. Institutionalization here is a process of change driven by government elites seeking to enhance their relative power over policy and shaped by the dominant conflicts and ideas of the times and the organizational precursors to change. Expectations and historical trends are not irrelevant to the course of institutionalization. This approach instead places elite power motives in the context of historical trends and rising expectations.

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[9] Elite-driven institutionalization is not instrumental in this case. Congress and presidents did not act to achieve specific goals or complete certain tasks. Institutionalization here is often a defensive strategy designed to prevent erosion of power rather than to augment strategic resources.

Few studies have compared institutional development across governmental bodies, i.e., the presidency, the Congress, and the bureaucracy. Most studies of institutionalization focus on one staff unit or executive agency as the unit of analysis. As a result, these models are often bound to the institution of the study. The focus on the arrangement of government lawyers bridges the gap created by the study of single institutions by examinating of a function of government as it develops in the presidency and the executive branch agencies, and the Congress.[10] Studying multiple institutions is essential to understanding the expectations and roles of other actors that shape the behavior of Justice Department

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[10] The focus on functions creates a theoretical problem in that the study of the evolution of a function is hampered by the need to analogize functions from one era to those of another. The research here suggests that this shortcoming is not so grave. In the debates on the creation of new institutional structures, participants in the dialogue refer to existing institutional arrangements as the starting point for reform. As such, analysis of the primary source material provides some means of continuity in the analogies between institutional structures and routines of different time periods. Examination of a broader time frame compels a functional orientation to the study of institutional development. Gains made in the expansion of the time frame offset the losses incurred by the analysis of government functions over time.

personnel generally, and the Office of Legal Counsel specifically.

Competition between Congress and the president is important in understanding the development of the OLC's role, particularly during the early period. Bell's explanation of the evolution of the Justice Department overlooks the competition for power among elites within the executive branch. Elite theories of institutionalization better explains the evolution of the OLC's roles. Rising external demands did not translate into growth or reorganization of government legal structures. Instead, power struggles between congressional and executive branch elites shaped the organizational structures of government lawyers. For most of their history, the attorney general and his lawyers carefully balanced political and professional values in administering the law. This balance continued through the New Deal expansion of the Justice Department and the creation of the OLC. The rise of an institutional competitor in the form of a White House Counsel is the central force altering the OLC's role.

Balancing Professionalism and Politics in the Administration of Law

From the earliest days of the Republic, the role of the attorney general required balancing political and professional values. Appointed by the president and serving as his government legal counsel, the attorney general was a political functionary of the president. Yet, the attorney general's mandate went beyond merely representing and advising the president. Professional ethics and the role as chief legal officer for the United States demanded a degree of professionalism that did not characterize the other presidential advisors.[11] The history of the Justice Department is a history of balancing these competing roles.

Statutory law and early practices demonstrate a common origin for the legal advisory and litigation

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[11] None of histories of the Justice Department discuss a tension between the professionalization of the legal community and recruitment for service as a government lawyer. While other government employees did not professionalize until the establishment of the civil service, lawyers had professional associations dating to the origin of the Republic. In this respect, the development of the legal state may be exceptional.

functions[12] of Congress, the president, and executive agencies. To provide legal services for the government, the first Congress of the United States established the Office of the attorney general. The framers relied in part on historical antecedents--the King's counsel, the colonial system of attorneys general, and the attorney general under the Articles of Confederation--to shape the structure, functions and accountability of the new attorney general. In England, the post of King's counsel had evolved from a limited functionary of the King to a member of the Cabinet and supervisor of all litigation for the Crown. In the colonies, the King relied on the appointment power of the colonial attorneys general to insure enforcement of the law according to the Crown's wishes. Under the Articles of Confederation, the Judiciary Act as originally proposed gave the judiciary the power to appoint the attorney general and the United States

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[12] Daniel Meador distinguishes the lawyering and non-lawyering roles of the Attorney General. Legal advice and litigation comprise the lawyering role while the supervision of agency programs constituted the non-lawyering and investigative roles. Daniel Meador, The President, The Attorney General and the Department of Justice (Charlottesville: White, Burkett, Miller Center, 1980), 15-24. The present study does not address the development of the six divisions of the Department of Justice.

attorneys.[13] When finally passed, the attorney general was an executive functionary appointed by and responsible to the president. These historical antecedents show a tradition of politically responsible attorneys assigned to execute the law.

Federalism and Separation of Powers in the Growth of a National Legal Structure

The creation of the attorney generalship institutionalized the conflict between political responsibility and professional administration of the law. The Judiciary Act of 1789[14] established the attorney general as the highest legal officer in the land and created the role of official legal advisor to the president and heads of cabinet-level departments. According to this statute, the president shall appoint,

> a meet person, learned in the law, to act as attorney general for the United States, who shall be sworn, or affirmed, to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the supreme court, in which the United States shall be concerned, and to give his advice and opinion upon all questions of law, when required by the

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[13] The rejection of this proposal provides some historical support for the Scalia's formalist dissent in Morrison v. Olson, 108 S. Ct. 2597 (1988).

[14] 1 Statutes 73.

> president of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their department....[15] (emphasis in original)

The first clause leaves implicit the historical understanding of executive appointment of the chief legal officer. The second clause emphasizes legal training and professionalism in selecting the attorney general. At that time, the attorney general was an aide to the president and the department heads rather than a member of the Cabinet. Unlike some of its precursors, the advisory role of the attorney general had a professional tone.

The statutory job description also required the attorney general to represent the interests of the United States as a whole before the courts. The need for national unity and professional conduct of the role dictated that the attorney general would not be merely the president's lawyer. The Judiciary Act of 1789 also did not prevent the attorney general from advising members of Congress. The early practice of the attorneys general confirms this reading of the Judiciary Act. The first six attorneys general frequently provided opinions to the Speaker of the

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[15] 1 Statutes 70-71, Chapter 20, Section 35.

House and other members of Congress. From 1789 to 1817, the attorneys general provided members of Congress with legal opinions, both formal and informal, in much the same manner that they provided advice to the president and Cabinet officers. Congress commissioned legal opinions from the attorney general in the same manner as the president. Both retained the attorney general much as one today would employ an outside private counsel. When the attorney general became a fully paid member of the Cabinet, the president ceased paying piecemeal, but the congressional practice continued.

Despite the emphasis on professionalism and the interests of national union, Congress was careful to restrict the power of the chief law enforcement officer. The attorney general was last in the rank of succession among all department heads and received a significantly smaller salary with no money for expenses. Attorneys general earned their incomes through private legal practice. The scarce resources of the new government contributed to the lack of resources for the attorney general.

Financial constraints were not the only reason for the limited resources and low stature of the attorney general. Congressional control of the

creation of the office is central to the subsequent development of the attorney general and the litigation and legal advisory sectors of the executive branch. The fragmented Congress and its sectional orientation feared a centralized mechanism of law enforcement, much as many feared forces of nationalization.

During this early period, the competition among political elites in Congress and the executive branch shaped the growth of the Justice Department. The Judiciary Act reflected fears of a strong attorney general. The attorney general, though expected to represent the United States in all cases before the United States Supreme Court, was not assigned control over trial litigation for the United States. Thirteen United States Attorneys, one for each district, retained the power to argue all cases at trial in which the United States was a party. Congress granted no statutory authority to the attorney general to supervise or control the actions of these attorneys. Members of Congress also retained influence over litigation for the United States through senatorial courtesy in the appointment of United States Attorneys and the decentralized arrangement established by the Judiciary Act. Such limited control over trial

litigation persisted through the Civil War.[16] Congress also left enforcement of criminal law outside the reach of the attorney general.

Each attorney general sought reforms to bolster the stature and power of the post. Edmund Randolph, the first attorney general of the United States, requested a clerk to handle the clerical duties of the post and argued fervently for the expansion of his role relative to the United States Attorneys. Complaints of uneven enforcement of federal law led Randolph to seek supervisory control over the attorneys. To improve preparation of cases for argument at the appellate level, he asked for a greater role in the litigation of cases in the federal district courts. Washington's ringing endorsement proved no use as Congress flatly rejected all three proposals for expansion of the attorney general's power.

In 1817, William Wirt, the seventh attorney general of the United States, stopped the practice of

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[16] Compare this to Congressional grants of jurisdiction in federal cases to lower federal courts. The development of federal jurisdiction strongly parallels the growth of the federal legal bureaucracy. Not until the Civil War and the need for Reconstruction did Congress give federal district courts jurisdiction over federal questions. See, Judiciary Act of 1875, 18 Statutes 470 (1875), and Carl McGowan, The Organization of the Judicial Power of the United States (Evanston, Ill.: Northwestern University Press, 1969).

advising Congress on questions of law. Under Wirt's interpretation of the Judiciary Act of 1789, the attorney general lacked authority to advise Congress. According to Wirt, prior attorneys general had provided such advice merely as a courtesy. This interpretation flew in the face of the historical precedent set by attorneys general in the states and English colonies as well as the practice following the ratification of the Constitution. For this practice to continue, Wirt demanded a revision of the Judiciary Act specifically authorizing the advisement of Congress.

This proposal resulted less from competition between the president and Congress than from a reaction to increasing demands on the attorney general. Wirt directed most of his energy to the development of a system of records of opinions and precedent to promote uniformity and continuity in interpretation by future attorneys general. His personal philosophy of government, based on an idea of a government of laws and limited authority, compelled refusal of congressional requests.[17]

Congress took no action to amend the Judiciary Act. Members of Congress attempted to filter requests

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[17] Homer Cummings and Carl McFarland, Federal Justice (New York: MacMillan, 1937), 82, esp. n. 15.

through Cabinet secretaries, but the attorney general refused to provide legal advice upon discovery of the source of the inquiry. It is not clear if any debate took place on the merits of Wirt's proposal. The amendment was simply not necessary. Advising Congress continued informally at least throughout the period leading up to the creation of the Department of Justice in 1870. Congress also turned inwardly to fill the advisory function. Both House and Senate created standing committees on the judiciary during the period of Wirt's tenure as attorney general. Individual members relied primarily on their knowledge or the knowledge of their peers for legal advice. Over half the members of the 9th and 13th Congresses were lawyers.[18] For the last 150 years, legal professionals have constituted a majority of members of Congress.[19]

Institutional comity continued between the Congress and the attorney general for 150 years after

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[18] Sterling Young, The Washington Community: 1800-1828 (New York: Columbia University Press, 1966), 92.

[19] Mary Ames Booker, Members of Congress Since 1789, 3d ed., (Washington: Congressional Quarterly Press, 1985), 2-3.

Wirt's initial refusal to provide advice to Congress.[20] Separation of powers issues did not divide the Congress and president enough to change the customary reliance on the attorney general. Congress still relied on the attorney general to litigate matters before the appellate courts. As the chief legal officer of the United States, the attorney general represented the government's position in all appellate litigation and provided the courts with the government's interpretation of legislative intent. Members of Congress still appeared before the courts. Henry Clay and Daniel Webster frequently argued before the U. S. Supreme Court while serving as private counsel in such landmark cases as Gibbons v. Ogden[21] and Dartmouth College v. Woodward[22]. This practice provided some informal means of congressional influence over court interpretation of legislative intent and prerogatives.

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[20] Two notable exceptions exist to the comity between Congress and President over legal matters. In both Myers v. United States, 272 U.S. 52 (1926), and United States v. Lovett, 328 U.S. 303 (1946), members of Congress employed outside counsel to defend legislative interests before the courts.

[21] 22 U.S. (9 Wheat.) 1 (1824).

[22] 17 U.S. (4 Wheat.) 518 (1819).

The refusal to expand the duties, resources, and personnel of the office of the attorney general reflect more than a desire for fiscal conservatism, or a lack of expansion of government legal business, or sensitivity to states' rights. Congress feared a strong national law officer. A centralized legal authority in the executive branch added power to an already growing arsenal of executive powers. In this same period, Congress created a solicitor for each major executive department and charged him with the litigative and advisory roles for that department. By the time of the Department of Justice Act, Congress had established six such solicitors in the War, State, and Treasury Departments, the Post Office and Internal Revenue.

The executive departments did not attempt to undermine the power of the attorney general or impede the growth of his power. Secretary of the Interior Alexander H. H. Stuart even suggested to Congress that the practice of separate agency counsel was inefficient and an exercise of authority that properly belonged to the attorney general. Congress rejected his proposal for the creation of an executive department to manage the legal officers and business of the government. The division of legal personnel among the various

departments and agencies continued and presented the pressing problem of coordination of the legal advisory and litigative functions.

Creating a Department of Law

Despite Congress's unwillingness to centralize control of government lawyers, the early period saw an expansion of the attorney general's duties and staff for other purposes. Congress finally appropriated funds for a clerk position in 1818. Not until 1861, less than a decade before the creation of the Department of Justice, did Congress bestow some authority over the United States Attorneys to the attorney general. Other nonlegal duties, such as petitions for clemency and a position on the Patent Board, expanded the attorney general's responsibilities, which prevented him (perhaps intentionally) from adequate supervision of the district attorneys and solicitors. Somewhat ironically, Congress justified early refusals to create a Department of Law or expand of the office's staff by citing the existing burdens of the attorney general in the management of his duties.

Several motives drove Congress finally to create a Department of Justice. A shift in feelings about a strong national government in the Civil War era removed an important barrier to expansion and the integration of federal legal power. Centralization of the federal legal machinery was a necessary step during Reconstruction. Enforcement of federal law could not depend on district attorneys with strong regional ties. Rising claims involving titles to property, rights to personal liberty, and litigation under the "law of war" overburdened the district attorneys and were impossible to control at the local level.

Congressional debates on the merits of the Department of Justice bill also emphasized economic efficiency. The Committee on Retrenchment, chiefly concerned with the efficiency of government operations, reported the bill and Senator Jenckes of Rhode Island spearheaded the floor effort to establish the new Department. According to Jenckes, the bill did not attempt to create a new department, "but simply to transfer to an existing Department some things properly belonging to it, but which are now scattered through

other departments."[23] The practice of soliciting outside counsel proved too costly in the post-war budget.

Strategic reasons motivated Congress as well. Jenckes believed that centralization of legal advice would allow Congress to oversee more effectively law enforcement. Without centralized control, agency counsel operated as hired guns for department chiefs. Said Jenckes: "We found, too, that these, law officers, being subjected to the control of the heads of the Departments, in some instances give advice which seems to have been instigated by the heads of the Department...."[24] Jenckes supported the efforts of previous presidents to gain control of legal interpretation within the executive branch. The confluence of rising demands, changing attitudes toward centralized federal power, and enhanced Congressional oversight abilities finally led to acceptance of presidential demands for a Department of Justice.

The Department of Justice Act of 1870 transferred all existing agency counsel to the newly formed Department of Justice. Congress also created

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[23] Congressional Globe, 41 Cong., 2d sess., vol. 42, 3034.

[24] Senator Jenckes, Ibid., 3035.

the position of Solicitor General as an assistant to the attorney general in charge of litigation and assigned the attorney general formal control over the United States Attorneys in both criminal and civil litigation.

It is apparent that Congress rejected wholesale consolidation of power over agency counsel under the attorney general. Congress did not repeal laws permitting independent legal staffs in executive agencies. Executive departments retained independent counsel and continue to do so. Shortly after the establishment of the Department, Congress created two new assistant attorneys general and assigned them to the Interior and Post Office Departments under the supervision of the agency heads.[25] Agency counsel filled both the litigative and advisory roles.[26] Though the attorney general had increased administrative and personnel support, agency lawyers in the various department presented a sizable obstacle to

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[25] Griffin B. Bell, "The Attorney General," The Sonnett Lecture reprinted in Department of Justice Authorization, 95th Cong., 2d sess., 1978, 360.

[26] Peter Irons provides an excellent series of case studies showing the pluralism among executive branch legal counsels and litigators in The New Deal Lawyers (Princeton, NJ: Princeton University Press, 1982).

integrating the legal business of the government. Recognizing the need for a strong federal state for Reconstruction, Congress extended the attorney general's authority. Yet, recognition of the political nature of legal enforcement and interpretation led Congress to retain a check on this power by creating an increasing number of agency counsel positions.

Centralizing the Legal Administrative State

The first World War brought expansion of the administrative state. As part of this growth, Congress gave these new agencies their own counsel and independent litigating authority. Under increased wartime authority, President Woodrow Wilson ordered agency attorneys to bow to the attorney general's authority over all litigation and made his legal opinions binding on the executive branch as a whole. This Executive Order expired at the end of the war, and agency counsel reasserted their independence. By 1928, Attorney General John Sargent expressed his frustration with the situation. Only 13% of agency counsels were under the statutory control of the attorney general.

President Roosevelt revived attempts to assert control over government lawyers. Administrative

theories of the time supported the trend toward greater efficiency and centralization of government. The 1930's brought increased emphasis on the Civil Service, neutral competence, and the science of administration. The Brownlow Report called for centralizing and consolidating authority and power in the presidency. At this same time executive branch lawyers increasingly became tied to the New Deal political ideology. Law professors loyal to the New Deal encouraged their young students to go to Washington.[27] The professional community eagerly sought lawyers who helped draft the regulatory statutes. Thus, their political aspirations and professional idealism were mutually reinforcing.

In 1933, Roosevelt sought to control lawyers in the agencies by an Executive Order that, like Wilson's, called for legal counsel to answer directly to the Department of Justice. Even with a supportive Congress of the same political party, Roosevelt failed in his attempt to consolidate presidential authority over government lawyers. Congressional needs for political control and oversight of the growing legal administrative state transcended party lines.

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[27] Irons, The New Deals Lawyers (Princeton; Princeton University, 1982), 6-9.

The Executive Order also expanded the Justice Department. President Roosevelt and attorney general Cummings created an Assistant Solicitor General post. The order charged the Assistant Solicitor General with advising the president, supervising legal counsel in the executive agencies, and aiding the Solicitor General in litigation. The present Office of Legal Counsel (OLC) emerged from the Assistant Solicitor General post.[28] Over time, the OLC gained increasing independence from the Solicitor General but still participates in litigation before the courts in certain instances. For example, this practice continued through the Kennedy administration when Nicholas Katzenbach and others aided in the development of litigative strategy for civil rights cases. Apparently, OLC Deputy Assistant Attorney General Lawrence Simms was central in the litigation of INS v. Chadha.[29] OLC lawyers also argued the initial round of

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[28] The Office of Legal Counsel operated under the title Executive Adjudications Division from 1950-1953, when President Eisenhower renamed it by Executive Order.

[29] Barbara Hinkson Craig, Chadha (New York: Oxford University Press, 1988), Chapter 6.

oral arguments before the United States Supreme Court in Garcia v. SAMTA[30].

At the agency level, successful coordination of legal personnel, opinions, and litigation still proved elusive. Congress continued the practice of creating independent counsel for different agencies. The number of agencies and independent regulatory commissions with separate counsel grew rapidly during the New Deal. The Justice Department expanded over time as well. The litigative and advisory roles were increasingly separated along organizational lines. President Truman elevated the Assistant Solicitor General position to division status and renamed it the Executive Adjudications Division. Though Eisenhower subsequently relabelled it the Office of Legal Counsel, the agency retained its emphasis on providing legal opinions for the president and overseeing the agency legal counsellors in their opinion function.

Although the aim of the earlier presidential commissions was to create an integrated, hierarchical bureaucracy, both the Brownlow and first Hoover Commission reports made no direct recommendations for the reform of the organization of legal services in the

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[30] 469 U.S. 528 (1985).

executive branch. The members of the second Hoover Commission selected a panel of distinguished lawyers and jurists to examine the status of legal counsel and procedures of administrative law hearings in the executive agencies.

This second Hoover Commission Task Force on Legal Services and Procedures presented its report in March, 1955. The report recommended strengthening Department of Justice control over all executive branch attorneys, the creation of a centralized and separate civil service system for lawyers, and extension of the Administrative Procedures Act to apply quasi-judicial procedures to more agencies.[31] These recommendations reflected a belief that legal professionals should not be subject to control by politicians or career civil servants tied to agency goals. The Commission also called for Congressional review of the growing number of agency counsels hired without express statutory authority.

Members of the executive branch and Congress, Democrats and Republicans alike, vigorously attacked the report for its legalistic orientation. The Task

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[31] Digest and Analysis of the Hoover Commission Report on Legal Services and Procedure (Washington: Citizens Committee For the Hoover Report, 1955), 72-76.

Force itself was divided. Politicians on the Hoover Commission reacted strongly against the recommendations of the legal professionals. Commissioner Holifield, himself a member of Congress, filed a lengthy dissent in which he argued that attempts to centralize control of legal personnel under the attorney general sought to undermine the political accountability of agency actions to Congress. Congress as a whole rejected the recommendations of the Task Force.

Proponents of increased executive control over administrative agencies also voiced displeasure with shifting control over administrative agencies. The extension of quasi-judicial proceedings in the administrative process gave agencies increased independence from executive control. The goal of bureaucratic reformers toward neutral, professional administration collided with needs for political accountability and control by Congress and the president. The result was a rejection of the reform proposals. The status quo proved strategic for political elites. Competiting for control over legal interpretation and procedure in the agencies, neither Congress nor the president could accept increased autonomy of legal staffs in the executive branch.

The Rise of Competition

The creation and emergence of the White House Counsel following the Roosevelt administration marks a crucial transition in administering law by the Justice Department Office of Legal Counsel. Interestingly enough, Roosevelt, who had created the Assistant Solicitor Generalship to advise the president on legal matters, also began the expansion of the role of the Counsel to the president, the White House counterpart and ultimate competitor of the Office of Legal Counsel. Samuel Rosenman, Roosevelt's Counsel, served more as a policy aide than as a legal advisor. For many years, White House counsel handled the personal legal matters of the presidents and served as an in-house link with Justice Department officials. Over time a transition occurred from relying on Justice Department and agency counsel for legal advice to the Counsel to the president.

A staff office for legal advice became a permanent fixture in the White House during the Eisenhower administration. The development of the White House Counsel was an outgrowth of the typical fears of a disloyal bureaucracy. Presidential scholar Richard Neustadt noted this tendency in the

relationship between the White House and Charles S. Murphy, Special Counsel to President Truman:

> In the Truman administration, the Justice Department tended to be evasive, sometimes downright unresponsive in providing the Executive Office with forthright legal guidance on legislative or operational issues. This left a vacuum into which the Presidential Counsel was pressed to move, and on a number of occasions--particularly concerning controversial legislation and Executive Orders--Murphy's views were, in fact, decisive.[32]

This interpretation illustrates the tension between the lawyers at the Justice Department and the White House that was institutionalized with the creation of the Office of Counsel to the president.[33]

The small size of the Office of White House Counsel and the lack of familiarity with the legal environment precluded its handling of most legal issues. The lack of manpower and expertise offset the relative advantages of speed and loyalty. Often the staff of the White House Counsel acted as a filter between the attorney general and the president. The

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[32] Unattributed quote, in Bradley Patterson, The Ring of Power, Chapter Six, "The Just-Us Department," (New York: Basic Books, 1988), 141.

[33] The Office of Counsel to the President still is used as the formal title for the Office. White House counsel is used more commonly when referring to the lawyers working in this office. White House Counsel is used here to refer to the lawyer who heads the Office of Counsel to the President.

Justice Department understandably guarded its turf closely and attempted to prevent a situation in which the White House Counsel excludes the Office of Legal Counsel.

Still, the strategic decision by presidents to bring the legal advisory function into the White House disturbed the role boundaries and normative structure of OLC lawyers. The Office of Legal Counsel historically had balanced professional legal advice with the partisan advocacy inherent in the role of the president's attorney. The role of partisan legal advocate having been transferred to the White House, the OLC began to search for a role that would retain its place in the system. The resulting competition heightened tension between the White House and the Justice Department. As one OLC member remarked:

> We certainly did not want some young, faceless twenty-five-year-old White House staffer taking issue with the attorney general of the United States,... and then taking the issue to the president in a memo which set forth two paragraphs and "Mr. President, check the box below."[34]

Bradley Patterson suggests that White House lawyers and the Department of Justice renegotiated a treaty at the

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[34] Anonymous quote in Bradley Patterson, The Ring of Power (New York: Basic Books, 1988), 141.

outset of each new administration to establish functional boundaries.

The rise of competition between Justice Department lawyers and the White House affected the quality and type of legal advice given to presidents. The expertise and resources of the Justice Department gave it an advantage over the White House Counsel in producing legal opinions. The Office of Legal Counsel maintained the two Deputy Assistant attorney general posts, one for a holdover from the previous administration and the other for an expert in a legal field relevant to the work of the OLC.[35]

This practice provided a greater degree of continuity and a higher degree of professional prestige for the OLC. This continuity worked to benefit

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[35]Frank Wozencraft, "OLC: The Unfamiliar Acronym," American Bar Association Journal, 57 (January, 1971): 36-7. It is not clear whether the OLC practice continues today. As recently as the Reagan administration, members of the OLC under Carter stayed for several years into the Reagan years. Interviews with members of the OLC during the Carter and Reagan administration indicate that one deputy post is reserved for a careerist and the other deputy post is a political appointee. This tradition reflects the long-standing balance between political and professional roles of the OLC. Despite the changes in organization roles of the OLC as an agency, the office retains personnel practices that are residuals of the historical role of the agency. Still, many of the attorney-advisors remain in the OLC across multiple administrations.

presidents. These career lawyers maintained a system of precedent within the OLC and understood the implicit bargains and norms that structure White House relations with Congress and executive agency counsel. As such, OLC lawyers could provide essential information of the politics in the legal environment. By moving lawyering functions into the White House, presidents freed themselves from the constraints of career lawyers and the boundaries of past presidential practice. Still, without adequate understanding of the structure of legal and administrative norms and precedents, presidents could not assess the risks associated with action that violated long-standing agreements.[36]

Watergate blurred whatever functional division of labor remained between the White House Counsel and the Office of Legal Counsel. Nixon's personal legal troubles involved issues of institutional power that the Office of Legal Counsel traditionally handled. Because the issue of executive privilege related so directly to charges against

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[36] This evidence suggests that the rational, economic calculations behind expanding the Executive Office of the President may be flawed. Terry Moe, "the Politicized Presidency", e.g., suggests that presidents will create White House counterparts to counteract bureaucratic disloyalty and gain greater control over policy. Rational actor models do not include calculations of the professional and political expertise lost by circumventing agencies.

Nixon himself, the responsibility for advising the president shifted to White House Counsel John Dean.

The responsibility of the Justice Department to investigate the Watergate charges also necessitated barriers to White House contacts. The tension grew worse over time and contacts between the Justice Department and the White House diminished. The distance created by Watergate spread to all contacts between the Nixon White House and Justice Department lawyers. Blaming souring relations on the Justice Department, White House policy advisor Geoff Shepard wrote:

> Richardson's efforts to create an independent department have almost totally ended my contacts with Justice. I have yet to be invited to a single meeting; I know of no legislation or policy options currently under consideration within the Department (and, of course, none have been submitted to the President either); and I am led to believe that Richardson has strong reservations about legislation Justice already has pending on the Hill.[37]

Shepard felt that Richardson loyalists at Justice (including OLC chief Robert Dixon) sought to "reorient" Justice policy away from the Nixon conservative policy agenda so that Richardson's successor would have difficulty stopping his policy proposals. Watergate legal

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[37] Memo, Shepard to Mel Laird, 10/3/73, folder "Department of Justice [5 of 7 August-October 1973]"; Memo, Shepard to Ken Cole, 11/8/73, folder "Department of Justice [6 of 7 November-December 1973]" in Box 1, WHCF, Richard Nixon Presidential Materials Project.

problems effectively drove a wedge into all relations between the White House and the Department of Justice.

Watergate and Nixon's legal troubles were part of a larger evolution in the relationship between the White House Counsel and the Office of Legal Counsel. The shift of advisory functions to the White House reflected a broader trend of distrust in career bureaucrats among White House policy makers. Growing competition for influence and power strained relations between the White House and OLC. Justice Department lawyers recognized the political pressures and benefits gained by supporting the president's program. Antonin Scalia, then Assistant attorney general in charge of the Office of Legal Counsel for the Ford administration, understood clearly the need to maintain status with the White House when he explained:

> The White House will accept distasteful advice from a lawyer who is unquestionably "on the team;" it will reject it, and indeed not even seek it, from an outsider--when more permissive and congenial advice can be obtained closer to home. And it almost always can be, if not from the White House Counsel then from one of the Cabinet members who is a lawyer, or from one of the Washington attorneys who soon become advisors of any administration.[38]

Alternate sources for legal advice furnish the president greater opportunity for evading legal constraints on

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[38] Quoted in Daniel Meador, The President, The Attorney General and the Department of Justice, 40.

political action imposed by careerists in the Justice Department.

At the same time, external pressures for reform and an independent attorney general led President Ford to appoint Edward Levi to that office in 1975. To outside observers, Levi and the Justice Department were independent, but out of the White House policy-making loop. Calls for an independent Justice Department ironically bolstered the transfer of power to the White House Counsel during the Watergate affair. The public perception of tension between the White House Counsel and the attorney general persisted throughout the administration. On March 31, 1976, White House Counsel Philip Buchen responded to an inquiry from Nina Totenberg, then columnist for the New York Times, concerning his relationship with the attorney general. Refusing to confirm that the relationship was less than harmonious, Buchen wrote:

> I know of no basis for any inference on your part that the Attorney General's relationship to me is anything but highly satisfactory. From the time the Attorney General was appointed, he and I have worked very closely on many critical issues. There is hardly a day that we do not confer either by telephone or in a conference. On these occasions, we have useful exchanges of ideas which have helped me a great deal in my work, just as I believe they are helpful to the Attorney General. There is no member of the

> President's Cabinet for whom I have higher respect and admiration.
>
> I trust the foregoing information will remove any misimpression you may have had on this matter.[39]

That Buchen felt the need to respond so strongly evidences heightened awareness of White House personnel to outside perceptions of a distant White House-Justice Department relationship.

The distance between White House lawyers and the Justice Department may have been more than mere perceptions. The White House security office refused to issue a pass to Antonin Scalia, when he was Assistant Attorney General in charge of the OLC, because he was not a sufficiently frequent visitor. Assistant Counsel to the President Roderick Hills informed Buchen of the matter:

> Apparently our request for a pass for Antonin Scalia has been turned down because he is not a sufficiently frequent visitor. However, Nino clearly comes to the White House to see us far more than anyone else and to insure a better working relationship with his staff and particularly with the Department of Justice, we will be requiring his presence even more.[40]

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[39] Letter, Philip Buchen to Nina Totenberg, 3/31/76, folder "FG 17 1/1/76-3/31/76," Box 87, WHCF, Gerald R. Ford Library.

[40] Letter, Rod (Hills) to Phil (Buchen), 4/29/75, folder "Counsel's Office-Admin. (1)," Box 11, Edward Schmults Files, Gerald R. Ford Library.

The letter to White House security reinforced the need for better relations with the Justice Department. "As you may know," wrote Hills, "our office has historically worked closely with the Office of Legal Counsel and in our judgment, over the next six months in particular, this relationship will increase."[41]

By the Ford administration, the functional division of labor between the White House Counsel and the Justice Department was unclear. White House Counsel handled all legal business submitted by members and offices within the Executive Office of the President. This included many functions traditionally reserved to the OLC in its job-assignment sheet: advisor on legal problems with presidential action (including claims of executive privilege), legislative programs, regulatory agencies, and the form and content of executive orders. From the perceived distance and disloyalty of the Justice Department, the White House Counsel emerged as a functional competitor for the Office of Legal Counsel.

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[41] Memo, Phil Buchen and Roderick Hills to Jerry Jones, 4/29/75, folder "Counsel's Office-Admin. (1)," Box 11, Edward Schmults Files, Gerald R. Ford Library.

Summary

The Judiciary Act of 1789 attempted to balance the professional role of the attorney general with the need for political accountability. Throughout the subsequent expansion of both the administrative state and the organizational structure and duties of the Justice Department, Congress resisted all attempts to centralize authority for controlling government lawyers in the executive branch. Instead, Congress consistently created agency counsel charged with independent authority over legal advice and litigation within major government organizations. These individual counsel continue to serve as one check on the power of Justice Department lawyers and as a role alter that defines the expected behavior of OLC lawyers. While these agency counsel represent the interests of their organizations, the Justice Department lawyers, especially in the OLC and Solicitor General's office, fill the role of counsel for the United States as a whole.

Reacting to this failure to centralize control over the legal state, presidents moved toward consolidating the legal advisory and executive oversight roles in the White House. After Roosevelt created the Office of Counsel to the President, succeeding presidents

expanded the scope and responsibility of the position. Tension always had existed between presidents and attorneys general who were unwilling to justify presidential action. Fears of disloyalty and the desire for quick, partisan advocacy drove the expansion of the in-house legal counsel's role. Lawyers in the White House Counsel increasingly handled matters previously assigned to the Office of Legal Counsel.

The emergence of a competitor altered the balance between legal professionalism and political advocacy that the Office of Legal Counsel lawyers had struck since its creation. The presence of White House lawyers also disturbed the functional role set of the Office of Legal Counsel. No longer was the OLC the president's lawyer for policy matters. OLC lawyers no longer balanced professional legal advice and partisan advocacy within the office. The rise of the White House Counsel balanced these competing values by redistributing responsibility for performing the two roles between two separate organizational structures. The result was to institutionalize conflict among the president's lawyers.

Faced with exclusion from the law and policy process in the White House, the Office of Legal Counsel sought to adapt its role in the system. The need for role differentiation pushed the OLC to choose between the

values of professionalism and political responsibility. One alternative--politicization--was to support the presidents's program and, over time, prove that it had sufficient loyalty to the White House. Another possibility--principled adjudication--was fostered by post-Watergate proposals in Congress. Calls for an independent Justice Department, appealing to the professionalist orientation of the OLC, reinforced an adjudicatory approach to legal interpretation. In the context of political reforms, the power motives of elites in the executive branch and Congress continued to combine with institutionalized values of political responsibility and professional administration of the law in shaping the OLC's role. The impact of these reform proposals and their unintended consequences on the role of the OLC merit separate examination because they frame the legal environment and roles of the OLC in the modern context.

Chapter Three

Post-Watergate Reforms: Partisan Control or Role Differentiation?

The Democratic Congress of the post-Watergate period did not seek to achieve partisan gains by substantially altering the earlier patterns of legal administration. Congress, rejecting proposals to reorganize the system, reaffirmed limited political checks on the president's power to administer the law. The major changes in the status of government lawyers resulted from internal reforms initiated within the White House or by the Justice Department. These internal reforms allowed the OLC to differentiate its role from that of White House counsel. The post-Watergate political environment reinforced values of professionalism and independence in the OLC.

Ironically, the reforms ultimately exacerbated tension in contacts between the White House and the Office of Legal Counsel and produced dysfunctional tension between the White House, the OLC, and agency counsel.

Many observers point to Watergate and the Nixon administration as the turning point in relations between Congress and the executive.[1] Post-Watergate reform measures, such as the War Powers Act and the Congressional Budget and Impoundment Control Act, attempted to restore checks and balances in the system of separation of powers. Many opponents charged that these reforms ignored the president's constitutional authority and unduly constrained presidential power. Legal scholars similarly suggest that the Nixon administration fundamentally altered the organization and control of government lawyers. From this perspective, the era of conflict that continued after the Nixon administration contributed to growing legal confrontation between the president and Congress. Thus, proponents of the partisan change model would trace the changes in the system to reforms initiated by a Democratic Congress to control presidential discretion in administering and interpreting the law.

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[1] For a detailed discussion of this literature see pp. 14-19 above.

These interpretations do not place the reform proposals in the context of the development of the legal administrative state. Reform of the legal administrative state began before the Nixon abuses. The perceived politicization in Kennedy's appointment of Robert to the attorney generalship and the emergence of the Justice Department in the vanguard of civil rights and other policies initiated heightened congressional interest in this area. As the rise of the White House counsel began to alter relations among government lawyers in the executive branch, Congress focused for the first time on the administration of law. By the end of the Johnson administration, individual members increasingly began to scrutinize the adequacy of Justice Department protection of congressional interests. The Nixon administration drew Congress's special attention to the Justice Department. The Watergate scandal, criminal convictions of two attorneys general, and widespread perception that Nixon had politicized the Justice Department, all spurred proposals to create an independent attorney general.

The ethical conflicts and perceived politicization of the White House sped consideration of these proposals, but the Congress rejected all attempts to alter existing relationships. Unwilling to pursue

drastic reform, Congress developed a limited institutional counsel and relied on the traditional method of creating agency counsel with independent litigating authority to control executive power in legal administration. The outcome of the Watergate era reforms was to reaffirm limited political checks on the existing tensions in relationships between the White House, the Department of Justice, agency counsel, and Congress. The reform proposals that resulted from congressional investigations did reshape the values of lawyers administering law in the executive branch. Calls for independent administration of law altered the normative climate in which government attorneys operated. Each Congressional proposal, whether ultimately rejected or accepted, resulted in change in the Office of Legal Counsel and its environment. These reforms produced new role alters for the OLC, in the form of institutionalized congressional counsel, and reemphasized values of neutral competence in legal administration.

Justice as an Independent "Branch" of Government

In the spring of 1974, Senator Sam Ervin offered S. 2803, a bill designed "to insure the separation of

constitutional powers by establishing the Department of Justice as an independent establishment of the United States." In Ervin's words, the proposal was "a point of departure for informed discussion of the many problems confronting the system of administration of justice."[2] Though nothing in the Constitution compelled its rejection, the proposal met opposition from all sides. Former officials of the Justice Department, legal scholars, and members of Congress were unwilling to replace presidential control with an independent model of legal administration.

Ervin's proposal specifically focused on mechanisms of appointment as the solution to politicization and partisanship at Justice. Nixon had followed Harding, Roosevelt, Truman, Eisenhower, and Kennedy in appointing key campaign figures to be attorney general. John Mitchell, the campaign manager for the Nixon's presidential bid in 1968, resigned the post to head the Committee to Re-elect the president in 1972. The bill called for appointing attorneys general, their deputies, and solicitors general to a

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[2] Congress, Senate, Committee on the Judiciary, Removing Politics from the Administration of Justice, Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary of the United States Senate, 93d Cong., 2d sess. (1974), 3 (hereinafter Removing Politics).

six-year term. The power to appoint assistant attorneys general would lodge in the attorney general, rather than the president. Irvin would limit the presidential removal power to incidents of "neglect of duty and malfeasance in office." Under S. 2803, the attorney general would no longer be a member of the Cabinet. The Department of Justice would function instead "much like the regulatory commissions."

Irvin's proposal met nearly unanimous rejection even in the wake of the Watergate abuses. Former Justice Department officials and constitutional scholars objected to the proposal as a violation of the removal powers of the president. The removal power presents difficulty to constitutional scholars because the text makes no explicit mention of removals, except for impeachment. Presidential removal power flows instead from the appointments clause and historical practice. The appointment clause of the Constitution gives the president the power to:

> nominate, and by and with the Advice and Consent of the Senate, ... appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone,

> in the Courts of Law, or in the Heads of Departments.

For critics of the Irvin proposal, the text makes clear that the president exercises power over the appointment of executive officials.

Supreme Court interpretation of the removal power supports this conclusion. Under the decisions in Myers v. United States[3] and Humphrey's Executor v. United States[4], the Supreme Court ruled that the president possesses exclusive power to remove executive officials exercising nonministerial duties. In Myers, the Court upheld the removal of a postmaster without advice and consent of the Senate. Taft, speaking for the Court, put the removal question broadly: "[Whether] under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the consent of the Senate"?[5]

Taft relied on the original understanding of Congress to bolster his conclusion. In debating a bill creating the Department of Foreign Affairs, Congress amended the statute to replace the phrase "to be

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[3] 272 U.S. 52 (1926).

[4] 295 U.S. 602 (1935).

[5] 272 U.S. 52 (1926).

removed by the President" with "whenever the said principal officer shall be removed from office by the President of the United States." The framers of the bill thought the first draft was a redundant attempt to confer powers already possessed by the president. Taft found this historical elaboration of the framers' understanding compelling evidence that the Constitution vested the president with exclusive removal power over executive officials. For Taft, congressional restrictions on the removal power would undermine the constitutional plan of government. He wrote:

> A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three branches of government.[6]

The dissenters in Myers, Holmes, Brandeis, and McReynolds, had found that the Article I, Section 8 "necessary and proper" clause gave Congress a share in power over federal employees. For Holmes, if Congress could create executive offices, then it could

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[6] Ibid.

condition the removal of those officers. While the three dissenters and constitutional scholars criticized both the history of the removal clauses and Taft's conception of unitary branches strictly separated, the Court has retained the basic framework that emerged regarding removal of executive officers.

The Supreme Court, adopting the logic of the dissenters, did restrict the reach of Myers nearly a decade later in Humphrey's Executor v. United States.[7] Humphrey's estate challenged posthumously his removal from the Federal Trade Commission. Under the Federal Trade Commission Act, the president only could remove commissioners upon a showing of "inefficiency, neglect of duty, or malfeasance in office." President Roosevelt ignored the statutory restrictions and argued that the legislation unconstitutionally constrained his unlimited power of removal. The Court, upholding the legislative restrictions, distinguished Myers by categorizing the commissioners functions as quasi-legislative and quasi-judicial. Under the Humphrey's Executor rule, the president possessed exclusive removal power over only "purely executive" officers.

Reference to the removal clause and the Supreme

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[7] 295 U.S. 602 (1935).

Court doctrine thus begs the central question of the nature of the Justice Department's functions. As the chief legal officer of the United States, the attorney general performs executive functions. The source of much presidential power flows from the constitutional obligation to "take care that the laws be faithfully executed." From this view, because the "take care" clause gives exclusive and plenary powers over law enforcement to the president, attempts to remove the Justice Department from presidential control would violate constitutional strictures.

Nothing in the Constitution or in Supreme Court decisions compelled this solution. Irvin sharply defended his proposal against removal clause objections:

> All powers of the Attorney General and of the Department of Justice flow from acts of Congress. There can be little doubt at all--that what Congress gives, Congress can take away. An independent Department of Justice or a permanent Special Prosecutor is constitutional in theory. I am aware, of course, that some commentators argue that because the Constitution says that the President has a duty to take care that the laws be faithfully executed, the administration of justice is inherently executive and cannot be altered by Congress. I firmly reject that notion. There is not one syllable in the Constitution that says that Congress cannot make the Justice Department independent of the President. After all, Congress has established the General

> Accounting Office, as well as certain regulatory commissions, all of which "execute" certain laws independently of the President. No one can validly argue that those agencies are contrary to the Constitution.[8]

While one can dispute Irvin's reading of the law, he is essentially correct that Congress conceivably could place stipulations on removing Justice Department officials by making certain functions part of an independent Justice Department. Binding constitutional law on the subject simply was not the primary reason for rejecting Irvin's notion of an independent Justice Department.

Senator Alan Cranston presented an alternate proposal that would have created a permanent special prosecutor to monitor conduct of Justice Department and White House officials. Special Prosecutor Cox and others testified that a permanent special prosecutor would allow presidents to neglect their responsibility to oversee Justice and prevent unethical contacts. Congress rejected Cranston's proposal, too. Instead, the Special Prosecutor legislation limited this check to instances of specific wrongdoing.

The principal opponents of an independent Justice Department and a permanent special prosecutor

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[8] Removing Politics, 3.

objected to the proposal on normative grounds. While everyone agreed that the Nixon administration polluted the Justice Department and the process of legal administration for partisan political gain, few would endorse a Department of Justice responsible to no one. Democrats and Republicans alike, including Ted Sorenson, Kennedy's White House Counsel and Richard Kleindienst, attorney general to Nixon, testified against the reforms. This uniform opposition reflected a long-standing consensus on the desirability and practical need for a political control of the administration of law. Archibald Cox, former Solicitor General and Watergate Special Prosecutor, expressed this normative consensus in a statement to the Senate Subcommittee on Separation of Powers:

> It seems to me that the President should have the power and responsibility for making these decisions when they are important enough for him to make them, or at least should have someone who is attuned to his philosophy of government making them. The chief reason he should be involved in making such decisions is that there <u>should be</u> political responsibility for the decision, and it is through the President, in quadrennial elections and the impact of off-term elections, that that political responsibility is made known.[9] (emphasis added)

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[9] Ibid., 202.

Cox also suggested that the independent department proposal would worsen the problem of excessive politicization by detaching professional lawyers from the White House. "[S]uppose S. 2803 had been law," the Harvard law professor asked:

> The governmental philosophy of the Attorney General and the Assistant Attorneys General might have well been opposed to that of the President (Nixon). Sometimes that might make no difference. Perhaps there would have been an effort at cooperation or at least consultation.... The inevitable consequence would be that Presidents would build up the White House staff or Executive Offices.... Such a trend would not merely result in expensive duplication, conflict, and confusion. It would also dangerously increase the size and isolation of the executive establishment.
>
> The same unfortunate consequences would follow in the area now occupied by the Office of Legal Counsel in the Department of Justice. Any President--every President--had need to consult with lawyers in whose wisdom and judgement (sic) he had absolute trust in securing legal advice about his powers and duties, with whom he works emphatically in discussing the legal consequences of a course of action, and in drafting executive orders.
>
> If the Department of Justice were independent, this relationship might sometimes develop, but it seems unlikely to develop often. A newly-elected President is unlikely to confide in an Attorney General or Assistant Attorney General chosen by the opposing party. Instead, he will provide himself with

> legal services by building up his personal staff.[10]

In an era when presidential scholars expressed fear of an isolated president surrounded by sycophants, Cox' words rang true to many on the Judiciary committee.

Witnesses blamed the problems at the Justice Department on Nixon administration personnel. For insiders, the politicization of Justice was an aberration resulting from appointing campaign officials. The blame lay with people rather than the system. The Senate hearings on an independent Justice Department and a permanent general counsel did not produce formal changes in the relationship between the White House and Justice Department lawyers.

Instead of diminishing presidential controls on the Justice Department, Congress increased political checks on the attorney general's power by diffusing it. In the period from 1970 through the proposed reforms, Congress rapidly extended independent litigating authority to newly created agency counsel. Congress created legal fiefdoms, as Justice Department officials call agency counsel offices, following the same course it had after creating the Department of Justice a

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[10] Ibid.

century before. By 1978, nearly one-sixth of government lawyers worked outside the Justice Department.

Congress Creating Institutional Counsel

The most significant change in the post-Watergate period was the creation of congressional counsel. This reform altered the structure of legal relations in the system of bicameralism and separation of powers. The initial proposals for congressional counsel would have reorganized legal administration by dividing the responsibility for law enforcement and litigation between the executive and the legislative branches. Congress again refused basic restructuring of executive power to enforce the laws. The final product of the congressional counsel reforms simply added another political check on the administration of law by the executive.

Creating congressional counsel reflected the emergence and institutionalization of Congress more than a challenge to executive primacy over federal administration of the law. Reaffirming of the president's control over legal administration, Congress recognized the conflict created by forcing the Justice

Department, concededly the legal arm of the president, to defend congressional interests. The effect was to alter significantly the Justice Department's perception of its role in defending the legal interests of Congress.

After a decade of proposals and debate, the Senate in 1978 created for the first time an office designed to represent the body as an institution before the federal courts. Before that time, Congress had relied primarily on the attorney general to advocate its interests in litigation. Separation of powers issues and legal conflict did not always characterize interbranch relations.[11] Aside from the cooperative atmosphere, the instability of membership in Congress through the first half of the twentieth century further explains Congress's failure to develop a more formalized system for legal advice and litigation. The decline in the number of first term members and the rise in the average tenure of members are evidence in part of the increased stability and institutionalization of the Congress itself.[12]

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[11] See above, p. 52, n. 18.

[12] Nelson Polsby, "The Institutionalization of the U.S. House of Representatives," American Political Science Review 62 (1968): 144-168.

Insufficient development of Congress as an institution was a barrier to the formation of support structures to execute the legal advisory and litigative functions at an earlier date.

Two factors precluded consistent pressure for institutional representation for Congress in earlier periods. High rates of membership turnover prevented the perception and transmission of the need for such a service to the Congress as a whole.[13] The absence of constituent demands and expectations also may have slowed the pace of change. The status of the attorney general as chief legal officer of the United States deflected constituency expectations of Congress in this area.

Without its own counsel, Congress relied on executive branch lawyers to defend matters of legislative prerogatives, such as franking privileges and legislative immunities. Individuals in Congress sometimes would pursue litigation to defend

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[13] Cary Covington, Joseph A. Pika, Lester Seligman, "Institutionalization of the Presidency," Paper presented at the 1983 American Political Science Association Annual Meeting. The literature and models on institutionalization provide yet another alternative for further research. The need to develop the historical background and conditions shaping the Senate Legal Counsel prevent full elaboration of the institutionalization perspective of this issue.

congressional interests and prerogatives. Dissident members used these tactics as a means to seek broad, injunctive relief against particular policy decisions without much success.[14]

Creating a specialized litigating structure for the Senate as an institution trailed behind the rise of litigation by individual members of Congress that began before the Nixon abuses. The calls for congressional counsel began before the Nixon administration. In 1967, Senator Vance Hartke proposed for the first time a Legislative attorney general to serve as legal advisor and litigator for the Congress.[15] The primary reason to create a this office was to supervise the executive branch lawyers, both in and outside the White House. Hartke felt that executive agencies, the White House, and judges undermined Congress's ability to make law, because they relied on independent and self-interested interpretations of legislative

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[14] Note, "Congressional Access to the Federal Courts," Harvard Law Review 90 (1977): 1632, 1633, n. 8.

[15] Congressional Record, Vol. 113, 5277-78, 6304-05, 7984-86.

intent.[16] The rising demands and the growth of administrative bureaucracy prevented adequate oversight of agency action.[17] Creating a legislative general counsel was another innovation designed to control an overreaching executive.

The initial proposal received little support. In hearings on the reform of the Justice Department in 1974, Hartke proposed again his vision of a congressional equivalent to the attorney general in S. 495. Hartke's proposal authorized a congressional counsel to defend the interests of Congress when another party challenged the constitutionality of a statute, to intervene in cases as an amicus curiae, or to defend a member of the Congress or the body as a whole, with the consent of the Judiciary Committee of either House of Congress.[18] The general counsel would be the functional equivalent of the attorney general and convey the "official" legislative intent to the courts. Hartke later limited the counsel's role by eliminating calls for a "Legislative Attorney General"

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[16] Removing Politics, 28-33.

[17] Ibid., at 33.

[18] Congressional Record, Vol. 113, Part 4, 5277.

and restricting litigation to intervention or amicus participation.

Senator Hartke was unable to marshall support for his bills. The primary problem was disagreement regarding procedures of appointment and the authorization of legal action by the counsel. Senator James Abourezk than took up the cause for a congressional counsel. As part of the Watergate Reorganization and Reform Act of 1975, Abourezk proposed S. 2731 to create the Office of Congressional Counsel.[19] Even at the height of post-Watergate reforms, Congress could reach no consensus and thus relied on the Department of Justice to interpret legislative intent and individual members to oversee agency interpretations.

Adverse court decisions that Congress attributed to inadequate representation provided further evidence of the need for independent counsel. While the Government Operations Committee discussed Abourezk's proposal as part of the Watergate Reorganization and Reform Act, the Committee on the Judiciary investigated

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[19] Congress, Senate, Committee on the Judiciary, Watergate Reorganization and Reform Act of 1975, Hearings before the Committee on Government Operations of the United States Senate, 94th Cong., 1st sess. (1976), 119.

the "Representation of Congress and Congressional Interests in Court." These hearings, providing a history of Justice Department and outside representation of Congress, uncovered the conflict inherent in Justice Department representation of the legislature. Legislators pointed to a worrisome pattern: The Justice Department often would win the case but lose points of crucial interest to the Congress.

Two cases were central to translating these concerns over inadequate Justice Department representation of congressional interest into action. Both vividly illustrated the inherent limitations of Justice Department representation. In Buckley v. Valeo[20], the Justice Department argued for the constitutionality of the Federal Election Campaign Act, with the exceptions of the enforcement powers of the Federal Elections Commission. The statute called for the President pro tempore and the Speaker to appoint a majority of the commissioners. This case was of particular importance, because regulating campaign finance directly affected a primary interest of Congress. The Solicitor General filed a separate

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[20] 424 U.S. 1 (1976).

brief, arguing that the issue was not ripe for adjudication. If the Court chose to hear the case, the Solicitor General would oppose the provisions as an unconstitutional vesting of power in the hands of the Federal Election Commission, essentially an arm of Congress. This assertion of unconstitutionality troubled many members of Congress and the bar generally, because the Justice Department decided not to support a duly passed statutory provision that the president had signed, when it was not necessary to take such a position. Archibald Cox then filed an amicus brief for selected members of the Senate that defended the enforcement provisions. The Supreme Court, siding with the Solicitor General, aggravated Congress's sense of underrepresentation in courts.

The second set of cases involved conflicts of interest when the Solicitor General argued the scope of immunity for federal legislators and their staff under the speech and debate clause of the Constitution. In Doe v. McMillan[21], parents, alleging an invasion of privacy, sought to enjoin publication of a congressional subcommittee report on the District of Columbia school system. The congressional committee

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[21] 412 U.S. 306 (1973).

believed that the speech and debate clause immunized Congress from such an injunction. The Justice Department relied on the speech and debate clause immunities to defend members of Congress from suits in the lower federal courts, but withdrew its services as counsel to congressional committees just as the cases reached the Supreme Court.

The Department was simultaneously prosecuting Senator Mike Gravel for publishing the Pentagon Papers and arguing for a narrow interpretation of legislative immunities for the Senator and his aides.[22] The Solicitor General, advocating a narrow interpretation of legislative immunity under the speech and debate clause in Gravel, did not want to argue simultaneously for a broad view of legislative immunity in Doe. Though Congress obtained private counsel, the Court ruled in favor of the private plaintiffs and narrowly defined the scope of legislative immunity under the speech and debate clause. As a result, Congress employed Fred M. Vinson, Jr. as outside counsel to argue the cases. The Supreme Court adopted the broad interpretation in Gravel, but restricted immunity to those matters that are "an integral part of the

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[22] Gravel v. United States, 408 U.S. 606 (1972).

deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation...."[23] The cases brought limited victories to Congress, but pointed out the clear conflict of interest inherent in Justice Department representation.

Losses occurred in other important areas. For example, in United States v. American Telephone and Telegraph Co.[24], the White House successfully enjoined compliance with a congressional subcommittee subpoena for an investigation of warrantless wiretapping. Representative John Moss hired private counsel to defend the committee's subpoena after the Justice Department refused to do so. This case was one of only three lawsuits by Congress or one of its committees before the creation of the Senate Legal Counsel.[25] The logic of the Court's decision in Buckley undercut Congress's ability to enforce its own subpoena power in

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[23] Ibid.

[24] 551 F.2d 384 (D.C. Cir. 1976).

[25] The others are Reed v. County Commissioners 277 U.S. 376 (1927) and Senate Select Committee on Presidential Campaign Activities v. Nixon 498 F.2d 725 (D.C. Cir. 1974).

the courts.[26] Other adverse decisions involving subpoenas and damage actions against a Senate committee as well as a challenge to the franking privilege, spurred congressional efforts to create independent legal counsel.[27]

Abourezk believed that deficient representation had shifted from the exception to the rule. "Although the Department itself acknowledges the conflict in these cases," he said, "I suggest that such a conflict exists whenever the Department is called upon to defend congressional powers which may be exercised vis-a-vis the executive branch."[28] Concern for adequate representation of Congress in separation of powers

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[26] 424 U.S. 1, at 166 (1976).

[27] Ashland Oil v. FTC, 409 F.Supp. 297 (D.D.C. 1976); McSurely v. McClellan, 553 F.2d 1277 (D.C. Cir. 1975); and, Common Cause v. Bailar, decided sub nom Common Cause v. Bolger, 512 F.Supp. 26 (D.D.C. 1980), aff'd, 461 U.S. 911 (1983). For a list of cases in which the Justice Department formally refused to defend the interests of Congress, see Congress, Senate, Committee on the Judiciary, Representation of Congress and Congressional Interests in Court Hearings before the Subcommittee on Separation of Powers of the United States Senate, 94th Cong., 2d sess. (1976), 36.

[28] Congress, Senate, Committee on the Judiciary, Watergate Reorganization and Reform Act of 1975 Hearings before the Committee on Government Operations of the United States Senate, 94th Cong., 1st sess., 121.

disputes energized Congress to seek more effective representation. Importantly, Congress chose not to alter the statutory responsibility of the attorney general to represent the United States in all litigation. Nor did Congress sever this professional role of the attorney general (i.e. providing effective representation for the interests of the United States as a whole) from the attorney general's political role as advisor to and defender of the president.

Despite competition with the executive branch over legal representation, the Senate initially hesitated to create its own Counsel largely for fear that members would use it as a tool to validate partisan policies through litigation. Abourezk's proposal addressed this concern. S. 2731 differed from Hartke's original proposal by permitting intervention by congressional counsel only upon authorization by a resolution of a House of Congress or by a two-thirds majority of a bipartisan joint leadership group composed of the majority and minority members of the Judiciary Committees, the Speaker and Minority Leader of the House, and the Majority and Minority Leaders of the Senate. Congressional counsel thus would represent only the whole Congress. The triggering mechanism alleviated fears that "counsel's assistance would be

invoked by groups with conflicting interests or groups with interests not in accord with those of the majority of the Congress."[29] At a time of rising litigation by individual members, Congress had reason to fear that dissident members would shift partisan battles to the judicial forum. The desire to stop the increasing litigation by minority factions in part provided the momentum for passing the bill.

On May 12, 1976, the Senate Government Operations Committee reported S. 495 to the floor with Abourezk's triggering mechanism substituted for Title II. The Senate passed S. 2731 in the 94th Congress by an overwhelming 91-5 vote, but the House did not act on the bill. The Senate again passed the proposal as part of S. 555, The Public Officials Integrity Act of 1977. Still, the House of Representatives refused to act on every proposal to establish a joint legal counsel. Institutional rivalry between the House and Senate prevented the creation of a joint office to coordinate legal matters for the Congress. Even with the concessions of joint and equal control, the House

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[29] Ibid. at 122.

balked at a cooperative arrangement with its prestigious partner.[30]

Over a decade after Hartke's initial proposal, the Senate finally passed legislation to established a separate Senate Legal Counsel as its legal advisor and litigator. Title 2 U.S.C. Sec. 288 charges the Senate Legal Counsel with the responsibilities to advise Congress on legislation and other congressional activities and to defend congressional authority, intent, and legislation in the courts. The House of Representatives relies on the Counsel to the Clerk of the Speaker to litigate. In contrast to the Senate Legal Counsel, the House's Counsel may intervene either to represent the interests of the whole body or the majority party.[31]

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[30] The conference report on S. 555 directed that the Senate Legal Counsel "should, whenever appropriate, cooperate and consult with the House in litigation matters of interest to both Houses." The House, pursuant to authorization by the Bipartisan Leadership Conference or the Leadership Conference, often appears with the Senate Legal Counsel. 1978 U.S. Code Cong. & Admin. News 4381, 4396.

[31] This significant difference merits further research and indicates the degree to which institutional variables affect the development of advisory units in Congress. The different authorization procedure would allow the House counsel to assert the interests of the majority party in the courts against the will of dissenting factions. Importantly, the role of the Counsel to the Clerk of

While debating various proposals for a counsel to the Congress, members repeatedly emphasized the importance of the individual chosen to represent them. Whether as a concession to gain support or a desire to strengthen the integrity of the office, Senator Hartke advocated a nonpartisan appointment and a depoliticized office.[32] The final statute mandated a nonpartisan appointment for two Congresses. Michael Davidson, the first Senate Legal Counsel, had no legislative experience before Senator Byrd interviewed him for appointment.[33] His last post before accepting the job was as counsel to the United States District Court of

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the Speaker of the House changed in response to the changing legal posture of the Carter Justice Department. The increasing confrontation that resulted from the "independent" Justice Department in cases such as Chadha spurred the House to seek an aggressive litigator to counter executive refusals to defend duly enacted laws. Chapters Five and Six discuss the dynamics of this growing confrontation. For the purposes here, it is only important that the House rejected the proposals in the post-Watergate reform era.

[32] Congress, Senate, Committee on the Judiciary, Removing Politics From the Administration of Justice Hearings before the Subcommittee on the Separation of Powers of the Committee on the Judiciary of the United States Senate, 93d Cong., 2d sess., 31.

[33] Michael Davidson, telephone interview with author, 24 July, 1990.

the District of Columbia, a research position in the very tribunal that had rendered the decisions that spurred creation of the Senate Legal Counsel. Davidson also had litigating experience as assistant counsel for the NAACP Legal Defense Fund from 1966 to 1973.

Partisan control over the Senate did not affect the appointment of Davidson or his deputy counsel. Unlike the Solicitor General's Office, few lawyers leave the Office of Senate Legal Counsel once hired. Michael Davidson, the only Senate Legal Counsel to date, continues in his post as Chief Senate Legal Counsel after twelve years of continuous service. Former Deputy Senate Legal Counsel Charles Tiefer left the Senate after seven years of service to join the Counsel to the Clerk's Office in the House. Deputy Senate Legal Counsel Morgan Frankel began work at the Senate Legal Counsel in 1981 after a clerkship with Judge Harold Greene of the District Court of the District of Columbia. The average length of tenure in the Senate Legal Counsel is longer than that of the Solicitor General's Office, which suggests a low level of partisanship and a high degree of internal cohesion.

Justice Reforms Itself

The atmosphere of reform also prompted internal reform by the Carter Justice Department. President Carter and Attorney General Griffin Bell endorsed attempts to depoliticize the Justice Department. Bell's theory of legal administration emphasized the multiple constituencies and professional norms that guide the Justice Department's mission. As Bell declared: "We're lawyers for the people of the United States, for the agency heads and for the President--not just employees of the government. We have to act professionally, give our best judgment and be ethical in what we do."

Bell established organizational barriers to White House influence in the Justice Department. A Justice Department organizational directive prohibited White House staff members, Cabinet members, and members of Congress from direct contacts with Justice Department officials below the rank of deputy attorney general. Though designed primarily to prevent intervention in criminal investigations, Bell's order had widespread effects on relations between the White House and all units in the Justice Department. Under the new arrangement, all White House staff requests for

legal advice from the Office of Legal Counsel would have to be filtered through the White House Counsel. The directive barred direct contact between White House staff personnel and OLC lawyers.

Bell's directive advantaged both the White House Counsel and the Office of Legal Counsel. Lawyers at OLC supported the proposal, because it limited the number of contacts with White House policy advisors and gave OLC lawyers freedom to make independent interpretations of the law. Early in the Carter administration, the OLC expressed concern to the White House Counsel that White House Staff did not follow the attorney general's directive.[34] The increased autonomy from White House policy directives and staff allowed OLC lawyers to develop a new role orientation. OLC lawyers, in contrast to those at the White House Counsel's office, no longer saw themselves as the personal lawyers of the president. One attorney-advisor expressed sentiments common among OLC lawyers after the Carter administration: "I viewed our client

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[34] Memo, Margaret McKenna to Robert Lipshutz, 2/10/77, folder "JL 4-3 1/20/77-1/20/81," Box JL-13, WHCF, Jimmy Carter Library.

as the Constitution, not the President."[35] In the OLC staff's eyes, White House lawyers were the president's hired guns.

White House Counsel Robert Lipshutz and the staff counsel favored the proposal, because it made them the sole contact between the White House and the Office of Legal Counsel. Accordingly, the White House Counsel could enhance and secure its role in coordinating all legal matters for the president. The White House lawyers jealously guarded this role. When Jody Powell contacted OLC lawyers directly to request a legal opinion on press passes for Soviet journalists, Lipshutz directed his anger at both Powell and the OLC for excluding his office from the decision.[36] The OLC similarly guarded its turf. When White House lawyers requested that Markham Ball, General Counsel to the Agency for International Development of the Department of State, contact them before following the legal and

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[35] OLC Attorney-Advisor, interview with author, 30 January, 1990. Other OLC members typically defined themselves by distinguishing their professional orientation to the White House Counsel lawyers' political role or by reference to the quality of legal work done in the OLC compared to that in the White House Counsel's office or in executive agency counsel offices.

[36] Memo, Margaret McKenna to Robert Lipshutz, 8/22/78, folder "JL 4-1 1/20/77-1/20/81," Box JL-13, WHCF, Jimmy Carter Library.

policy advice of the OLC, John Harmon, Assistant Attorney General in charge of the OLC, informed Markham that he was bound statutorily by OLC's opinion.[37]

Bell's close relationship with Carter and Carter's commitment to reforming the Justice Department seemingly supported Bell's effort. If personalities and political loyalties were important ties, the problems that Richardson had with the Nixon White House would be unlikely to occur under Bell. Nevertheless, tensions between the White House and Justice continued unabated. Organizational directives limited contact between White House staff and Justice Department units on policy or enforcement issues. Members of the White House staff and the White House Counsel objected to the directive for all Justice Department lawyers except those in the OLC.[38] Continuing a policy developed in the Ford administration, Bell had the OLC serve as the

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[37] Memo, Robert Lipshutz to Markham Ball, 5/27/77; Memo, Robert Lipshutz to John Harmon, 10/27/78; Memo, Ball to Lipshutz, 10/16/78; Memo, Harmon to Lipshutz, 12/8/78; and Letter, Ball to Harmon, 12/14/78; all in folder "Veto, Congressional: 2/77-12/78 Agency for International Development," Box 49, Staff Office-Counsel Lipshutz, Jimmy Carter Library.

[38] Memo, Robert Lipshutz to the Attorney General, 9/12/78, folder "Justice, Department of 1/77-9/79," Box 30, Staff Office-Counsel Lipshutz, Jimmy Carter Library.

filter for White House requests for updates on enforcement.

From Bell's perspective, the internal reforms fulfilled Carter's campaign promise to re-establish neutral administration of the law. "It is one campaign promise that has been absolutely carried out," he stated:

> The response we have had demonstrates that there ought to be a neutral, nonpartisan Justice Department, just as in the foreign intelligence area. And I'll say something else; it would be very difficult for anybody to change it back. The lawyers here would hardly stand for it. There might be an Attorney General with a political bent, but the people down the line would protest and so would the American people and members of Congress who want an independent Justice Department.[39]

Creating barriers between the Justice Department and White House staff was a shrewd political maneuver in the wake of Watergate. Bell thought these reforms would increase the stature of the Justice Department by restoring the faith of Congress and the people. If Bell's attempt to used a favorable environment to justify changes of degree, the result of his agenda

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[39] Quoted in Dom Bonafede, "'Judge' Bell Presides Over a Changed Justice Department," National Journal, 2/10/79, 214.

was to produce an unrealistic separation of politics and professionalism.

Whatever broad political support may have resulted from increased independence, however, the reforms did not satisfy White House staff advisors who believed that the neutrality and independence of the Justice Department often interfered with policy development. Members of the Domestic Policy Staff met to discuss the widespread dissatisfaction with Justice among White House and executive agency personnel. Notes of this meeting by a domestic policy staffer summarized the effects of the severed ties between Justice and the president. Among general "perceptions about justice," she noted:

> 1. That concern about depoliticizing has affected relationships in program areas (Law Enforcement Assistance Administration, the Bureau of Prisons, Immigration and Naturalization Service)--interchange occurs only when we initiate.
>
> 2. That Justice has become its own client + often ignores views of the agencies it represents.
>
> 3. That Justice often resolves interagency matters in a manner contrary to views of all the agencies without White House involvement.[40]

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[40] Notes, Domestic Policy Staffer, No Date, folder "Justice Department-Relationship," Box 14, Domestic Policy Staff-Civil Rights & Justice-White, Jimmy Carter Library.

Two years into his term, Griffin Bell bluntly described the limits on coordinating legal policy: "Although I am the chief legal officer in the Executive Branch, I have virtually no control or direction over the lawyers outside the Department of Justice, except indirectly in connection with pending litigation." Bell felt that the Justice Department's independence made it uniquely able and qualified to coordinate legal advice and litigation for the executive branch. Like the Hoover Commission's recommendations for consolidation, Bell's pleas for better efficiency and coordination of executive branch lawyers fell on deaf ears.

The multiplicity of agency legal staffs and litigation by the 1970's proved unmanageable for the attorney general and unacceptable to the White House staff which wanted stronger policy oversight of executive agencies. The burgeoning number of agency counsel created in the early seventies made it difficult for the Office of Legal Counsel and the Solicitor General to coordinate legal policy in the executive branch. In response to executive agencies pursuing litigation without approval from the Justice Department, President Carter established the Federal Legal Council by Executive Order 12250 to provide

better coordination and control of advice and litigation in the Executive Branch.[41] The Council consists of the heads of 15 executive agencies and the attorney general. The Executive Order also created a Litigation Notice System requiring agency counsel to notify the attorney general of all pending litigation. It is not clear to what extent the Federal Legal Council works to coordinate agency legal staffs.

Attorney General Bell also tried to expand the OLC's role in coordinating legal opinions among agency counsel before the litigative stage. In theory, the Office of Legal Counsel serves as coordinator of the various agency counsel on questions of law or interagency legal disputes.[42] This process, however, is initiated by agency counsel themselves.[43] As is the case with trial-level litigation, the Department of Justice only can oversee the major cases that arise and must leave most legal matters to agency lawyers.

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[41] Codification of Presidential Proclamations and Executive Orders, 2 November, 1980, 482-84.

[42] 28 U.S.C. S 510.

[43] Agency counsel sometimes seek to ascertain the OLC opinion before it is issued formally. If the advice proves less than satisfactory, agency counsel may attempt to withdraw the request for advice. The OLC often issue the formal opinion in spite of the agency's withdraw.

Lacking formal authority to enforce uniform interpretation of law in the executive branch, OLC lawyers depended on maintaining good relations with agency counsel in order to coordinate legal policy.

The new independence of the Justice Department created tension in its relationships with agency lawyers. Agency counsel could no longer assume that Justice Department officials acted on behalf of White House policy interests. While they were willing to accept adverse policy decisions and legal interpretations from the president's operatives, agency counsel were unwilling to submit to the authority of an independent Justice Department.

The increased independence of Justice Department lawyers from White House control also had dysfunctional effects on relations with Congress. Though the history of the congressional counsel reaffirms Congress's commitment to executive administration of the laws, the existence of congressional counsel had a broader impact in the separation of powers arena. Freed from representing congressional interests in litigation, Justice Department lawyers began to take a stronger stand on separation of powers issues. The congressional counsel stood as a role alter for Justice Department lawyers in the OLC. Just as the Senate

Legal Counsel was expected to defend the constitutional powers of Congress, so OLC lawyers were to defend the constitutional prerogatives of the president. With the ties to the White House severed and the White House Counsel serving as the political lawyer for the president, the OLC adopted the role of defending the presidency.

By the time Bell left office before the 1980 presidential campaign, the relationship of the Justice Department to other government lawyers had changed substantially. From the origins of one attorney general serving the legal needs of the entire government there had evolved a competition among many government lawyers with diverse interests and roles. Tension and rivalry between the OLC and the White House Counsel persisted. The OLC's independence diminished the Justice Department's ability to supervise the counsel of various executive agencies. The existence of congressional counsel freed the OLC from its obligation to defend the interests of the United States before the courts. The implications of this fragmentation of the government's legal administration is the focus of the rest of this study.

Conclusions and Implications for a Cross-Institutional Theory of Development

The need to balance political responsibility with professionalism has been a continuous force shaping the development of the federal legal administration. In striking this balance, elites in the Executive Branch and Congress battle for control and power over law enforcement by the Justice Department. The continued independence of agency counsel reflects the earliest fears of a strong centralized legal officer. The shifting relationship between the White House Counsel and Office of Legal Counsel indicates the constant desire of presidents to receive supportive, as distinct from independent, legal advice. Congress's rejection of proposals to create an independent Justice Department suggest a continued commitment to a legal administrative state that is responsible to the president and, at the same time, represents the interests of the United States as a whole. From the earliest stages to the present developments, the history of the federal legal state provides no support for arguments regarding the independence of the Justice Department.

This history suggests the need to expand the time frame of current studies of institutionalization of advisory staff units in the presidency and Congress in order to understand more adequately the process of institutionalization. Early structural arrangements, in whatever form, set the course for future developments. Both the president and Congress battled for control over the legal functions of government as a means to gain control over the development of policy. Still, Congress never considered seriously proposal to fundamentally alter control of the legal state. Presidents increasingly relied on the White House Counsel to receive a more generous legal interpretation of their power. Congress similarly created the Senate Legal Counsel to wrest control over legislative prerogatives and interpretations of legislative intent from the executive branch and the courts. Each sought to augment control over policy rather than to achieve a specific instrumental goal. This battle for control illustrates the role of elites in the process of institutionalization. Throughout the course of development of federal legal machinery, Congress, the president, and the courts determine the pace and direction of change.

Several implications for theories of institutions follow from the findings of these case studies. Placing greater emphasis on the interplay of historical antecedents and elite power motives better explains the course of institutional development. While external demands from a growing society may catalyze institutional growth, the outcome of the process more likely reflects the structure of elites who have a stake in the shape of the resultant institutions. These elites interact within the context of beliefs about the proper arrangement of government institutions. These beliefs constitute an enduring ideology of state development that constrains the choices of elite reformers.

Institutional interests motivate elites to seek institutional change as well as particular policy preferences. Elites acted within their roles in shaping the development of the modern legal administrative state. Researchers need to analyze systematically the choices available to elites and their attempts to construct institutions to enhance their relative power. The difficulty with this approach lies in linking external demands, institutional structures, and elite motives to the outcomes of the process of institutionalization.

The comparison of development of the lawyering functions in the Congress and presidency highlights the different requisites for institutionalization. Congress as an institution itself developed more slowly. As a result, growth of advisory units proceeded more slowly and Congress relied on executive agencies to fill these functions. Congress during this period was able to prevent the centralization of executive authority over the bureaucracy as a means to maintain its power. After membership in Congress stabilized, transmission of the need for a separate advisory unit and the desire for individual members to retain control slowed the process of development.

In the presidency, a distinct set of limitations hindered efforts to change organizational arrangements of federal lawyering functions. The need for congressional approval of changes precluded presidents from constructing institutions to fit their needs. Presidents likely will continue to seek greater control over the various agency counsel, whether by strengthening the role of the Federal Legal Council or some other means, while Congress tries to maintain a check on legal administration through a decentralized legal structure and a defensive institutional counsel. Officeholders will determine the shifting bargains

between the Department of Justice and the White House. The relationships among the myriad of legal professionals in the government may change substantially over time, but the forces shaping those changes for the past two hundred years have not.

Changing relationships among government lawyers affect the development of legal policy both inside and outside the courts. Three major developments are central to understanding legal administration in the modern American state: (1) the rise of a White House counterweight to the Office of Legal Counsel; (2) the emergence of a congressional counsel, and (3) agency antagonism toward centralized Department of Justice control. The development of the White House Counsel and congressional counsels dramatically altered the number of government lawyers and the nature and structure of norms of government legal policy.

The internal reforms undertaken to "remove politics from the administration of Justice" had the unanticipated consequence of causing tension in the roles of OLC lawyers. The political and professional legal roles once performed by the Justice Department alone were spread among the various government lawyers now present in the modern system. The following chapters use case studies of legal disputes to focus on

three relationships: the White House and the Justice Department, Congress and the president, and the president and the executive agencies. Each case study shows how the changing norms of the legal administrative system affected legal policy and legal interpretation by the Office of Legal Counsel.

Part II

OLC Politics and Constitutional Interpretation

Chapter Four

Interagency Conflict and Styles of Dispute Resolution

The effects of the post-Watergate reforms were most notable in the OLC's mission of resolving conflicts among executive agencies. Several role orientations were open to OLC lawyers in resolving interagency legal disputes. The OLC could operate as the president's political agent, a functionary, settling each dispute in a manner most consistent with the president's policy agenda. Alternatively, the OLC could mediate disputes, a mediator, minimizing conflict by finding a middle ground for agreement between the two agencies in conflict. The OLC also could serve as a legal advisor to the clientele agency, an advocate. In a dispute between agencies, the OLC would defend the party represented by Justice in on-going litigation.

In the wake of reform and Bell's effort to restore the Justice Department, the OLC adopted an adjudicatory approach to interagency dispute resolution. This orientation differentiated the OLC's functional and representational roles.[1] By adopting an independent, judge-like posture to conflict resolution, the Justice Department avoided overlapping functions with the White House Counsel, who increasingly served as the president's emissary to agency counsel. Moreover, the distance from the White House reinforced the values of departmental neutrality and independence that Congress felt the Nixon administration had compromised.

The adjudicatory method chosen by OLC lawyers did not function well because it heightened conflict. In the post-reform era, the OLC tendency toward formal adjudication and independent legal reasoning caused dissatisfaction both among agency counsel and within the White House Counsel's office. In searching for a new role, OLC lawyers abandoned the traditional balance of professional and political roles in favor of

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[1] Ralph Turner and Paul Colomy, "Role Differentiation: Orienting Principles," Advances in Group Processes 5 (1987): 11. Functional roles differ based on the tasks performed by role occupants. Turner and Colomy define representational roles by the values, (e.g. independence) supported by performing the role.

neutral, principled adjudication of legal issues within the Justice Department. The effect of this new role was to escalate close policy disputes to the level of constitutional confrontation, forcing the issues into courts.

According to Martin Shapiro, the nature of adjudication compromises the neutrality of the arbiter. Once the judge renders a decision, losers no longer perceive that the process was fair or that the ruling is impartial. Because courts need political support, judges must deviate from the strict form of adjudication in most cases. The prototypical model of adjudication as "(1) an *independent* judge applying (2) preexisting legal norms after (3) adversary proceedings in order to achieve (4) a dichotmous decision in which one of the parties was assigned the legal right and the other found wrong" does not describe the actual role of judges, but instead creates a mythical picture of what courts do, the "myth of the triad"[2]

The process of managing interagency conflict by the Office of Legal Counsel directly parallels the tensions in the triadic resolution of adjudication.

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[2] Martin Shapiro, Courts: A Comparative Analysis, (Chicago: University of Chicago Press, 1981), Chapter 1.

Interagency conflict and the need for executive oversight of legal interpretation among agencies exacerbate problems associated with adjudication as a means of dispute resolution. Agency counsel are the consummate "repeat players"[3] in legal struggles in the executive branch. The on-going relationships between agencies over diverse policy issues and the need for executive oversight demand that mediation be the primary means of conflict resolution.[4] If the Justice Department is to fill this role, parties to interagency disputes cannot feel that the Department's Office of Legal Counsel impartially resolves disputes. Supervision of agency counsel is difficult because agency counsel must voluntarily seek OLC intervention. If the OLC alienates agency counsel or the agency counsel fears an adverse ruling, the counsel can withdraw the request for advice and seek to bargain directly with the antagonist. The result is diminished

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[3] Marc Galanter, "Why the "Haves" Come Out Ahead," L. & S. Rev. 9 (1974): 95.

[4] Lon Fuller, distinguishing the two styles of dispute resolution, characterizes adjudication by a formal resolution of competing claims of right and mediation by the more activist role of the mediator in finding gorunds to bring parties to a bargained solution. "The Forms and Limits of Adjudication," Harvard Law Review 92 (1978): 353.

oversight of the executive agencies and declining status with the White House.

The OLC's approach to dispute resolution directly influences its status with White House lawyers and policy makers. A case study of the events intervening between the Supreme Court's decisions in National League of Cities v. Usery[5] and Garcia v. San Antonio Metropolitan Transit Authority[6] illustrates both the limitations of formal adjudication as a method of conflict resolution among agency counsel and the importance of coordinating mechanisms for executive branch lawyers.

In National League of Cities v. Usery, the Supreme Court held that the Tenth Amendment of the Constitution barred application of the minimum wage and maximum hour provisions of the Fair Labor Standards Act to "integral government functions" of states and municipalities. Less than a decade later, the Court abandoned the National League approach. Justice Blackmun wrote for the 5-4 majority,

> Our examination of this 'function' standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of

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[5] 426 U.S. 833 (1976).

[6] 469 U.S. 528 (1985).

> state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is inconsistent with established principles of federalism and, indeed, with those very federalism principles on which National League of Cities purported to rest. That case, accordingly, is overruled.[7]

The short period between the two decisions and the seeming lack of concern for stare decisis by both sides drew the attention of journalists and legal scholars. The closely split decisions were seen as a showdown and watershed moment for the competing theories of federalism. Conservative critics attacked the Garcia decision as sounding the death knell for federalism as a constitutional limitation on national power.

The transition from National League to Garcia was not so abrupt as it appeared. The demise of the 'traditional state function' approach began as a political and legal battle involving the Department of Labor, the Department of Transportation, the Justice Department's Office of Legal Counsel, and the White House Counsel. The road from National League to Garcia illustrates the distinct approaches to conflict resolution taken by the White House Counsel and the Justice Department's Office of Legal Counsel and their effects on developing constitutional law. The OLC

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[7] Ibid.

adjudicated the dispute as though it were a judge hearing the case. White House lawyers and politicians resolved the conflict created by applying the Fair Labor Standards Act to state and municipal operations by a negotiated settlement after months of legal confrontation.

National League of Cities: The Origins of Conflict

Congress in 1974 amended the Fair Labor Standards Act to extend coverage of the statute's minimum wage and overtime provisions to employees of States and municipalities. The National League of Cities sought to enjoin enforcement of these provisions on the grounds that they unconstitutionally extended congressional power over interstate commerce. In the Supreme Court, NLOC argued that operations of state and local governments were intrastate commerce and thus beyond the reach of federal regulation. In National League of Cities v. Usery, the Court agreed in principle, but limited the scope of the state's immunity from congressional power to the regulation of wages and hours. The Supreme Court struck down the amendments to the Fair Labor Standards Act and ruled that the Commerce Clause does not allow Congress to

extend minimum wage and overtime wage provisions to workers involved in "traditional" or "integral" state functions. The case overruled the 1968 decision in Maryland v. Wirtz[8], which rejected a challenge to extending the FLSA provisions to state employees in schools and hospitals.

Underlying the decision was a traditional conception of the relationship between federal power and state autonomy under the Constitution. Rehnquist, writing for the majority, argued that some activities of the state must be immune from federal regulation or the state would be little more than political subdivisions of the federal government. The Court thus created a zone of immunity from congressional power for those government functions that are essential to state's existence. The Court did not provide a clear line demarcating those government activities that were immune from wage and overtime regulation under the FLSA.

The Court remanded the decision to a three-judge federal district court for application of the statute. The National League of Cities filed a brief before the district court that, despite the Supreme Court holding,

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[8] 392 U.S. 183 (1968).

sought an injunction against the enforcement of the FLSA provision. According to the Department of Labor, the National League of Cities attempted to broaden the Court's holding by enjoining enforcement of the FLSA in nontraditional activities. On remand from the Supreme Court decision in National League, the United States District Court for the District of Columbia entered an order that permitted the Department of Labor to classify operations by states and municipalities as traditional and nontraditional state functions.[9] The ruling directed the Secretary of Labor to publish regulations listing government activities "determined by the Courts or by the Administrator not to be . . . integral operations."[10] In National League of Cities, the Supreme Court had not specified the scope of traditional state functions. The majority opinion simply listed police and fire protection, sanitation, public health, and parks and recreations as examples. Rather than developing an exhaustive list, the district court, consistent with a limited judicial role, suggested that the traditional state function approach

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[9] National League of Cities v. Marshall, 429 F. Supp. 703 (D.D.C. 1977, three-judge court).

[10] Ibid., at 707.

would "require elucidation in the factual settings presented by future cases."[11]

The Road to Garcia

Lawyers in the Labor Department took this order to mean that the Supreme Court did not require formal rule-making to promulgate regulations governing the application of the FLSA to state employees. Their interpretation rested on the assumption that formal rule making was inappropriate to apply legal principles to specific fact situations. As Labor Secretary Marshall defended the "opinion letter" and law suit process:

> Clearly, it would be entirely inappropriate(and contrary to the agreement reached with the court and the NLOC) to test the correctness of the Department's legal position with respect to the coverage of specific governmental activities through the notice and comment provisions of the Administrative Procedure Act instead of through case-by-case litigation on an actual set of facts. No purpose would be served by permitting a hearing and comments on the Department's views. Statutes cannot be effectively enforced by publishing the government's legal theory in the Federal Register and then seeking the public's views on whether

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[11] Ibid., at 706.

> the government is correct in its application of constitutional principles. The forum for that kind of review is the courts . . ..[12]

This process allows that agency to promulgate the regulation, issue the legal opinion to interested parties and, after a thirty day period that permits voluntary compliance, sue in court to enforce the regulation.

On September 17, 1979, three years after the Supreme Court ruling, the Wage and Hour Administrator of the Labor Department issued an opinion letter to the Amalgamated Transit Union indicating Labor's intention to rule that the FLSA minimum wage-maximum hour provisions applied to public mass transit operations.[13] In November, 1979, the San Antonio Mass Transit Authority received a copy of the opinion letter and summarily filed suit seeking declaratory and injunctive relief from the Department of Labor's ruling.

The Wage and Hour Administrator defended the opinion by citing a series of cases holding state-

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[12] Marshall, in a March 5 memo to Jack Watson, Assistant to the President for Intergovernmental Affairs, responded directly to the NLOC complaint. Memo, Ray Marshall to Jack Watson, 3/5/80, folder "Transportation 3-10/80," Box 113, Staff Office-Counsel Cutler, Jimmy Carter Library, 5.

[13] Opinion Letter No. WH-499 of the Wage and Hour Division, September 17, 1979.

operated enterprises subject to congressional regulation.[14] From Labor's perspective, judicial decisions supported a distinction between a state's proprietary and governmental functions. In National League, the Supreme Court noted the continuing authority of several precedents holding publicly-operated railroads subject to federal regulation.[15] Burger's concurrence in City of Lafayette v. Louisiana Power & Light Co.[16] , holding public railways subject to federal anti-trust laws, noted that these railway cases supported the conclusion that "the Court had already recognized, for purposes of federalism, the difference between a State's entrepreneurial personality" and integral operations in the area of traditional governmental functions. To the Labor

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[14] Ibid. The similarities in the opinions of the Wage and Hour Administrator and the Department of Labor memorandum of March 5, 1980 suggest that either consultation occurred or the lawyers at Labor drafted the legal opinion justifying the opinion letter of September, 17, 1979.

[15] United States v. California, 297 U.S. 175 (1936); California v. Taylor, 353 U.S. 553 (1957); and Parden v. Terminal Railway Co., 377 U.S. 184 (1964), cited in National League of Cities v. Usery, 426 U.S. 833 at 854-855 and n. 18. See also Fry v. U.S., in which the Court sustained limits on wage increases on public employees under the Economic Stabilization Act.

[16] 435 U.S. 389, at 422 (1978).

Department lawyers, the Helvering v. Powers[17] decision provided further evidence that the Court did not include public transportation within the ambit of tradition government functions. In Helvering, the Court ruled that local street railway was "distinct from the usual governmental functions" and thus subject to federal regulatory statutes. In Labor's opinion, the Court made a clear distinction between publicly-run business enterprises and traditional government functions.[18] A district court holding after the National League decision also suggested the lower courts understood that local mass transit operations were not a traditional government function immune from regulation.[19]

The Wage and Hour Administrator published the final regulation in December, 1979 without soliciting public comment or formal fact-finding.[20] The regulation classified alcoholic beverage stores, public

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[17] 293 U.S. 214, at 227 (1934).

[18] Memo, Ray Marshall to Jack Watson, 3/5/80, folder "Transportation 3-10/80," Box 113, Staff Office-Counsel Cutler, Jimmy Carter Library, 5-6.

[19] Brotherhood of Locomotive Engineers v. Staten Island Rapid Transit Operating Authority, (E.D. N.Y. 78-C-2083, February 9, 1979).

[20] Federal Register 44 (December 21, 1979): 75630.

utilities, off-track betting, and mass transit systems as nontraditional government operations and added only the operation of public libraries and museums to the list provided by the Court in National League. The Labor Department stood poised to defend the regulation in court rather than accommodate the interests of state and local governments.

By preventing public comment on promulgated regulations and bypassing attempts at interest accommodation or negotiated arrangements, the opinion-and-suit process shifted the burden of enforcement and conflict management to the judicial system. Of course, this presents an oversimplified picture. After Labor promulgated the rule, the White House Counsel or the OLC could have intervened and mediated to prevent the dispute from proceeding to court. For whatever reasons, Labor did not inform White House personnel or Justice Department lawyers of the growing conflict.

In part, growing irritation with the perceived delaying tactics of the National League of Cities pushed the Labor Department lawyers to seek judicial resolution of the matter. From their perspective, they had made a good faith effort to follow the district court's order. This holding included limiting double damage claims against state and municipal governments.

The court, concerned that Labor would seek liquidated damages and back pay for employees for the period when the governments did not abide by the regulation, asked Labor to protect states and municipalities from the threat of large damage awards. The Department published a notice in the Federal Register that adhered to court's concern for double or liquidated damages by limiting these claims to areas previously labelled as nontraditional government functions by courts or by regulation.[21] Labor, noting the complexity of the situation, also discouraged courts from awarding liquidated damages in suits by independent groups of employees. The language of this regulation pleased neither organized labor groups, such as the AFL-CIO, nor the National League of Cities.

The Labor Department expressed frustration with attempts to accommodate the various parties and anger at NLOC's attempts to stall compliance. NLOC accused Labor of seeking to remove this legal question from the courts by using the "notice" system to resolve the question of liquidated damages. From Labor's perspective, NLOC's insistence on a notice-and-comment system would delay the proposed regulation by as much

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[21] Ibid., at 75629.

as three years. In the face of growing complaints from organized labor and municipal employees, Labor Secretary Ray Marshall was eager to enforce the FLSA provisions.

Though the district court approved the Labor Department's approach, the National League of Cities was not happy with the compromise. In a February 1980 letter, the NLOC had expressed frustration with Labor's interpretation of the FLSA and the district court's holding to Jack Watson, Assistant to the President for Intergovernmental Affairs. Labor Secretary Ray Marshall responded with a memo defending the Department's legal position. Domestic Policy advisor Stuart Eizenstat and Transportation Secretary Neil Goldschmidt also received copies of the memo. The American Public Transit Association, an interest group representing employers of transit workers, had engaged O'Melveny & Myers to handle the problems associated with the application of the FLSA to mass transit systems. Former Transportation Secretary William T. Coleman spearheaded the firm's efforts to change Labor's ruling.

On April 15, 1980, Coleman wrote to Transportation Secretary Goldschmidt challenging the

legal grounds supporting Labor's interpretation.[22] For Coleman, the National League's definition of traditional government functions was not so limited as the Labor regulation suggested. Coleman took issue with Labor's reading of the National League v. Usery. While Labor read the Court's citation of United States v. California to support its conclusion that public transit was a nontraditional government function, Coleman suggested this case controlled only publicly-run freight operation, not public mass transit.[23]

According to Coleman, public mass transit was an 'integral operation' in the traditional government area of services designed to promote the public welfare. Coleman's definition of integral operations rested largely on policy considerations, the institutional policies of the Transportation Department, and the legislative histories of mass transit statutes passed by Congress. Transportation had a long-standing policy that public transit operations are an "essential" public service. Statistics demonstrated essentiality according to National League of Cities standard,

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[22] Letter, William T. Coleman to Neil Goldschmidt, 4/15/80, folder "Transportation 3-10/80," Box 113, Staff Office-Counsel Cutler, Jimmy Carter Library.

[23] Ibid., at 4, especially n. *.

Coleman maintained, because public transit handled 91% of all passengers trips in 1978.[24] Coleman also provided statements by Congressmen that analogized transit service to fire protection and public utilities.

Interest groups favoring exemption from FLSA regulations also cited a body of lower court rulings to support their cause. In the years after National League, the Court of Appeals for the Fifth Circuit held that overseeing state transportation systems "traditionally has been one of the functions of state government, and thus appears to be within the activities protected by the Tenth Amendment."[25] The Sixth Circuit ruled that, under the National League standard, Labor could not apply the FLSA provisions to employees of a municipal airport.[26] While air transit was not a historical function of the state, the court held that "the terms 'traditional' and 'integral' are

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[24] Ibid., at 3.

[25] Peel v. Florida Department of Transportation, 600 F. 2d 1070 (5th Cir. 1979).

[26] Amersbach v. City of Cleveland, 598 F. 2d 1033 (6th Cir. 1979).

to be given a meaning permitting expansion to meet changing times."[27]

State and local governments felt that Labor's ruling ignored the practical effect of applying rigid provisions to the peculiar operating requirements of transportation industries. According to Coleman, severe economic hardships would result from the financial burden and impact on collective bargaining agreements caused by applying the FLSA provisions to publicly-operated transit systems.[28] The FLSA minimum wage and overtime provisions were inappropriate, he argued, because of the system of "spread time" commonly used in transit industries. Transit operations operate on a peak time schedule so that most drivers work the morning and evening rush hours. In the off-peak hours, drivers have nonworking release time. Collective bargaining agreements often contain provisions to guarantee eight paid hours within a ten or eleven "spread period," regardless of the hours actually worked. The employer pays overtime for hours worked in excess of an eleven hour spread. Though the practical

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[27] Ibid., at 1037.

[28] Letter, William T. Coleman to Neil Goldschmidt, 4/15/80, folder "Transportation 3-10/80," Box 113, Staff Office-Counsel Cutler, Jimmy Carter Library, 6-8.

implications of applying the FLSA provisions were used in support of Coleman's legal arguments, the financial impact on municipalities soon would become central to the resolution of the conflict.

If Labor applied the FLSA provisions to public transit operations, the employer would have to pay overtime at one and one-half times the "regular rate" for all hours worked in excess of forty per week. The statute defined "regular rate" as the total compensation per week divided by the "total hours actually worked." Within these definitions, "spread time" release hours would not count toward the "total hours worked." According to Coleman's letter to Transportation Secretary Goldschmidt, Labor's ruling would result in increased overtime hours at overinflated compensation.

The FLSA provisions also would alter the existing collective bargaining agreement in the transit industry. The American Public Transit Association insisted that they be granted generous wage concessions to account for the diminish actual work hours of a "spread time" system and that Labor's ruling unfairly upset settlements reached between transit unions and government units. If the FLSA had been applicable," Coleman wrote on behalf of APTA,

> those wage rates, guarantees and premium would not have been granted or at least would have been granted only in exchange for major concessions from the unions. Imposition of the statutory requirements at this time would alter the balance the parties have reached through the traditional quid pro quo negotiation process.[29]

For Coleman, the essence of National League was the preservation of state and local government autonomy. Noninterference in contractual arrangements was the heart of state autonomy from federal regulation.

Transportation Gathers Support: Enter the White House Counsel

Coleman's letter pushed Transportation Secretary Goldschmidt to action. Goldschmidt instructed General Counsel Thomas Allison to prepare a legal brief for submission to the Labor Department. Before pursuing a direct confrontation with Labor, Goldschmidt contacted the Domestic Policy Staff (DPS) in the White House.[30] DPS members feared that the plaintiffs in the suit, San Antonio Mass Transit Authority, could obtain the Transportation brief through a Freedom of Information

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[29] Ibid., at 8.

[30] Memo, Ralph Schlosstein and Myles Lynk to Stu Eizenstat, folder "Transportation 3-10/80," Box 113, Staff Office-Counsel Cutler, Jimmy Carter Library, 1-2.

Act request, if Goldschmidt sent the brief to Labor.[31] The Domestic Policy Staff encouraged Transportation to hold the brief until White House personnel could review the matter.

Ralph Schlosstein and Myles Lynk of the Domestic Policy staff provided an option paper on the FLSA issue for Stuart Eizenstat, Carter's chief domestic policy advisor. For the Domestic Policy Staff, the positions of organized interest groups were important. Early in the memo, Schlosstein and Lynk discussed the alignment of forces in the conflict.[32] Only organized labor supported Labor's ruling. The Transportation Department, the NLOC, APTA, NACO, USCM, and state and local mass transit authorities all opposed the regulation.

The Domestic Policy staff also emphasized potential conflict with other policy programs of the president. The adverse economic impact of the regulation coincided with cuts in grants-in-aid to state and local governments. Increased costs of operations resulting from the regulation, combined with diminished financial support from the federal

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[31] Ibid., at 2.

[32] Ibid., at 1.

government, would hinder the president's efforts to expand mass transit services.[33] In the midst of the oil crisis, boycotts, and OPEC cartels, mass transit concerns topped the list of presidential concerns. The Domestic Policy Staff instructed the Transportation Department to provide data on the potential impact of Labor's ruling.

The legal briefs of interest groups persuaded Lynk and Schlosstein that the Labor Department had a weak argument. They agreed that the Supreme Court ruling in National League did not tie the interpretation of "traditional government functions" to a historical definition. Citing the Coleman letter submitted to Transportation Secretary Goldschmidt by the APTA, Schlosstein and Lynk disputed the substance and procedure underlying the Labor ruling. On substantive grounds, they felt that transportation fit within the definition of "traditional" government functions. Public transit operations had a historical basis dating to 1897 and a nonprofit (and thus nonproprietary) nature.

Schlosstein and Lynk also found Labor's regulatory procedure inadequate. Labor's chief

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[33] Ibid., at 6.

objection to following the Administrative Procedure Act's notice-and-comment system was that formal rule-making would delay the imposition of the regulations and be unfair to employees waiting for a final ruling. The Domestic Policy staff thought Labor's argument regarding the procedure was "disingenuous" given Labor's alternative procedure. Labor had claimed the opinion-and-suit procedure would work by applying specific sets of facts on a case-by-case basis. Thus, the decision in the San Antonio litigation only would affect the mass transit employees in that system. If Labor lost the pending suit, it intended to apply the FLSA provisions to other mass transit systems. In Schlosstein and Lynk's view, this procedure would delay final rulings for many employees by limiting the scope of the court's ruling. For the Domestic Policy Staff, the heart of Labor's decision rested on the desire to support organized labor by applying the FLSA provisions.

Schlosstein and Lynk contacted Secretary Marshall in an attempt to resolve the conflict. Marshall refused to reconsider the merits or the procedure underlying the new regulation. From Marshall's perspective, any change in the decision would have to result from action by courts, and not

from discussion within the administration. In the face of Marshall's resistance, the Schlosstein-Lynk memo presented three options to Eizenstat:

> 1) Do Nothing. This option assumes that this matter will ultimately be resolved in the courts. Under this option, the Justice Department will defend the DOL's position in the courts.
>
> 2) Ask DOL to review its decision that local transit systems are not a "traditional" or "integral" government function. DOL has indicated that its list of "nontraditional" functions will be amended from time to time to reflect recent determinations . . .. It would be consistent with this position for DOL to review its decision regarding mass transit employees. DOL could initiate such a review in light of information presented by DOT, APTA, NLC, and mass transit operating authorities. The present decision would stay in effect until the review was completed. Judicial proceedings might be stayed, however, pending the outcome of this review.
>
> 3) Require DOL to reopen its decision process to follow the notice-and-comment procedure of the Administrative Procedures Act. This would delay the issuance of a final decision on this matter, and would have an effect on pending litigation. The courts might stay proceedings pending the completion of this review.[34]

Schlosstein and Lynk recognized that options 2 and 3 would anger Marshall and organized labor, while option 1 would leave state and local officials with a perception that the Carter administration did not take

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[34] Ibid., at 7.

their needs seriously. Ultimately, the option paper recommended that Eizenstat meet with Labor, Transportation, and Justice to encourage Labor to review its ruling.

Eizenstat understood the new limits on White House intervention imposed after Watergate. Contacts with Justice on an on-going case were taboo in the wake of the reformist movement. In a handwritten note on the Schlosstein-Lynk option paper, Eizenstat commented: "DOL has a very weak case, on initial impression. [This leaves the] Question of whether in light of court suit administration intervention is merited."[35] Justice already was litigating Labor's side of the dispute. With the legal conflict at such a late stage, Labor's handling of the issue left frustrated White House policy people with few options. Eizenstat expressed his irritation: "Why didn't Ray [Marshall] tell somebody in advance?"[36]

The White House Counsel's view of the legal merits and Eizenstat's feelings toward Secretary Marshall's conduct worked to align White House support with Transportation's cause. White House personnel met

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[35] Ibid., at 1.

[36] Ibid.

May 14 to discuss the FLSA issue, the Schlosstein-Lynk option paper, and the proposed contact with Justice.[37] In addition to Eizenstat and the Domestic Policy staffers, Jack Watson and Lloyd Cutler, the White House Counsel attended the meeting. Ultimately, the White House personnel decided to have Goldschmidt contact the Justice Department. Though both the Domestic Policy Staff and the White House Counsel sided with Transportation, neither wanted to intervene in pending litigation or pursue the conflict with Marshall directly.

Goldschmidt challenged Labor's legal and policy position in a letter of May 15, 1980 to Attorney General Benjamin Civiletti (with a copy to White House Counsel Lloyd Cutler).[38] Before Transportation's contact with Civiletti at Justice, Goldschmidt had elicited the support of White House policy advisors and the White House Counsel. White House Counsel lawyers, after reviewing Labor's legal opinion and Coleman's

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[37] Handwritten note by Eizenstat on Memo, Schlosstein and Lynk to Eizenstat, 5/7/80, and Note, Shelly to Mr. Cutler, 5/14/80, in folder "Transportation 3-10/80," Box 113, Staff Office-Counsel Cutler, Jimmy Carter Library, 1.

[38] Letter, Neil Goldschmidt to Benjamin Civiletti, 5/15/80, folder "Justice Department 8/79-5/80," Box 97, Staff Office-Counsel Cutler, Jimmy Carter Library.

April 15 letter to Secretary Goldschmidt, became allies to the Transportation Secretary's cause.

Justice had planned to file a motion and supporting brief for summary judgment in the San Antonio litigation. Goldschmidt suggested that the brief did not reflect the views and interests of the Transportation Department.

> In order to ensure that the interests of the entire Federal Government are adequately represented in the San Antonio litigation, I would appreciate your calling a meeting of high-level representatives of your Department, the Department of Labor, the White House, and my Department to discuss the government's posture in this case. The position of the Government in this litigation ought to recognize that public mass transit systems are constitutionally immune from Federal regulation under the FLSA. Since DOJ currently plans to take a critical step in the San Antonio case by May 29, I believe we should meet within the week.[39]

Goldschmidt asked Justice to reverse its position in the pending litigation and argue that public transit systems were constitutionally immune from federal regulation under the FLSA.

Eizenstat and the Domestic Policy Staff wanted Justice to handle the conflict. Yet, they did not inform Civiletti that the Domestic Policy Staff had met with Jack Watson and Lloyd Cutler and that White House

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[39] Ibid., at 1.

opinions on the matter had already crystallized. Instead of indicating the White House interests in the dispute, Goldschmidt's letter took the form of a legal brief to be submitted to a court supporting the relevant legal principles and policy consequences of Labor's legal opinion.

Transportation, relying on a narrow distinction, found fault with Labor's legal analysis of the "traditional government function" standard. According to Goldschmidt's letter, the railroad cases[40] cited by DOL to support their conclusion involved freight railroads operating along commercial wharves. By the Court's interpretation of the commerce clause, freight railroads engaged in commerce are subject to congressional regulation. Transit railways are not commercial and often do not cross state lines or impact directly on interstate commerce.

The opinion letter of the Wage and Hour Administrator also cited the 1934 Helvering holding involving a local street railway to support federal power applied to public transportation. This case, however, implicated Congress's taxing rather than

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[40] United States v. California, California v. Taylor, and Parden v. Terminal Railway Co. at n. 15, above.

regulatory power. For Transportation, this distinction was crucial because the federal government has a more compelling justification to limit state immunity from federal taxing power.[41] The competition over subjects and objects of taxation flows from the concurrent state and federal taxing powers, as compared to Congress' plenary power over commerce. Transportation felt that entry by states into new areas of commerce directly affects the ability of Congress to use its taxing power. Whereas courts applied a historical test of "traditional government functions" to prevent erosion of the taxing power, Transportation lawyers thought the historical test was inapposite for federal regulatory power. Federal regulations can penetrate much deeper than mere taxation and affect the states' ability to implement substantive policy choices, which was the essential evil the Court wished to prevent with the National League decision. Finding the revenues generated through taxation more compelling than the federal interest in overtime wage provision, Transportation's counsel argued that the national

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[41] Letter, Neil Goldschmidt to Benjamin Civiletti, 5/15/80, folder "Justice Department 8/79-5/80," Box 97, Staff Office-Counsel Cutler, Jimmy Carter Library, 5-6.

interest in federal regulatory power is less than that for taxing power.[42]

Transportation urged Justice to adopt a broader, nonhistorical interpretation of "traditional" or "integral" government functions that relied on modern circumstances and policies to prove the essential nature of public mass transit.[43] The logic of this argument drew largely from Coleman's letter for the American Public Transit Association. Congress repeatedly emphasized the significance of local transit to local economies and to other services classified by courts as "traditional" or "integral" government operations, such as schools and hospitals.

The Transportation Department further argued that no essential difference existed between schools, parks, or museums (concededly protected by the National League holding) and public transportation. All are essential to the public welfare. Goldschmidt's letter disputed Marshall's reliance on Burger's Lafayette

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[42] In adopting a functionalist approach to this issue, Transportation lawyers' logic ran counter to judicial interpretations of Congress' power over commerce. The Court consistently recognized that federal power over commerce is plenary. See, e.g., Chief Justices Marshall in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) and Stone in Southern Pacific Co. v. Arizona, 325 U.S. 761 at 783 (1945).

[43] Ibid., 6-7.

concurrence, which distinguished between proprietary and governmental activities, and the Secretary's emphasis on the existence of private sector alternatives. That the majority of the Court had rejected Burger's approach explicitly provided sufficient evidence to Goldschmidt. Eight Justices had rejected the standard as applied to intergovernmental tax immunities. Even if one accepted the distinction, Goldschmidt contended public transportation was not an entrepreneurial activity because public transit systems operate in a "negative financial framework." The public/private distinction was inapposite because private sector competition exists in areas explicitly immunized from federal regulation by the National League opinion.

Goldschmidt's analysis also criticized Labor's reliance on the holding in Brotherhood of Locomotive Engineers v. Staten Island Rapid Transit Operating Authority[44] . In that case, the district court held the Staten Island Rapid Transit Operating Authority (SIRTOA) subject to the Federal Railway Labor Act (FLRA). For Goldschmidt, SIRTOA was an anomalous case because freight cars used the public transit lines and

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[44] E.D. N.Y. 78-C-2083, February 9, 1979.

the Interstate Commerce Commission had found that SIRTOA engaged in interstate commerce. Only one other public transit railroad allowed freight carriers to operate on their rail lines.

Goldschmidt admitted that the Brotherhood Court held that, even if characterized as solely a commuter rail line, SIRTOA was subject to federal regulation. He urged Justice to ignore the district court because the holding had no precedential effect. For Goldschmidt, even if the district court holding were good law, Blackmun's balancing test from National League might compel different conclusions because the federal interest in enforcement might be stronger for the FRLA than the FLSA.

In place of Labor's historical interpretation of the National League government functions test, transportation advocated the test adopted by the 6th Circuit in Amersbach.[45] The nonhistorical Amersbach test defines "traditional" or "integral" government operations by a four-part test:

> (1) the government service or activity benefits the community as a whole and is available to the public at little or no expense; (2) the service or activity is undertaken for the purpose of public service rather than pecuniary gain; (3)

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[45] See n. 26, above.

> government is the principal provider of the service and activity; and (4) government is particularly suited to provide the service or perform the activity because of a community-wide need for the service or activity.[46]

Transportation thus urged Justice to move beyond the National League focus on "functions essential to [the state's] separate and independent existence" to grant constitutional immunity to those functions undertaken for the public welfare.

Admitting that the National League opinion held that the impact of regulation was not a central factor for resolving these issues, Goldschmidt discussed the consequences of applying the FLSA to the mass transit industry. The letter relayed Coleman's concerns about the cost to state and local transit operators and the potential impact on collective bargaining agreements but went further to emphasize the impact on federal transportation policy. Goldschmidt suggested that Labor's ruling would seriously jeopardize the president's policy to expand and improve mass transit system across the nation. The wages and overtime paid to state and municipal transit workers under the FLSA would negate any budgetary increases in the mass

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[46] 598 F.2d 1033, at 1037 (6th Cir. 1979).

transit area and prevent any expansion or improvements in services or equipment.

Goldschmidt, perhaps knowing the Justice Department's orientation to interagency disputes, did not seek a compromise. Instead, he requested that Attorney General Civiletti change the government's position in the San Antonio litigation and forwarded copies of the letter to White House Counsel Lloyd Cutler.

Watching Justice

Sympathetic to Goldschmidt's views and interests, Lloyd Cutler and his staff carefully watched the pending litigation and the actions of the Justice Department. Because existing precedent did not provide clear guidance, the closeness of the legal question allowed participants to view the issue along the lines of their political goals. Following the May 14 meeting, Cutler assigned Philip Bobbitt to prepare a brief on the legal issues and the relative merits of the positions of the Domestic Policy Staff and the Labor and Transportation Departments. Though Bobbitt carefully analyzed the relevant cases, he found no conclusive guidance from the National League decision

or subsequent holdings. The ambiguity in these decisions ultimately would lead Bobbitt to reject the adjudicatory approach to resolving this narrow legal dispute.

Bobbitt's brief directly attacked the Domestic Policy Staff's interpretation of the National League opinion. According to Bobbitt,[47] the Schlosstein-Lynk memo emphasized the historical test of "traditional government functions," which from his perspective would not provide adequate support for Transportation's position.

> If this view is right, then contrary to what I presume to be the intention of the memo's authors, the DOL decision is probably correct. Mass transit is not a traditional function of municipal government but is rather a municipal service closely analogous to the state harbor transit specifically cited in National League of Cities as not coming within the holding of the case . . .. In the following memo, I argue for a

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[47] Bobbitt had misread the Domestic Policy Council brief. Schlosstein and Lynk did not argue for a historical interpretation of "traditional government functions." Their interpretation of immunity from federal regulation rested on a broader premise: "DOL has provided no reason why the determination should not be reasonably related to the actual operations of State and local governments today." (emphasis added) The misinterpretation is not crucial as the Bobbitt memo rejects that argument that transit operations are "traditional" or "integral."

> different view of the case[48] one that casts doubt on the DOL decision.

Bobbitt rejected the entire approach used in Labor's opinion letter, Coleman's letter to Goldschmidt, and the Domestic Policy Council option paper.

He proposed an alternate interpretation of the National League holding. From Bobbitt's perspective, the Court was not concerned with the historical basis of a government services or benefit, nor with the federal interest in regulation. The central issue for the National League majority was rather the sovereignty of individual states and their independent ability to structure their decisions. Bobbitt found support for this position in the National League opinion:

> One undoubted attribute of state sovereignty is the State's power to determine the wages which shall be paid to those whom they employ to carry out their governmental functions, what hours those persons will work and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are functions so essential to separate and independent existence . . . so that Congress may not abrogate the States' otherwise plenary

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[48] Memorandum, Philip Bobbitt for Lloyd Cutler, 5/22/80, folder "Transportation 3-10/80," Box 113, Staff Office-Counsel Cutler, Jimmy Carter Library, 1.

> authority to make them. (emphasis added by Bobbitt)[49]

This interpretation required a broader reading of the government operation affected by the Labor Department ruling. The issue was not whether transit regulations infringed on government sovereignty, but whether the regulation impaired the state's ability to make independent economic choices: "[T]he function under scrutiny as to whether it be integral to state sovereignty, is the function of allocating revenue among various services, not the services themselves," Bobbitt suggested. The National League Court's list of protected functions simply elaborated the services provided by the allocation of revenue.[50]

The majority in National League stated that exemption from federal regulatory power requires that a government operation must "directly displace the States' freedom to structure integral operations in the areas of traditional government functions." Bobbitt

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[49] Ibid., at 3.

[50] Here, Bobbitt comes close to begging the essential question. The Court in National League, and the three-judge District Court, listed some areas exempt from federal regulatory and some that were not. Both courts suggested that some areas of government operations were not constitutionally immune from federal regulation, even though these areas require the allocations of funds.

read this standard as a "bivalent" test that involves the essentiality of the function to state sovereignty and the historical or traditional basis of the government services. The Court's dicta in National League and later cases applying the standard did not settle the matter for Bobbitt.

The Court's citation of United States v. California posed particular problems for interpreting the scope of constitutional immunity. In footnote 18 of National League, Justice Rehnquist discussed the 1936 case, which held state railroads subject to the FRLA. His footnote indicated that the Court's holding did not disturb the railway cases[51] cited by Labor. Bobbitt argued that the statutes involved in those cases did not restructure the state's decision-making in the manner that the FLSA provisions would. Facing conflicting precedents, Bobbitt consistently found an interpretation to support the Transportation argument.

A day after writing the opinion memo, Bobbitt informed Cutler of the status of the litigation and conflict at the Justice Department. The San Antonio Mass Transit Authority had sued and filed a motion for

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[51] United States v. California, 297 U.S. 175 (1936); Parden v. Terminal Railway Co., 377 U.S. 184 (1964); California v. Taylor, 353 U.S. 553 (1957).

summary judgment. The litigation campaign focused on San Antonio because the Labor ruling on FLSA most directly affected its transit operations. The San Antonio Mass Transit Authority (SAMTA) was one of very few mass transit operators that currently did not pay workers the minimum or overtime wages. From Bobbitt's perspective, SAMTA's anomalous situation was important. Because the FLSA provisions would affect few other transit authorities, enforcing the new regulations posed little threat to state autonomy and state economic choices.

The Justice Department planned to review the conflict after receiving a new opinion paper from Labor in support of the regulation. Justice informed White House Counsel that Associate Attorney General John Shenefield would handle the matter. Understanding that the Justice Department ruling was crucial to the pending litigation and the outcome of the dispute, Bobbitt told Cutler: "I think it is important that we have our say before then."[52] If the Counsel's staff could influence Shenefield, perhaps they could fend off the Justice's motion for summary judgment on May 29th.

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[52] Memorandum, Philip Bobbitt for Lloyd Cutler, 5/23/80, folder "Transportation 3-10/80," Box 113, Staff Office-Counsel Cutler, Jimmy Carter Library.

Attorney General Benjamin Civiletti had referred the matter to Associate Attorney General John Shenefield, who forwarded it to the Office of Legal Counsel for an official opinion.[53] Shenefield had directed the OLC to review the conflicting views of Labor and Transportation and issue an opinion resolving the legal issues. Shifting the conflict resolution to the OLC was a mixed blessing for Transportation and their White House allies. Waiting for the OLC opinion delayed the motion for summary judgment and gave the White House Counsel time to negotiate a solution. Yet, the shift to OLC altered the norms and people involved in resolving the dispute. Thomas Allison, General Counsel to the Transportation Department, informed Bobbitt that OLC was handling the matter. Bobbitt, preferring to intervene with Shenefield at Justice, asked Cutler if it was important to discuss the issue with OLC lawyers.

The shift from Shenefield to the OLC was important because each had a different orientation toward dispute resolution. The associate attorney general, the solicitor general, and the litigative

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[53] Memorandum, Philip Bobbitt to Lloyd Cutler, June 4, 1980, folder "Transportation 3-10/80," Box 113, Staff Office Files-Counsel Cutler, Jimmy Carter Library.

divisions interpreted the conflict in light of the pending litigation. In this clientele model, the needs of the agency (in this case, the Labor Department) and the prospective success of the litigation were the central factors shaping their view of the conflict. OLC had a different conception of Justice's role in interagency conflict. Consistently with the procedures put in place under Bell, OLC adjudicated these disputes as though they were judges.

After reviewing the legal memorandum of the Labor and transportation Departments, John Harmon, Assistant Attorney General in charge of the OLC, issued an opinion issued on June 16, 1980.[54] With the request for an opinion, Shenefield had forwarded the new Labor Department opinion letter of May 30. The new Labor brief, for the first time, addressed the potential impact of applying the FLSA provisions and countered the claims of the Transportation Department. Though the impact statement would be important to White House counsel, OLC lawyers ignored the policy consequences of their decision. Instead, the OLC opinion focused exclusively on statutory and constitutional

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[54] Attachment to Memorandum, Philip Bobbitt for LNC (Cutler), undated, folder "Transportation 3-10/80," Box 113, Staff Office-Counsel Cutler, Jimmy Carter Library.

interpretation to find that coverage of mass transit employees under the Fair Labor Standards Act did not violate the Tenth Amendment.

OLC agreed with Bobbitt's reading of the National League standard. The two-pronged test held a regulation under the commerce clause invalid if it (1) directly displaces decisions of states regarding (2) traditional or integral government functions.[55] Unlike the analysis of Labor, Transportation, and the Domestic Policy Staff, the OLC did not rely on analogy to the list provided in National League to decide if mass transit was a "traditional" or "essential" state function. Because the Court provided little guidance in the opinion, the OLC lawyers referred to the reason underlying immunity from commerce clause regulation.

OLC's focus on state sovereignty thus allowed a broader exemption than Labor's purely historical approach to defining "traditional" government functions. The opinion embraced the Amersbach logic that a government activity not performed in 1789 could become an essential function because of modern circumstances. Though purporting to reject the proprietary/governmental distinction of City of

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[55] Ibid., at 3.

Lafayette v. Louisiana Power, the OLC placed great import on the economics of the government undertaking. "In short, states exist, in part, to perform needed functions that the marketplace cannot or will not perform. Thus, there is no reason to extend NLC protection to state activities that compete with, or replace, private activities that would be provided without state involvement."[56]

If government entered the marketplace for profit or competition, then it would receive no constitutional immunity from federal regulation. Under the OLC reading, to become an essential function, the government must undertake the operation for the public interest and must not compete or coexist with private sector alternatives. OLC admitted that mass transit came close to meeting this standard. Though clear differences exist in the logic of the OLC opinion and those of the various courts, the OLC opinion carefully noted that it was consistent with the Amersbach court and the other post-National League decisions.[57]

To this point, the OLC opinion seemed to support the policy goals of the Transportation Department, the

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[56] Ibid., at 6.

[57] Ibid., at 5-6.

White House Counsel, and the Domestic Policy Staff. A nonhistorical reading of the National League test would coincide with White House policy and OLC conflict resolution would reinforce White House policy and oversight goals. Even so, the severed ties between the OLC and the White House or executive agencies soon became apparent.

Lawyers at the OLC saw the National League decision as a "marked departure" from the Court's interpretation of Congress's commerce power. The basis for the departure rested on the need to protect state sovereignty in making decisions essential to the states' separate existence. OLC did not agree that wage determinations were the core of protected state decision-making under the National League standard. Rather than reading the scope of states' sovereignty over decisions broadly, the OLC gave a very narrow interpretation of the scope of "traditional functions." If the Court designed the exemption from Congress's plenary commerce power to protect state sovereignty, then only those decisions necessary to states qua states are immune from federal regulation. For the OLC, whether transit activities are immune depended not on history, but instead on a conception of what defines a state.

The OLC opinion noted two exceptions to the Amersbach test of essential government functions.[58] First, the activity must be performed by and be essential to states generally. The need to account for the essential functions of individual states or localities would unduly burden congressional commerce power to make broad policy decisions. Second, state activities would not be immune constitutionally if entered into as part of a cooperative federalism arrangement with Congress. In this case, the rise of mass transit on the state level resulted from increased federal support. Before congressional action, public mass transit operation were in seriously financial difficulties. Congress's interest in maintaining these systems was substantial. A grant of constitutional immunity would displace Congress from regulating an area in which it had a well-established and overriding interest. The OLC test, in effect, required balancing of the federal interest in regulation with the states' interest in self-preservation.[59]

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[58] Ibid., at 6-7.

[59] The OLC reviewed congressional testimony and findings on the FLSA and the state of the nation's transit systems to find a strong national interest in the regulation. Ibid., at 11-13.

To support these conclusions, the OLC turned to the District Court holding in Brotherhood of Locomotive Engineers, the Court's citation of United States v. California, and the Second Circuit decision in Friends of the Earth v. Carey. In rejecting a claim of constitutional immunity under the Tenth Amendment, the circuit court stated:

> . . ., the prospect that the City may be required to take action in the area of transportation control cannot be considered an interference with an "integral" government program or service. The regulation of traffic on roads and highways, with its strong regional and interstate character (particularly in the New York City metropolitan area), has long been considered to be a cooperative effort between City, State and federal authorities, with no single entity being able to provide or impose a comprehensive traffic system, and with federal power, where necessary, taking precedence.[60]

The intermingling of government powers over road traffic negates any state claims to exemptions from federal regulation. The OLC understood the Supreme Court's denial of certiorari to mean that it supported that logic underlying the rejection of constitutional immunity.

The OLC also read Blackmun's decisive concurrence in National League as an endorsement of the

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[60] 552 F.2d 25 at 38 (2d Cir. 1976), cited in Ibid., at 14-15.

OLC's balancing approach. Harmon relied on Blackmun joining the Rehnquist opinion on the condition that the Court adopted "a balancing approach [which] does not outlaw federal power in areas . . . where the federal interest is demonstrably greater and state . . . compliance . . . would be essential." The OLC opinion admitted that Blackmun must have considered applying FLSA an insufficient interest in National League. Here, the OLC found controlling Congress's efforts to tie aid for public mass transit to protection of transit workers as a means of eliminating competitive advantages by public transit over private operators.

In short, while adopting a broad test of "traditional" or "integral" government functions, the OLC opinion allowed for broad exceptions to constitutional immunity under the National League test. Both exceptions concerned preserving congressional power over commerce. OLC was concerned less with enforcing White House policy goals or negotiating a settlement acceptable to the interests involved.[61]

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[61] The OLC staff was aware of the views of White House policy staffers and White House Counsel Lloyd Cutler, but, according to one attorney-advisor, believed that they "were right on this issue." The attorney-advisor felt vindicated by the Court's decision in Garcia. Attorney-advisor, Office of Legal Counsel, inteview with author, 31, January, 1990.

Independent in orientation, the OLC did not placate White House lawyers and policy-makers or side with the Labor Department, the client in the pending litigation. Instead, OLC defended congressional power and sought consistency with the relevant statutory provisions, legislative histories, and court precedents.

White House Counsel: Alternative Dispute Resolution

One day after issuing the OLC opinion, Harmon met with vigorous opposition from General Counsel of the Transportation Department, Thomas Allison. Like any good advocate, Allison was unwilling to accept an adverse ruling when other avenues for success were available. On June 17, Allison wrote a letter to Lloyd Cutler arguing that OLC's legal interpretation was wrong.[62]

On Allison's reading of the OLC opinion, entering into a financial arrangement with the federal government amounted to a forfeiture of constitutional immunity from regulation.[63] From Transportation's

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[62] Memorandum, Thomas G. Allison to Lloyd Cutler, 6/17/80, folder 'Transportation 3-10/80," Box 113, Staff Office-Counsel Cutler, Jimmy Carter Library, 1.

[63] Ibid., at 2.

perspective, federal funding did not render mass transit services any less essential. Although OLC correctly cited the Urban Mass Transportation Act (UMTA) as establishing a partnership between the federal government and municipalities, nothing in the UMTA constituted a waiver of sovereign independence or constitutional immunities of state and local governments. The UMTA also did not seek to regulate the administration of the transit systems and thus could not provide justification for further regulation. Under the Act, states were free to operate mass transit authorities in any suitable manner. The federal government only provided financial support for the enterprise.

For Allison, the two circuit court opinions cited by OLC did not support their conclusions. In Friends of the Earth v. Carey, the court did not reject the claim of constitutional immunity under the Tenth Amendment because a federal-state relationship existed. The nature of the relationship was controlling. That case involved the Clean Air Act by which the federal government attempted to reduce air pollution through a comprehensive regulatory scheme. Allison found support for the Carey decision in Blackmun's concurrence in National League:

> In my view, the result with respect to the statute under challenge here [FLSA] is necessarily correct. I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state compliance with imposed federal standards would be essential.[64]

The ellipses in the OLC's citation of this very passage proved telling for Allison's argument. Allison admitted that the federal interest was a part of the balancing test, but refused to accept OLC's conclusion that federal funding indicated a substantial federal interest. OLC's reliance on the Amersbach test was curious to Allison in light of that Court's holding. The Amersbach Court ruled that a municipal airport was constitutionally immune from the FLSA despite receiving federal funds.

At the White House Counsel's office, Bobbitt, too, was unconvinced by OLC's arguments.[65] Given the

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[64] 426 U.S. 833 at 856 (1976), cited in Ibid., at 3.

[65] Bobbitt stated his views in a memo apprising Cutler of the status of the FLSA issue:

> Not being one for fresh thoughts, I would simply reiterate that the OLC memo does not treat the argument that wage determinations in the mass transit area will have the effect of restructuring choices in what are concededly "integral" areas by any test; and that the "federal

reputation of the OLC in the Carter White House and among the executive agencies, it was not surprising that the opinion irritated Cutler, Bobbitt, and Allison. The White House counsel adopted a more conciliatory and policy-oriented stance to the ongoing conflict. Though Bobbitt and Cutler agreed that Transportation had the better legal argument, both recognized that policy and political considerations mandated a more harmonious resolution of the matter to smooth over relations among Labor, Transportation and the affected interested groups on both sides. Bobbitt also thought that Transportation had not proven that the FLSA enforcement posed a substantial threat to the affected states and municipalities.

The Counsel's office then intervened and mediated a settlement to appease all parties, which forced cooperation and consultation between Labor and Transportation officials. Under the arrangement, the Department of Labor would issue regulations that

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> interest" argument heavily relied on by OLC...is erroneous, since only the wage determination of mass transit is at issue. Indeed insofar as federal statutes have declared mass transit an important governmental responsibility, this cuts DOT's way.

Memorandum, Philip Bobbitt for LNC (Cutler), Undated, folder "Transportation 3-10/80,' Box 113, Staff Office-Counsel Cutler, Jimmy Carter Library.

spread-time would not qualify for overtime pay under the FLSA. Bobbitt also organized a joint task force of representatives from Labor and Transportation to defend state and local governments against claims for retroactive damages, prevent application of the FLSA to rural, para-transit systems, advise and help develop rate and pay schedules that most economically complied with the FLSA provisions, and provide a stable, balanced body that could resolve any disputes arising from enforcement. To resolve the apparent conflict between government agencies in the pending San Antonio litigation, Labor and Transportation would together draft a section of the brief highlighting the minimal impact of FLSA enforcement on mass transit systems.

The resolution did not change the official position of the government in the San Antonio litigation, nor did it overrule Justice's opinion authorizing Labor to enforce the FLSA against state and local governments. The Justice Department proceeded with its motion for partial summary judgment on June 23, 1980. Indirectly, though, the White House counsel and White House policy officials operated to undermine Justice's position and "minimize the adverse impact of the application of FLSA . . .." Eugene Eidenberg, Assistant to the President for Intergovernmental

Affairs, conveyed the bargain struck by the White House counsel to Alan Beals, Executive Director of the National League of Cities, and Richard Ravitch, Chairman of New York's Metropolitan Transportation Authority.

Though they successfully mediated the conflict, White House counsel expressed frustration with the method of interagency adjudication employed by the Office of Legal Counsel. Bobbitt, blaming the OLC for exacerbating the problem, concluded: "I hope this will prove to be a model for the executive oversight of agency conflict instead of the 'client' view expressed by Justice." The adjudicatory style of the Office of Legal Counsel neither stabilized relations among agencies nor endeared the Justice Department to White House lawyers and policy makers.

Conclusions: Constitutional Principles or "Applied Politics"

Justice Felix Frankfurter once described constitutional law as "applied politics." "[D]ecisions of the Court denying or sanctioning the exercise of federal power," Frankfurter said ". . . largely involve a judgment about practical matters, and not at all any

esoteric knowledge of the Constitution."[66] That is so in all branches of government. Lawyers in the executive branch may have an important role translating narrow political disputes into the constitutional conflicts that sometimes end in court. Post-Watergate attempts to create an independent Justice Department was dysfunctional because it institutionalized tension between organizational units that must interact on a regular basis. The adjudicatory and legal process approach of the OLC worked to heighten conflict. As the Garcia case shows, the OLC's adjudicatory approach allowed the White House Counsel to supplant the OLC's role in executive oversight and interagency coordination. The pragmatic, policy orientation of the White House Counsel led to negotiated settlement and increased interagency cooperation. Agency counsel were willing to accept adverse policy decisions made within the White House, but were resistant to legal interpretation or policy options coming from the Justice Department. Though the OLC retained formal, statutory authority over legal opinions for executive

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[66] Felix Frankfurter, "The Red Terror of Judicial Reform," in Archibald MacLeish and E.F. Prichard, Jr., eds., Law and Politics: Occasional Papers of Felix Frankfurter: 1913-1938, (Gloucester, MA: Peter Smith, 1971), 12.

agencies, the loyalty to the presidential policy program and the availability of the White House counsel isolate OLC lawyers from the legal policy stream.

The OLC was central in developing and arguing the government's brief in Garcia. By the time Solicitor General Rex Lee and William T. Coleman argued the second round of oral arguments before the Supreme Court, briefs by the various executive branch lawyers had developed fully the implications of the National League and Garcia approaches for operation of transit systems by municipalities. This process resolved the issue with a solution more satisfying than would appear from the Garcia decision. Formal adjudication of this interagency dispute worked to exacerbate the tensions between the departments and to force judicial resolution.

Justice Blackmun, writing for a majority of five, held that the Fair Labor Standards Act provisions applied to transit workers of states and municipalities. Though the Court adopted an approach closer to the OLC's interpretation, it suggested that political representation, rather than judge-imposed rules, best preserved states' interests. Absent a defective political process, the Court would defer to Congress' plenary powers over commerce. The Garcia

case itself proved that political representation was sufficient to preserve state interest. In the executive branch, the pressure applied by interest groups representing the states positively affected the bargained solution reached among the White House Counsel, Transportation, Labor. States and municipalities won in Congress as well. In the wake of Garcia, Congress, fearing the rising costs to municipalities, provided relief by delaying the implementation of FLSA provisions and allowing compensatory time as a substitute for overtime pay.[67]

However, the importance of the case ranged far beyond the narrow economics of labor costs in public mass transit. The Garcia case reaffirms Frankfurter's view of constitutional law as "applied politics." Garcia became the vehicle for the major confrontation over theories of federalism. Ironically, the great issue of federalism that drew the attention of all Supreme Court observers turned on a narrow policy dispute that White House lawyers and Congress resolved handily. The OLC's adjudicatory mode, by contrast, escalated a close policy choice into a major constitutional showdown. Though a narrow majority of

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[67] Public Law 99-150.

the Court resolved the issue by shifting decision making to the political branches, the dissenters suggested the battle over judicially enforced constitutional limitations to protect state autonomy was not finished. "I do not think it is incumbent on those of us in dissent," Rehnquist observed with an eye to future appointments, "to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of the Court."[68]

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[68] Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

Chapter Five

Defending the Throne: The "Test-Case" Strategy and the Role as the President's Legal Advisors

The reformist atmosphere of the Justice Department in the Carter administration also changed the orientation of OLC lawyers toward their role of advising the president about his constitutional powers. Their emphasis on the rule of law and principled administration led to developing a test-case strategy. That is, OLC lawyers, asserting a stronger defense of the constitutional prerogatives of the president, forced direct legal confrontations against congressional intrusions on executive power. Like the New Deal litigation, the test-case strategy of the Carter OLC challenged the status quo in legal doctrine and institutional arrangements. Unlike the New Deal

litigation, the OLC test-case strategy in separation of powers often conflicted with the goals of the White House itself.[1] Here again a relatively minor substantive policy dispute gave rise to another chapter in the constitutional issue of executive privilege, culminating in a major decision upholding the constitutionality of special prosecutors.[2]

The rise of a more independent Justice Department aggravated tensions between the executive and legislative branches. The point of this chapter is to explain the reasons for and implications of the "test-case" strategy developed under the Carter administration and carried through the Republican administration. To refute the partisanship and divided government theses, it is only necessary to show the

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[1] The congruence between the agenda of the White House and the OLC becomes central later in this work. During the Carter and earley Reagan administrations, the OLC vigorously defended all presidential prerogatives. While the Carter adminstration supported the test-case strategy as part of the "independent" Justice Department, the Reagan White House, on the other hand, supported confrontation only when the prerogatives were essential parts of the presidential policy agenda. For example, the legislative veto case fit squarely within Reagan administration goals for deregulation and a unified executive branch.

[2] Morrison v. Olson, 108 S. Ct. 2597 (1988), which gained increasing importance with the emergence of the Irangate scandal and the threatened prosecution of Oliver North.

continuities in legal strategies and positions of the OLC during the Carter and Reagan years and that the congressional responses did not reflect partisan conflict between a Republican White House and a Democratic House of Representatives.

Carter's OLC focused primarily on attacking the legislative veto device. After tracing the origins of the test-case strategy in the Carter adminstration, I shall show the continuities in the motivations and approach of the Carter and Reagan OLCs by concentrating on the controversy surrounding withheld documents by the Reagan's EPA.[3]. A comparison of the test-case

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[3] This case study primarily covers the controversy from the beginning stages to the time the executive privilege claim collapsed. The aftermath of the conflict, including Olson's misleading testimony before Congress and the appointment of a special prosecutor to investigate Justice Department actions, are not as central to the purpose of this study. Though the initial inquiry began as a bipartisan effort to gain access to documents, the furor ended as a battle to preserve the integrity of the Reagan administration. Allegations of political corruption in administering the EPA Superfund transformed this from a legal issue uniting the House to a divisive political issue. The aftermath is important to the extent it illustrates the consequences of pursuing the "test case" strategy.

A second difficult emerges from this case study. By the end of the controversy and the subsequent investigation by the House Judiciary Committee, the dispute became highly politicized. The report resulting from the investigation presents only one interpretation of the events. Only one Republican joined the majority report. No Democrats joined the dissenting report. White House Counsel Richard Hauser and Robert McConnell and Theodore Olson filed rebuttals. Where possible, this

strategies in the two administrations shows that partisanism was not the primary factor causing the executive privilege test-case to fail. How this particular dispute, with all the historical precedents of executive refusals to provide information, erupted into such a conflict again illustrates the importance of organizational factors in public disputes.

The conflict over EPA documents did involve a Democratically controlled House and a Republican administration, to be sure, but partisanship alone does not explain fully its emergence or intensity. Personalities and leadership styles undoubtedly influenced relations within the executive branch and between Congress and the Justice Department. Shift in institutional orientation and organizational norms nonetheless were vital forces shaping this dispute. The Office of Legal Counsel, breaking from the historical tradition of cooperation, was anxious to push the dispute as a test-case of the broader constitutional boundaries of executive privilege.

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case study relies on examination of the 2,300 pages of documents gathered from the EPA and Justice Department. It is difficult to reconstruct an accurate picture of the evolution of the dispute from the reports, though these reports provide some evidence not available in the gathered documents.

The Origins of the Test-Case Strategy: The Carter OLC Legislative Veto Project

The Reagan adminstration did not initiate the test-case strategy. The push to defend constitutional prerogatives of the president began with the Democratic Carter administration challenging the legislative vetoes passed by a Democratic Congress. In order to understand the EPA test-case and the reasons for its failure, it is useful to study the origins and success of this earlier case.

In the first six months of the Carter administration, John Harmon, Assistant Attorney General in charge of the Office of Legal Counsel, began a legal campaign against legislative vetoes. Harmon's "project" would last through the Carter presidency. With the support of President Carter, Harmon carefully pursued each opportunity to test the validity of congressional review of agency regulations. The legislative veto project would set a precedent for OLC behavior during the Reagan administration for other separation of powers issues.

In early June, 1977, the OLC produced an outline for study of the legislative veto issue. The first part of the outline discussed the need to evaluate the

constitutional doctrine and precedents involved, the number of actual and pending veto devices, and the effect of the veto devices on executive branch policy-making. The third and final section of the outline for suggested the test-case strategy as a course of action for handling the legislative veto problem. The section "Options for Dealing with the Issue" presented a strong confrontational stance:

A. Legislative Vetoes Currently in Force
  (1) Court challenge where available
    (a) cases presently in the courts
    (b) litigation strategy for selecting cases to bring where opportunity arises
  (2) Disregard of congressional action to trigger litigation or where no court litigation opportunity is available
B. Legislation presented to the president for his signature.
  (1) When should a veto seriously be considered?
    (a) severability of veto provision
    (b) impact on Executive functions
  (2) Signing statement.
    (a) when should statement include comment on veto provisions?
    (b) should president direct subordinates to disregard a veto provision?
  (3) Role to be played by Attorney General through formal opinions and advice to Executive Branch officers concerning their duties with respect to vetoes.
C. Congressional Relations

(1) Identification of proponents and opponents of legislative vetoes in Congress.
(2) Possibility of reaching agreement with leadership on a moratorium on vetoes for a period of one year or longer, addressing the concerns that have spawned the problems from Congress' viewpoint.[4]

The OLC pushed forward with a litigation strategy. At Harmon's request, Bob Beddell, Assistant General Counsel in the Office of Management and Budget, distributed a directive asking each agency to provide information on the use of legislative veto provisions and the effect of their existence on agency decision-making since the Nixon administration, as well as a list of pending veto provisions in Congress.[5]

The OLC analyzed several opportunities in pursuing the test-case strategy for the legislative veto. The Chadha litigation, involving the veto provision in the Immigration and Nationality Act, had progressed to the Ninth Circuit Court of Appeals. On April 10, 1978, John Harmon argued the government's case before the appellate court. As late as March, 1980, the Court of Appeals had not decided the case.

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[4] Memorandum, Harmon for Lipshutz, June 29, 1977, folder "Veto, Congressional: Justice Department," Box 49, Staff Office-Counsel Lipshutz, Jimmy Carter Library.

[5] Ibid., 3.

Concerned with the progress of that litigation, the OLC drafted a memorandum for Attorney General Benjamin Civiletti discussing the alternate possibilities for litigating the issue.[6]

Justiciability standards of courts and reluctance of agency personnel to cooperate posed substantial organizational barriers to pursuing other cases. The Federal Trade Commission Improvements Act of 1980 included a veto provision in Section 21. President Carter signed the bill because that same section contained a clause waiving prudential limitations on judicial consideration of the constitutionality of the legislative veto provision of the bill.[7] Despite the explicit waiver, the OLC doubted that this legislation would result in litigation. The General Counsel's Office in the FTC informed the OLC that the funeral industry was the most susceptible to veto exercise, but the 96th Congress

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[6] Memorandum, Civiletti to Carter, May 30, 1980, folder "Legislative Veto, 10/79-11/80," Box 97, Staff Office-Counsel Cutler, Jimmy Carter Library.

[7] This provision was necessary because Circuit Court of Appeals for the District of Columbia earlier avoided resolution of the matter in Clark v. Valeo, 559 F.2d 642, 650 n. 10, aff'd 431 U.S. 950 (1977). The Appeals Court indicated that even if Article III limitations had not existed in that case, the Court would have avoided resolving the matter for prudential reasons.

would adjourn before the issue became ripe for judicial review.[8]

The House of Representatives exercised the veto power under the Natural Gas Policy Act of 1978 to disapprove a rule promulgated by the Federal Energy Regulatory Commission (FERC). The OLC indicated that the executive branch could force litigation of the issue if the FERC refused to recognize the veto.[9] In such a scenario, the FERC would continue to enforce the promulgated rule as if Congress had not acted. Robert Nordhaus, General Counsel for the FERC, told the OLC that the FERC is an independent regulatory agency with litigating authority independent of the Justice Department. Out of the jurisdiction control of the OLC and more directly concerned with congressional oversight, the FERC was unwilling to cooperate with OLC's test-case strategy.

The OLC had another route to litigating the one-house veto in the Natural Gas Policy Act. The Department of Energy and the Council on Price and Wage Stability participated in the rule-making process at

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[8] Memorandum, Harmon to Civiletti, May 20, 1980, folder "Legislative Veto, 10/79-11/80," Box 97, Staff Office-Counsel Cutler, Jimmy Carter Library, 1-2.

[9] Ibid., 3-5.

the FERC. The Administrative Procedure Act entitles participants to file for reconsideration of the rule by the FERC and to litigate upon denial of the petition. The OLC recommended pursuing this strategy and asserted its role in coordinating the litigation. In addition, the OLC contacted Alan Morrison, an attorney for the Public Interest Litigation Group. Morrison indicated to the OLC staff that he intended to follow the same procedure on behalf of a consumer group.

The central problem with the Natural Gas Policy Act as a test-case was that the veto provision was not severable from the delegated regulatory authority. As the OLC memo conceded, the statute "strongly suggests that, but for its ability to take a 'second look' at the wisdom of the FERC rule finally issued, Congress might not have given the FERC the authority to issue the rule in the first place."[10] If a court found the veto provisions unconstitutional, the rule issued by the FERC would fall as well. Morrison's client was pursuing this very course and pressing the court to nullify the rule. While the OLC felt that "neither of these holdings (i.e., the severability or the invalidity of the final rule) should prevent our

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[10] Ibid., at 5.

securing a judicial determination of the constitutional issue," the OLC memorandum suggested that administration policy officials should understand the potential impact of the litigation.[11] Despite the potential loss of delegated powers, the OLC wanted to litigate the case. Attorney General Civiletti informed President Carter that the Justice Department would pursue this case, but would argue that the court should sever the substantive grant of authority from the legislative veto provision.

The final alternative to the Chadha litigation involved four regulations issued by the Department of Education.[12] Congress relied on its authority under Section 431 of the General Education Provisions Act to invalidate the promulgated regulations by a concurrent vetoes. This case posed several difficulties for the OLC test-case strategy. Several regulations did not impose severe burdens on education grantees. Private litigants were unlikely to challenge the regulations in court.

One of the regulations was a candidate for challenge by multiple parties. The regulation set the

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[11] Ibid.

[12] Ibid., 2.

procedures of the Education Appeal Board for recovering expenditures not permitted under federal grant programs from state and local education agencies. Congress's veto of the regulation invalidated the authorization of the Appeal Board generally. A party wishing to stall a ruling by the Appeal Board could challenge the validity of any of its rulings based on the congressional veto. The State of Pennsylvania, with a five million dollar claim pending against it, appeared to be a certain candidate to seek injunctive relief from the Board's authority.

Still, these scenarios also did not insure an acceptable case to challenge the veto provision. The OLC memorandum noted that Congress may not have acted in a timely matter when disapproving the regulations. The Court could limit its holding to invalidating the veto based on the period intervening the regulation and the concurrent resolution. Besides, if Pennsylvania or another party refused to challenge the validity of Appeal Board, Representative Carl D. Perkins of the House Education Committee indicated to the Education Department that he would bring suit to enforce the veto provisions. By this point, the OLC had not decided if it wished to test separation of powers conflicts by proceeding directly against members of Congress. OLC

also feared that courts would avoid such a direct confrontation on prudential grounds or for lack of standing.

Attorney General Civiletti issued a memorandum to Secretary of Education Shirley Hufstedler on the legislative veto of the four regulations.[13] In the memo based on an OLC opinion, Civiletti informed Hufstedler that the veto provision of the General Education Provisions Act was unconstitutional and that she could implement the promulgated regulations. To stimulate a suit by a private litigant, Civiletti urged Hufstedler to move forward with the Education Appeal Board regulation.

President Carter stood firmly behind the effort to challenge the congressional veto. On the attorney general's memo, Carter wrote simply "cc Ben (Civiletti) Lloyd (Cutler) Push this test J.C. ."[14] In the Department of Education's weekly report of June 27, 1980, Hufstedler reported attempts to negotiate with Congress to resolve their differences over the vetoed regulations. The settlement would allow members of

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[13] Memorandum, Civiletti to Carter and Hufstedler, June 16, 1980, folder "Legislative Veto, 10/79-11/80," Box 97 Staff Office-Counsel Cutler, Jimmy Carter Library.

[14] Ibid., at 1.

Congress to voice their concerns before the Department of Education issued the final regulation. Though this concession did not directly address or recognize the congressional veto power, Carter reiterated his concern about the veto to Hufstedler with a note on the Education Department's weekly report: "Do not accede to congressional veto without approval by AG & me."[15]

Hufstedler implemented the regulations. The reaction from Congress was predictable. Chairman Perkins and other members of Congress expressed worries that the Secretary's action set a bad precedent and reflected indifference to congressional interests in educational policy. Given the White House needs for support on the Hill for the new Department of Education, Hufstedler's action also drew concern from White House policy advisors Bert Carp and Joe Onek.[16] A meeting of White House policy advisors, John Harmon of the OLC, and Under Secretary Of Education Minner produced a compromise position that would allow Hufstedler to regain standing with Congress.

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[15] Attachment to, Memorandum, Onek to Cutler, July 14, 1980, folder "Legislative Veto, 10/79-11/80," Box 97, Staff Office-Counsel Cutler, Jimmy Carter Library.

[16] Memorandum, Onek to Cutler, July 14, 1980, folder "Legislative Veto, 10/79-11/80," Box 97, Staff Office-Counsel Cutler, Jimmy Carter Library, 1.

Hufstedler altered the initial regulations by formal rule-making procedures so that the regulations would reflect the substantive concerns of the Perkins and the Congress. By following the rule-making procedure, Hufstedler would not concede that the veto was constitutional. The new regulations did not disturb the OLC's pursuit of a test-case. The meeting produced an agreement that Hufstedler would not change the regulation involving the Education Appeal Board. Thus, Hufstedler could maintain good relations with Congress, while the OLC, the attorney general, and the president retained the best chance of a test of the veto under the education regulations.

The test-case strategy of the Carter administration continued as OLC and White House personnel carefully balanced the need for political support for the president's policy agenda with the desire to challenge directly congressional encroachment on executive authority. By the end of the Carter administration, the Office of Legal Counsel continued litigating the legislative veto issue. Chadha remained in the Court of Appeals and the FERC litigation faced a similarly long road. The Supreme Court would not issue its decision on the legislative veto until 1983.

The Carter administration had pledged to restore confidence in the administration of the laws. Ironically, Congress saw the test-case approach as an extension of the Nixon administration's failure to execute the laws. To force confrontations over separation of powers issues, the Justice Department had refused to enforce duly passed legislation. Congress, seeing vetoes as a method of oversight of delegated power, reacted strongly to the changing posture of the Justice Department. By the end of the Carter administration, Congress called for Attorney General Benjamin Civiletti to defend the Department's position.[17]

The Test-Case Strategy Falters: The Case of Executive Privilege Leading to Morrison v. Olson[18]

The test-case strategy of the Carter administration carried over to the Reagan OLC. In its early stages, the test-case strategy seemed headed for positive results. The new professional orientation and

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[17] "The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation," Opinions of the Office of Legal Counsel (Washington: Government Printing Office), 4A (1980): 55.

[18] 487 U.S. 654 (1988).

a strong commitment to the "rule of law" encouraged several OLC lawyers, including Deputy Assistant Attorney General Larry Simms, to stay at the OLC after Reagan's election. Theodore Olson became assistant attorney general in charge of the OLC under Attorney General William French Smith.

Unlike the adjudicatory approach to interagency adjudication, the principled defense of the constitutional prerogatives of the president initially brought a positive response from inside the White House. As a strong advocate of executive power, the OLC became the defender of the institutional prerogatives of the presidency. Yet, like the adjudicatory approach to interagency conflict, the principled, judge-like interpretations of separation of powers issues led to conflicts among executive organizations, as well as with Congress. Attempts to force legal confrontations over separation of powers issues produced such tense relations with Congress, in fact, that Reagan White House staffers ultimately opposed the test-case strategy because it interfered with the president's domestic agenda.

Withholding of EPA documents from the Levitas and Dingell subcommittees of the House at first glance appears to be a confrontation between partisan

Democrats and a Republican administration over enforcement of environmental protection laws. At a deeper level, the conflict over document access reveals an OLC eager to push a case testing the bounds of executive privilege. The initial interpretation of the executive privilege claim by the OLC was consistent with past interpretations by Justice Departments of Republican and Democratic administrations.

Key differences turned this case into a major constitutional challenge of congressional access to executive documents. The posture of OLC lawyers toward separation of powers issues shifted from conciliation to confrontation. Though earlier administrations had argued claims of executive privilege, ultimately the Congress received the requested information. The shift toward a test-case strategy on executive privilege claim altered the institutional norms. The true failure of the test-case strategy emerged from the conflict between organizational needs within the executive branch. On the legislative veto issue, the OLC and the White House did not collide over goals and strategies. The needs of executive agencies heads like Secretary Hufstedler were met while the OLC pursued the test-case. As the OLC lawyers pushed forward to defend executive prerogatives, they became less concerned with

the organizational and strategic needs of the White House and the Environmental Protection Agency. A case study of the EPA document controversy shows the importance of institutional norms in determining the limitations of the new test-case strategy.

A Brief History of Executive Privilege and the Department of Justice

A historical review of executive privilege claims shows a remarkable consistency among positions taken by the Justice Department, presidents, and their congressional counterparts.[19] Congress and presidents

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[19] This section reviews the legal bases underlying claims of executive privilege by presidents and the various conflicts between the Congress and the President over document access that elaborated those principles used to justify privilege claims. As such, the section does not present a comprehensive history of executive privilege, nor an evaluation of the merits of arguments for and against a presidential power to withhold documents. For a historical review and arguments for and against the exercise of executive privilege, see Raoul Berger, Executive Privilege: A Constitutional Myth (Cambridge: Harvard University Press, 1974); Robert Kramer and Marcuse, ""Executive Privilege: A study of the Period 1953-1960," Geo. Wash. L. Rev. 29 (1961): 623; Congress, Senate, Committee on the Judiciary, Executive Privilege: The Withholding of Information by the Executive, Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary of the United States Senate, 92d Cong., 1st sess. (1971) (hereinafter Executive Privilege: The Withholding of Information by the Executive). The historical discussion that follows draws heavily on these works. The historical precedents for executive privilege are not the subject of dispute.

traditionally have negotiated conflicts between the legislature's need for access to documents for investigations and the executive's need for secrecy to "faithfully execute the laws" with adjudication serving as a threat if negotiations stalled. Though the legal and historical foundations of these conflicting powers are murky at best, over time Congress and presidents accepted the established legal norms for claims of executive privilege. Attorneys general and presidents consistently asserted privilege for the same categories of documents. Congress continued to push for broader access. The Reagan era shift in relations between the branches is not so much a change in interpretation or in partisan alignments as an outgrowth of the role of White House and Justice Department lawyers in the post-Nixon era.

The Constitution does not grant specific authority to the president to withhold documents from the compulsory processes of Congress or the courts. Like congressional authority to investigate in pursuance of its legislative power, presidential claims to executive privilege rest on a theory of implied powers, history, and precedent. The inherent power

theory finds executive privilege as an outgrowth of the Article II, Section 3 requirement that the president to see that the "Laws are faithfully executed."[20] Presidents have found secrecy a useful, and arguably essential, tool for maintaining the ability to discharge this duty. The conflict between implied legislative power to investigate and inherent power of executive privilege dates to the earliest years of the Republic. Congress recognized a limited power of executive privilege as essential to executing the laws and defending the public interest and national security.

The traditional comity between the branches eroded in the midst of the McCarthy hearings. The Eisenhower administration took the broadest interpretation of executive privilege claims. Attorney General William Rogers issued a sweeping opinion that suggested absolute executive discretion to withhold

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[20] The Supreme Court, too, endorsed executive privilege as an inherent power of the President in United States v. Nixon, 418 U.S. 683 (1974). Despite requiring the White House to provide the subpoenaed tapes, Burger, writing for a unanimous majority, stated "A President and those who assist him must be free to explore alternatives... . These are the communications justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers... . [emphasis added]

documents from Congress.[21] The opinion understandably provoked the ire of the Congress. From the Kennedy adminstration through Nixon's, Congress attempted to get more concrete understandings of the scope of executive privilege and the process used to assert such claims.[22] Kennedy responded to Congress's concerns by establishing a White House policy to review requests for documents on a case-by-case basis and that all assertions of privilege must flow directly from the president.

Anxious for this comity to continue, Chairman Moss wrote to Presidents Johnson and Nixon upon their respective inaugurations expressing his desire for the White House to continue to minimize assertions of executive privilege and to maintain open channels of

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[21] For Rogers, executive privilege did not rest on powers pursuant to the president's duty under Article II, Section 3, to faithfully execute the laws. Instead, executive discretion to maintain secret documents amounted to a political check on the legislature. Under his interpretation, the president is responsible only to the people. Rogers read the historical antecedents and expanded Washington's notion of secrecy for the public good to justify absolute discretion for presidents to invoke executive privilege. Rogers published this official opinion at American Bar Association Journal 44 (1958): 941.

[22] For a published record of the interbranch correspondence discussed during this period, see Executive Privilege: The Withholding of Information by the Executive, 33-37.

communications between Congress and executive agencies. Nixon responded to Moss that his "Administration was dedicated to ensuring the free flow of information to the Congress . . . ."[23] Early in his first term, Nixon issued a memorandum outlining the procedures for invoking executive privilege. The procedure followed the centralized process of previous administrations. The Office of Legal Counsel and the attorney general received all inquiries from executive agencies. On their instructions, agencies were to furnish all documents to Congress. If the OLC and attorney general agreed that a valid claim of privilege existed, they referred the matter to the Counsel to the president and the president for a final decision.

The procedural continuity did not produce comity between the branches. Within a year of his inauguration, Nixon authorized Secretary of Defense Melvin Laird to withhold a seventeen volume history of the Vietnam decision-making process. Invoking of privilege fell within the established principles of privilege claims, but Congress was unwilling to accept Nixon's refusals.

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[23] Ibid., at 36.

Nor did Nixon's internal memo and executive privilege process satisfy lawyers in the executive branch. Though Nixon continued the practice of centralized approval of executive privilege claims, this practice worsened the rising tensions between the president's lawyers in the White House and the Justice Department. By statute, the attorney general renders the official legal opinions for the president. As the distrust between Justice Department lawyers and White House insiders grew, the White House Counsel and the Department of Justice jealously guarded their roles in executive privilege claims.

In the Ford administration, Cabinet Secretaries Kissinger, Morton, and Mathews faced subpoenas for different matters. In an attempt to clarify the matter for other Cabinet officials and the White House staff, White House Counsel Philip Buchen sent a letter outlining the respective situations and the relevant legal principles involved in executive privilege and subpoena matters. Attorney General Edward Levi hastened to remind Buchen of the statutory role of Justice in such matters. "I am troubled," he wrote, that the memorandum:

> (1) comes close to giving legal advice to the departments--which by statute is the duty of the Attorney General, and (2) in

> discussing Executive privilege does not make clear that the process requires the endorsement of the Attorney General. I am naturally troubled about this, since there is an expected tendency in the departments to go directly to the White House and for the Counsel to the President to relate to the departments in this way.[24]

As in all relations with executive agencies, Justice Department lawyers feared that lawyers in the White House Counsel's office were replacing them in legal policy and advisory process.

Closer to the president, the White House Counsel had the advantage of representing, or at least appearing to represent, the president's will. With the stirrings toward an independent Justice Department in the Ford administration, agencies began to see Justice Department lawyers as detached from White House policy goals. The conflicting roles and interests of the White House Counsel and the Justice Department in executive privilege claims during the Ford years foreshadowed their different approaches in the administrations that followed.

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[24] Letter, Edward Levi to Philip Buchen, 11/26/75, folder "Executive Privilege (5)," Box 13, Philip Buchen Files, Gerald R. Ford Library.

Prelude to a Conflict: The Watt Controversy

Conflict between the Democratic House and the Reagan Justice Department began early in the first term. In the spring of 1981, the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, chaired by Representative John Dingell of Michigan, undertook a study of the impact of Canadian policy on American mining interests.[25] The Mineral Lands Leasing Act empowered the Secretary of the Interior to bar Canadian ownership of stock in U.S. mineral leasing companies upon a finding that Canada did not provide reciprocal treatment to U.S. mining firms. When the investigation began, Secretary Watt had yet to rule on the status of Canadian mining interests.

In pursuit of the study, Chairman Dingell requested relevant documents from Secretary Watt. Watt withheld some requested documents. In response, the

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[25] Congress, House, Committee on Energy and Commerce, Contempt of Congress: Report on Congressional Proceedings Against Interior Secretary James G. Watt for Withholding Subpoenaed Documents and for Failure to Answer Questions Relating to Reciprocity Under the Mineral Lands Leasing Act, Hearings before the Committee on Energy and Commerce of the House of Representatives, 97th Cong., 2d sess. (1982) (hereinafter Contempt of Congress).

Subcommittee voted unanimously on September 28 to subpoena "all documents relating to the determination of reciprocity." The unanimity is evidence that partisanship did not motivate Congress to challenge Watt's assertion of privilege. Watt sought the advice of the attorney general regarding his obligations under the subpoena. Attorney General William French Smith referred the matter to the Office of Legal Counsel. Following past OLC interpretations of executive privilege claims, Theodore Olson, Assistant Attorney General in charge of the OLC, drafted an opinion justifying Watt's refusal to produce the documents.

Dated October 13 (the day before the scheduled hearings), Olson's opinion adopted the case-by-case approach that had come to characterize OLC review of privilege claims.[26] Two separate foundations existed for asserting a claim of privilege in the Watt case. Because (or from the Congressional perspective, though) Watt had not made a reciprocity determination, the materials requested were part of the deliberative discussion of an on-going policy decision. The materials also implicated foreign policy considerations since Watt's determination had direct bearing on

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[26] Letter and Memorandum, William French Smith to President Reagan, October 13, 1981.

relations with Canada. Following the practice of previous administrations, Olson sent the opinion advocating assertion of executive privilege to the president for his signature. Reagan signed a letter ordering Watt to withhold the documents.

Watt complied with the subpoena by appearing before the Dingell subcommittee, but, citing President Reagan's letter and the OLC opinion, refused to provide the documents. Dingell pursued the contempt citation and sought the legal advice of Stanley Brand, General Counsel to the Clerk of the House of Representatives. Brand, finding no support for Watt's claim of executive privilege, flatly rejected the logic of OLC's legal opinion.[27] Negotiations between Watt and the Dingell subcommittee for several weeks in February of 1982 did not resolve matters. The full Committee on Energy and Commerce voted to proceed with contempt charges against Secretary Watt. Again, the vote did not reflect partisan divisions within the House Committee.

Perceiving the political costs of the conflict, the White House intervened to prevent direct confrontation. White House Counsel Fred Fielding negotiated a settlement with Chairman Dingell and

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[27] Memorandum from Stanley Brand to John Dingell, November 10, 1981.

Republican members of the subcommittee.[28] The agreement provided limited access and note-taking by subcommittee members only. Justice Department officials, including Olson and OLC staffers, conspicuously were absent from the settlement meetings. Olson later testified that he opposed any settlement that provided access to those documents.

The Watt affair provided a brief prelude to the more protracted conflict to come. During the Watt affair, all parties acted consistently with their organizational norms. The OLC vigorously defended the institutional prerogatives of the presidency, even against the policy goals of the White House. The White House Counsel again chose negotiation over partisan or principled conflict. House members and the House counsel pressed the White House for access and sought to assert legislative prerogatives. While the subcommittee and the House counsel pushed toward confrontation, members were willing to bargain with the White House and recognized the legitimate need for secrecy. To the degree that House members pushed for document access, they did so without regard to partisan affiliation and in a manner consistent with past

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[28] Contempt of Congress, 8.

efforts by Congress to obtain documents from the executive.

From Cooperation to Compromise: Congress Investigates Superfund Enforcement[29]

Part of the problem in the Watt controversy was that Watt's refusal presented a substantial departure from past EPA practice of cooperating with Congress. From Congress's perspective, EPA consistently had provided documents to subcommittees without seeking the approval of the Justice Department or the White House. Whatever the standing executive branch policy on document secrecy, the EPA established an unwritten, working understanding of unlimited access to their administrative files. For requests for highly confidential material or for large quantities of documents, EPA administrators simply required written notice. The Justice Department OLC understood that executive agency officials frequently provided

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[29] The following case study reconstructs events based on the primary documents from the OLC, EPA, and Congress found in Congress, Senate, Committee on the Judiciary, Withholding Environmental Protection Agency Documents from Congress, Hearings before the Committee on the Judiciary of the House of Representatives, 99th Cong., 1st sess., (1987) (hereinafter Withholding EPA Documents).

sensitive information to Congress without seeking clearance from the OLC or the attorney general, but did not condone the practice.

This policy of open access continued through the early part of Reagan's first term, but shifted when the focus turned to the politically charged investigation of Superfund sites. The Dingell Subcommittee and the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation (chaired by Elliot Levitas) commenced investigations of the EPA administration of hazardous waste cleanup under the Superfund program. The conflict over Superfund document access began on September 13, 1982 when Robert Prolman, a professional subcommittee staff member planned to go to the New York regional office of the EPA to examine documents related to Superfund sites there. The EPA administrator sought advice on document access from the agency's Office of Legal and Enforcement Policy (OLEC). After agreeing on a procedure for confidentiality, Prolman was to have access to all files. This access included files marked "confidential" or "prepared in anticipation of litigation" as well as references to individuals who might be prosecuted for violations.

Some OLEC lawyers and other EPA staff members suspected that political interests affected some Superfund enforcement. Evidence existed that officials delayed cleanup of the Stringfellow site in California to influence the Senatorial contest with Democratic Governor Jerry Brown and pursued a hurried settlement with a polluter in Republican Senator Richard Lugar's district. EPA counsel also worried about the conduct of Rita Lavelle, Assistant Administrator of the EPA's Office of Solid Waste and Emergency Response (OSWER). Lavelle promised the Senate Committee on Environment and Public Works that she would recuse herself from involvement with the Stringfellow waste site. Her former employer had generated the waste and was a target for possible prosecution. OLEC and OSWER members had knowledge that Lavelle continued to intervene in the Stringfellow case. EPA Administrator Anne Gorsuch and her chief policy and legal advisors had no direct knowledge of these improprieties. This evidence of political manipulation would prove important in derailing the OLC's test-case.

At this point, Richard Mays, the Deputy General Counsel for the EPA, intervened regarding access to certain information. For the first time, Mays indicated to congressional representatives that

sensitive materials (such as the names of potential violators) were confidential and subject to executive privilege. Robert Perry, General Counsel of the EPA, wanted to restrict access to materials related to possible prosecutions ("enforcement sensitive" documents) until the Justice Department clarified the administration's legal position on executive privilege claims. Gorsuch suggested in written communications that the secrecy maintained by the Subcommittee members and staff in the past satisfied the EPA's concerns. Congressional records show that as late as October, 1982, Gorsuch and her chief of staff, John Daniel, still were willing to provide open access to members of Congress.

Perry contacted the Department of Justice concerning the legal basis for restricting access to EPA files. EPA officials indicated to Justice that they felt Congress would subpoena the relevant documents if necessary to gain compliance. During later testimony before Congress, Perry was unsure whether his contact was with the Land and Natural Resource Division (LNR) or with the Office of Legal Counsel. Organizational variables shaped the EPA's choice of legal advisors at the Justice Department. OLC personnel stated that contacts with EPA counsel did not occur until after the

initial contacts between EPA and the Division of Land and Natural Resources. The Lands Division prosecutes cases for the EPA and has a continuing relationship with their enforcement officers. Based on informal opinions from LNR, the EPA withheld the names of parties in possible Superfund cases. Lands officials later admitted that they knew of the Lavelle problem in early September of 1982.

The House Judiciary Committee investigating this matter later found that EPA Counsel Richard Mays sought a formal opinion from the Justice Department but was unable to get legal guidance from the OLC. This report overlooked the ongoing tension between the OLC and agency lawyers. Perry and Mays sought legal advice from the Justice Department, but the EPA lawyers were reluctant to seek a formal opinion. Acting General Counsel to the EPA Gerald Yamada advised Perry and Mays to seek informal advice. By statute, the OLC renders the official opinions for the executive branch. If the OLC issued a formal opinion to the EPA, the opinion would bind the actions of EPA administrators.[30] EPA

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[30] The problem of binding agencies to the opinion is a recurrent problem for OLC lawyers. Agency counsel often seek informal opinions or some other indication of the OLC's interpretation before submitting a request for a formal opinion. Agencies, hearing rumors of an adverse OLC interpretation, will seek to withdraw their requests

lawyers were unwilling to allow the OLC to foreclose the option of bargaining with Congress.

On September 28, 1982, OLC lawyers provided EPA officials with a standardized response to congressional requests for documents. OLC told the EPA to express a willingness to cooperate with the Subcommittees on most of the document requests, but to withhold judgment on enforcement sensitive materials. By their admission, OLC lawyers had little knowledge of the Superfund or the withheld documents. OLC staffers later told the investigating committee that their recommendations were standardized responses to requests regarding informational requests from Congress. The OLC approach was to suggest a desire to comply, offer restricted access to certain documents, and point out those documents that raised issues of executive privilege. They based their decision to withhold certain documents on an understanding of the broad categories of documents requested by the House committees, rather than the customary relations between the agency and the subcommittees on Capitol Hill.

Chairmen Levitas and Dingell requested case files for EPA Superfund sites. These case files

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for formal opinions. The OLC then must decide whether to issue a binding opinion despite the withdrawal.

included materials on possible prosecution of violators ("enforcement strategy"), as well as documents gathered in making enforcement decisions ("deliberative"). Both kinds of documents fell into categories that OLC lawyers traditionally found protected by executive privilege. Even so, at a September 29 meeting, Deputy Assistant Attorney General Lawrence Simms told EPA officials not to assert privilege before either committee until the OLC concluded that the matter warranted a claim of privilege.

After the preliminary meeting with lawyers from OLC and the Lands Division of the Justice Department, EPA and Lands Division officials met with Robert Prolman, staff counsel to the Levitas Subcommittee. OLC lawyers avoided these early meetings with Congress because they felt entering the discussions would compromise their role as counselor to the agency and might escalate the conflict prematurely. Prolman, stating that the committee historically had maintained the confidentiality of documents, insisted that he and executive branch representatives could arrange a satisfactory access agreement.

Different Counsel, Different Roles

Amid escalating conflict the October 1 meeting forced EPA officials to seek guidance from OLC and White House lawyers. Even the earliest contacts between the EPA and the Justice Department illustrated their different approaches to this issue. On the morning before the October 1 hearings, representatives from the EPA, Lands Division, OLC, and White House Counsel's Office met to discuss strategy. According to later testimony, EPA officials informed Justice Department officials that they intended to settle the matter and cooperate fully with Levitas. According the EPA representatives at the meeting, the OLC prevented the EPA from full disclosure. Simms doubted that any settlement agreement could ensure the confidentiality of the documents.

The OLC representatives interpreted the outcome of the meeting much differently. From their perspective, EPA officials were to seek assurances that House rules would not permit wider access to the documents. Under the OLC's understanding, release of these documents to the Subcommittee would allow access to any member of Congress or their staff. By extension and consistently with House rules, no agreement between

the EPA and Levitas would stop other members of Congress from entering the documents into the public record. The OLC lawyers left the October 1st morning meeting with the understanding that the EPA would contact them before reaching any settlement with Levitas.

At the October 1 meeting, members of the Subcommittee and their staff, citing their past record on confidentiality, convinced EPA representatives to continue the past practice of releasing documents as requested on a case-by-case basis. EPA officials later disputed the subcommittee's interpretation of the nature of the agreement reached but generally consented to handing over all documents.

The EPA's shifting position on the documents reflected the cross-pressures on the agency and the intervention by the OLC. On one hand, the threat of subpoena and the need for continuing relations with the Levitas and Dingell subcommittees pushed Gorsuch and Perry toward cooperation and full disclosure. On the other hand, OLC lawyers fervently pressed the importance of withholding documents relating to enforcement decisions and litigation. The EPA even received conflicting advice from within the Justice Department. Lands Division lawyers disagreed on this

issue. Walker and Ramsey consistently supported a claim of executive privilege. Other lawyers in the Lands Division, perhaps because of their knowledge of political influence and Lavelle's refusal to recuse, understood the importance of maintaining good congressional relations and recommended cooperation and compromise. Justice Department officials could not reach a consensus on the appropriate course of action.

Later in the afternoon of October 1, EPA Associate Administrator and General Counsel Robert Perry sent a letter to Chairman Dingell suggesting the need for further discussions. In sending some documents to the subcommittee, Perry wrote,

> we have not in this submittal provided certain internal Agency documents such as enforcement strategy memoranda and statements of negotiation or settlement positions being utilized in ongoing litigation. EPA is concerned that the release of this information at this time may interfere with the ongoing enforcement procedures. Should your Subcommittee find, however, after reviewing the material provided under cover of this letter, that it is still necessary to review this enforcement-sensitive information, we will be willing to discuss its release and confidential treatment with you or your staff.[31]

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[31] Letter, Robert Perry to John D. Dingell, Jr., October 1, 1982, in Withholding EPA Documents, 917-918.

Though Perry sent the letter to confirm the events of the October 1 meeting, Levitas interpreted Perry's action as a retreat from compromise previously adopted.

Levitas believed that Justice Department lawyers had intervened to prevent cooperation between the EPA and the Subcommittee. Earlier drafts of Perry's letter indicated to Levitas that Perry intended to give all requested documents to the Subcommittee. At the OLC, Simms reviewed the letter and deleted the statements that the EPA would make "all documents available." According to Simms, the intent of the redraft was to remove any ambiguity from Perry's letter. At this point, OLC lawyers still believed that the EPA fully supported a claim of privilege.

At this stage, the OLC began to intrude into the process. Robert Perry also was to meet with Michael Barrett, counsel to the Dingell subcommittee, on October 6th to discuss document access. In preparation for that meeting, EPA officials again met with members of the OLC. At the meeting, members of the EPA's Office of Legal and Enforcement Policy (the litigative arm) and their Office of Congressional Liaison joined Perry and his Deputy Counsel. According to the OLC version of events, Deputy Assistant Attorney General Larry Simms emphasized the process necessary to claim

privilege and urged the EPA to deliver the withheld documents to the OLC for review. The OLC still professed to be following a case-by-case review procedure of earlier administrations.

The differences between the EPA and OLC interests sharpened. OLC lawyers particularly were worried that some EPA officials wanted to turn over the documents to avoid conflict with their authorizing Subcommittee. Perry's later testimony suggested that he favored full disclosure and withheld the documents only under the request of the OLC.[32] Sensing EPA's concern about the political costs of angering Levitas and Dingell, Simms became more forceful with EPA officials. While EPA Congressional Liaison Lori Gribbon advocated maintaining good relations with Congress, Simms spoke more generally of the importance of preserving the president's constitutional authority. According to various participants, the discussion moved from a focus on the specific documents to the broader constitutional foundation of privilege claims.

The EPA continued to receive mixed signals from the Justice Department. While OLC advocated a hard line against any disclosure of the sensitive documents,

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[32] Perry interview, cited in Withholding EPA Documents, 77, n. 302.

Lands Division Counsel Alfred Regnery and Kim Pearson pushed EPA to seek a negotiated settlement to ensure the confidentiality of the documents.[33] Gribbon, Regnery and Pearson emphasized that the costs of withholding documents fell directly on the EPA. From their perspectives, Simms underestimated the costs associated with asserting the privilege because those costs fell directly on the EPA and not the Justice Department.

To this point, OLC lawyers had no knowledge of the political manipulation of Superfund enforcement. Simms had heard discussions among EPA officials that Lavelle should have recused herself from the Stringfellow matter. For Simms, such discussions were commonplace and did not mean that Lavelle had a legal obligation to recuse. He was unaware that Lavelle had made a commitment to this effect during her appointment

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[33] Justice Department and Lands Division lawyers would later downplay the differences in approach when testifying before the House Judiciary Committee, chaired by Representative Peter Rodino. However, EPA administrators perceived that Simms and the OLC increasingly pushed confrontation. Lands Divisions lawyers actively pursued a negotiated settlement with Levitas subcommittee counsel Barrett. Thus, despite the conflicting testimony, the Justice Department lawyers differed both in perception and reality.

hearings before the Senate committee.[34] Neither EPA nor Lands Division officials informed the OLC of the existence of evidence of wrongdoing in the withheld documents. As a result, the OLC pressed forward with the executive privilege claim unaware of the consequences and their unknowing participation in a cover-up.

Members of the OLC later denied that all EPA officials wanted to cooperate with the committee. The OLC impression was that the EPA was merely uncomfortable with the impending conflict with Levitas, but still agreed on the sensitive nature of the documents involved. Even so, EPA Deputy General Counsel Richard Mays suggested to the Dingell subcommittee that the OLC was eager to push the executive privilege conflict. "[I]t was my opinion," Mays testified,

> that the Watt matter had not resolved the issue of executive privilege to the satisfaction of the Department of Justice or at least the Office of Legal Counsel, and that they were on the lookout for another case by which they might test the issue.

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[34] To this point, the Superfund conflict and Lavelle's conflict of interest were not reported in the press.

EPA officials felt that the OLC was more concerned with pushing the test-case than understanding the EPA's political predicament.

As part of the standard procedure in executive privilege claims, the EPA forwarded the documents to the OLC for review. After the October 6th meeting, Perry sent the withheld documents to the OLC. Before this time, OLC lawyers simply had relied on the description of documents provided by the EPA and Lands Division officials. The transfer of documents to the OLC exacerbated tension between the Levitas subcommittee, Michael Barrett of the Dingell subcommittee staff, and the Justice Department. Levitas and Barrett believed that OLC lawyers had instructed Perry to purge the EPA files of all documents related to the dispute. In other words, the OLC attempted to circumvent the subpoena process by confiscating the withheld materials. Perry admitted that his miscommunication with the OLC and Barrett caused the problem. Though Perry called Barrett and attempted to correct any misperception about the document transfer, the Dingell subcommittee and Barrett

believed that the Justice Department was obstructing their investigation.[35]

Theodore Olson, Assistant Attorney General in charge of the OLC, vehemently denied ordering a purge. According to Olson, the OLC refused to accept the original documents from EPA. Watt had suggested that Justice take control of the documents during the earlier controversy. Simms indicated that the OLC learned then that such a transfer violated the Federal Records Act.[36] The document transfer was a routine procedure required before forwarding a recommendation to assert privilege to the president. Perry later testified that no one at the OLC ordered a purge and that he may have suggested, as Watt had, the transfer of the originals. Simms tried to assure Chairman Dingell that the department had no intentions of purging EPA files in order to repair relations with Congress.[37] The Judiciary Committee investigating the EPA document dispute found no evidence that the OLC attempted to obstruct the investigation by ordering a

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[35] Withholding EPA Documents, 88, n. 405.

[36] Ibid., 92, n. 442.

[37] Letter, Simms to Dingell, undated, in Withholding EPA Documents, 1218.

purge.[38] Though no obstruction occurred, the purge issue is important because it illustrates the souring of relations between the OLC and Congress. The Watt controversy and congressional perceptions of the OLC test-case strategy made the subcommittee suspicious of Justice Department involvement.

Regardless of intentions, the document transfer definitively shifted control to the OLC. Deputy Assistant Attorney General Larry Simms, a holdover from the Carter administration who had orchestrated the legislative veto test, oversaw the matter at OLC. Staff attorney-advisor Laurel Pyke Malson assisted Simms while Mark Rotenberg, another OLC staff attorney with expertise on executive privilege matters, provided advised Malson. Within the OLC, the momentum for asserting the privilege grew stronger. Laurel Pyke Malson, undertaking a preliminary review of the documents on October 10th, she found that many documents related to ongoing litigation.[39] Simms,

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[38] Ibid., 91-93.

[39] Malson and Simms agreed to release some documents that were not enforcement sensitive or in active case files. They targeted others for release for political reasons. For example, Malson suggested releasing documents involving a site in Dingell's district. This strategy attempted to satisfy the parochial concerns of the Subcommittees without sacrificing the broader principle of executive privilege.

agreeing with Malson's assessment, suggested she contact the Lands Division to confirm that the documents were from active case files. Perceiving a chance to test the limits of the president's executive privilege, the OLC abandoned the approach of thorough, case-by-case review of the documents in favor of a broader assertion of constitutional prerogatives. The OLC forwarded a recommendation to the president before formally asserting executive privilege. Worried that the Lands Division still wanted conciliation, Simms doubted that the OLC could push the issue: "[I]f the Lands people do not want to hang tough," he told Malson, "there is very little we can do other than to try to get Dingell to agree not to make public the most sensitive stuff."[40]

The actions of the Lands Division confirmed Simms' fear. Regnery still pursued direct negotiations

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The strategy backfired. Ultimately, OLC's attempt to release documents of particular interest to Subcommittee members would lead them to investigate Federal Elections Commission records to look for connections between contributors and the enforcement files. This FEC visit was another source of declining relations because Subcommittee members felt the OLC was seeking to impeach the motives of the investigation. Document Review Notes, Malson to Simms, October 10, 1982, in Withholding EPA Documents, 954-958, 127-132.

[40] Note, Simms to Malson, October 11, 1982, in Ibid., at 959.

with Barrett. As a gesture of cooperation, Regnery sent several documents related to ongoing enforcement to the subcommittee. Regnery met with Barrett and other subcommittee staff on October 14. The Dingell subcommittee staff reviewed the withheld documents, but Regnery retained possession of them. Unwilling to concede a legal basis for privilege, the Dingell subcommittee still saw this as a first step. The initial review allowed the subcommittee to decide which documents were essential to the investigation. Regnery thought that the review would convince the subcommittee that the documents were enforcement related and that the Justice Department was not hiding any wrongdoing. James Christy, minority counsel to the subcommittee, and Regnery attempted to reach a settlement. Under their proposal, the EPA would hand over all documents under conditions of limited access and confidentiality procedures.

Despite involvement of Republican minority, the OLC never seriously considered the Regnery-Christy proposal.[41] Simms later discussed the proposal with

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[41] This point is yet another source of dispute. The OLC and Carol Dinkins, Assistant Attorney General in charge of the Lands Division, denied that Regnery informed them of the proposal. Regnery testified that he consulted with Simms or Olson. The Subcommittee staff understood from Regnery that he needed to consult the OLC

Christy over the phone. In their conversations, Christy indicated to Simms that Republican subcommittee members were unlikely to support any claim of executive privilege. Christy and Simms both agreed that the partisan divisions were not the source of the confrontation.

At a meeting of OLC and Lands Division lawyers, Dinkins and Olson reiterated the need to review of the documents and keep EPA officials committed to the executive privilege claim. Regnery, rejecting the implication that personalities influenced the decision[42], later testified that his settlement proposal never received serious consideration because the OLC focused on the executive privilege claim. On learning that Regnery allowed the subcommittee to review the documents, Olson and Dinkins excluded Regnery from future decisions.

As a result of the October 15th meeting, Robert McConnell, Assistant Attorney General in charge of the Office of Legislative Affairs, informed Chairman Dingell that the department saw no need for the subcommittee to have the EPA documents. The lawyers

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before finalizing the agreement. Ibid., at 100-103.

[42] Ibid., at 103, n. 541, 542.

argued that the subcommittee's review of the documents allowed the Congress to confirm that the documents were enforcement-related and free of any evidence of wrongdoing.

After receiving the letter Dingell ordered a subpoena of EPA administrator Anne Gorsuch. The October 21st subpoena gave Gorsuch one day to produce the withheld documents. Otherwise she was ordered to appear before the subcommittee on October 26th. Gorsuch, thinking that an agreement was imminent, expressed surprise and concern at the subpoena. Lawyers from the OLC and the Lands Division met with Gorsuch later in the evening on October 21st.

Until this time, the discussion within the executive branch did not include high-level Justice Department officials and White House Counsel. When subcommittee staff served the subpoena, Attorney General William French Smith was abroad and White House Counsel Fred Fielding was on medical leave. Their absences were crucial to the course of the dispute. Generally speaking, officials in the attorney general's office serve as generalists and political strategists who coordinated the various departmental divisions. As such, they temper the specialized interests of the divisions such as the OLC. House counsel Stanley Brand

suggested after the dispute that had Deputy Attorney General Edward Schmults represented the Justice Department in the conflict, the subcommittee and the department could have resolved the matter amicably. Similarly, White House Counsel often override Justice Department actions that run counter to White House political interests. Without their centralizing force, the OLC would be free to pursue the executive privilege claim without White House approval. Representatives from the White House Counsel attended the meeting with Gorsuch on October 21st, but the urgency for decision dictated that the OLC take control of the matter.

Olson reviewed the documents personally but, like Malson and Simms, lacked direct knowledge of ongoing prosecutions at the Lands Division. Without any confirmation from Lands, Olson formally recommended asserting the privilege. Olson's understanding was that releasing the materials would compromise pending prosecution of Superfund violators and interfere with the deliberative processes used to make prosecutorial decisions. Dinkins supported this position. Two issues concerned Olson and Dinkins. Olson feared that providing access to Prolman and Barrett might constitute a waiver of the privilege claim. Dinkins

worried that Gorsuch and other EPA staffers wanted to accede to congressional wishes.

Despite these concerns, the OLC drafted a memorandum to the president justifying the assertion of privilege. Olson forwarded the formal recommendation on October 25th. The OLC memorandum reiterated the legal position of past Justice Departments. All material related to legal strategy and ongoing litigation fell within the scope of executive privilege with one notable exception. Olson conceded that any communication that contained evidence of official wrongdoing negated any claim of executive privilege. Unknowingly Olson exempted the very situation that would derail the test-case. Perhaps with U.S. v. Nixon[43] in mind, he told President Reagan:

> It is possible, of course, that documents similar to the 35 in question here might themselves contain some evidence of unlawful conduct by a government agency or government officials. In such a situation, the overriding importance of furnishing evidence of unlawful behavior would weigh heavily against any assertion of Executive Privilege and we would be most reluctant to recommend that we assert Executive Privilege under such circumstances.[44]

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[43] 418 U.S. 683 (1974).

[44] Memorandum, Theodore Olson to President Ronald Reagan, October 25, 1982, in Withholding EPA Documents, 1021.

The Olson memorandum reflected the standard legal position taken by the OLC in past administrations, both Democratic and Republican, as well as the Court's dicta in Nixon. Hence, it was not novel substance in the OLC's legal position that heightened the conflict.

White House Counsel and the president's domestic staff were skeptical of the privilege claim because of the political costs. The Watt controversy had reinforced their feelings about direct confrontation over document access. Olson attempted to assuage White House fears by insisting that this case presented a more substantial claim of privilege. "[T]he present situation," Olson wrote,

> is, in our view, an even more compelling one as regards an assertion of your privilege to protect the confidentiality of deliberative documents from disclosure to Congress or the public. The Department of Justice, as well as many other federal agencies, constantly generate documents indistinguishable from the 35 at issue here which develop strategy and legal positions related to the development and prosecution of cases . . . in connection with our important responsibility to act on your behalf to fulfill your constitutional responsibility to "take care that the Laws be faithfully executed . . .." Were such documents routinely or even sporadically to be furnished to congressional subcommittees, Members of Congress would be able both to participate in the decision making that occurs with regard to such cases as well as to reveal, with impunity, the Government's case to

> the targets of the cases under development.[45] (emphasis in original)

Olson provided no further distinction between the Watt controversy and the dispute at hand, nor any evidence of concrete damage or injury resulting from the past practice of accommodation. Instead, he relied exclusively on the argument that the legislature would press for greater access. For Olson, the president must assert the privilege to stop further intrusions by Congress into the litigation process.

By acting as an intermediary between the president and the EPA, Olson managed to coopt both. Though Gorsuch balked at the OLC's suggestions, she was willing to assert the privilege on the orders of the president. Olson stated in the memorandum that the OLC based the privilege claim on the Land Division's recommendation, but also suggested that Gorsuch agreed with the OLC's position. Whether Gorsuch actually supported the assertion is unclear. The confusion

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[45] Earlier Draft of Memorandum, Olson to Reagan, October 25, in Ibid., at 1051. The earlier draft conveys the essence of the test case strategy more directly. While the later draft emphasized the importance of secrecy in legal strategy, this draft suggests that Congress will continue to seek other similar documents. The OLC attempted to convince the EPA, Lands Division, and White House Counsel of the potential scope of congressional inquiries if the White House asserted no claim for these documents.

worked in the OLC's favor. Just as the president's staff thought that Gorsuch supported the claim, so Gorsuch thought that the White House approved the OLC recommendation.

Still unaware of the evidence of political manipulation, OLC lawyers vigorously defended the assertion of privilege as late as November, 1982. Olson even publicly defended the executive privilege claim after the Washington Post ran an article alleging that the withheld documents contained evidence of "misconduct and unethical behavior" by the EPA. Olson, thinking that the Post distorted the facts, counterattacked, in a manner uncharacteristic of OLC's of past administrations. In a direct letter to the editor,[46] Olson cited the positions of the Roosevelt administration supporting executive privilege.[47] Earlier drafts suggested that Post writer Mary Thornton had simply defended Dingell because the subcommittee was a loyal source.[48] Later drafts deleted the attack on the Post and Chairman Dingell. Despite the Post's

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[46] Theodore Olson, "Hazardous Waste, Hazardous Story," Washington Post, November 13, 1982, A17 (1).

[47] Ibid., A17 (2).

[48] Draft Letter, Ted [Olson] to Ed [Schmults], October 27, 1982, in Withholding EPA Documents, at 1111, 1112.

references to political misconduct, the OLC and EPA counsel found no evidence of manipulation when reviewing the documents in December.

Asserting the Privilege: Who Takes the Heat?

Gorsuch did not want to appear before the subcommittee and assert the claim of executive privilege. Given her willingness to cooperate and maintain good relations with Levitas and Dingell, it is not surprising that Gorsuch steadfastly continued her opposition to withholding the documents. The letter from President Reagan, though based on the White House's misunderstanding of Gorsuch's position, convinced Gorsuch that she should support the president's desire to withhold the documents.

Gorsuch contacted Watt about his role in the earlier conflict over the weekend of November 6th. Watt warned Gorsuch that the Justice Department wanted to provoke a direct confrontation. For Watt, the Justice Department was not the only problem Gorsuch faced in dealing with the Dingell Subcommittee. The White House initially had backed Watt in asserting privilege but then negotiated a settlement that undermined his credibility. Watt, thinking that the

White House would repeat its retreat, urged Gorsuch to remove herself from the conflict at any cost.

Gorsuch heeded Watt's warnings. Monday, November 8th, she ordered Perry to deliver all the withheld documents to the White House or Justice Department. Perry informed Simms at the OLC of her order. Simms told Perry that such a transfer violated federal law. Sensing the seriousness of Gorsuch's action, Simms also called Richard Hauser at the White House to get an official there to convince Gorsuch to stay the course. Chief of Staff James Baker contacted Gorsuch directly in attempt to assuage her, but she continued to object to asserting the privilege. Once Baker and other White House officials assured her that the president supported the claim, Gorsuch reluctantly consented to holding the documents. President Reagan signed a memorandum ordering Gorsuch to withhold the documents.[49]

Though willing to withhold the documents, Gorsuch did not want to be the messenger asserting the privilege.[50] Instead, Gorsuch wanted to appear before

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[49] Memorandum, Reagan to Gorsuch, November 30, 1982, in Withholding EPA Documents, at 1166-67.

[50] Handwritten Note of Michael Brown, 11/22/82, in Withholding EPA Documents, at 1131.

the subcommittee with the relevant documents in hand. During her testimony, Gorsuch wanted Justice to assert the privilege and prevent her from providing the documents to the subcommittee or testifying about their contents. Gorsuch understandably felt that she was taking the heat for a decision made by the OLC.

Olson opposed Gorsuch's plan. As official custodian of the documents, only the EPA could assert the privilege claim and refuse to hand over the documents. The procedure defined by executive branch legal opinions compelled the custodian to assert the privilege claim. Olson indicated he was willing to provide Gorsuch with an opinion justifying the need for her to go before the Subcommittee and withhold the documents. Other concerns perhaps motivated Olson to have Gorsuch take the lead. Members of the subcommittee publicly had accused Olson and other Justice officials of overruling Gorsuch and orchestrating a purging of EPA files. Olson feared his assertion of the claim would lend credence to Dingell and Levitas' accusation that Justice had directed the withholding and seized the documents from EPA files.

On December 2nd, Gorsuch reluctantly testified before the Levitas subcommittee, accompanied by EPA Deputy General Counsel Michael Brown and Olson from

OLC. Gorsuch asserted privilege for 74 documents. Robert Perry, General Counsel of the EPA, testified before the Dingell subcommittee the next day. During this testimony, Chairman Dingell questioned Perry about the role of the Justice Department in orchestrating the conflict.[51] Perry stated that he did not forward the withheld documents to the OLC. Apparently sensing the growing conflict, Perry was evasive and tried to diminish his role as liaison between the OLC and subcommittee counsel Michael Barrett. Relying on Barrett's evidence of Perry's involvement, Dingell reminded Perry of his oath.[52] Still, Perry consistently refuse to admit any direct role in withholding the documents.

EPA officials resented being the "fall guys" for the constitutional lawyers at the OLC. Gorsuch continued to push the Justice Department to take responsibility for claiming executive privilege. To distribute responsibility and ensure White House support, Gorsuch forced Olson and Hauser to sign

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[51] Congress, House, Committee on Energy and Commerce, EPA Withholding of Superfund Files, Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 97th Cong., 2d sess., (1982), 27-53.

[52] Ibid., at 42, 46, 53.

statements certifying that they reviewed the documents and personally supported withholding the documents. To this point, only Richard Hauser, a staff attorney of the White House Counsel, represented the president in this affair. Though Baker had spoken to Gorsuch about the issue, the matter was not a substantial concern to the White House.

Shortly after Gorsuch and Perry testified before Congress, OLC lawyers became aware of possible political improprieties at the EPA.[53] Malson contacted Simms, who relayed the information to Olson. Malson, EPA counsel, and Lands Division lawyers discovered the potential problem when conducting their first joint review of the documents. The OLC might have pushed the right principle in the wrong case, or simply failed to follow procedures to ensure a successful test-case. Prior to this, each agency had conducted reviews separately.

In the margins of Document 38 of the withheld memoranda, EPA General Counsel Michael Brown wrote

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[53] Testimony of Laurel Pyke Malson, attorney-advisor, and Theodore Olson, Assistant Attorney General in charge of the OLC. Withholding EPA Documents from Congress, 70, n. 240. The Judiciary Committee Report supports the OLC lawyers claim that they had no knowledge of political misconduct when the OLC advocated asserting the executive privilege claim.

"ethics?." EPA officials told Malson that they believe Perry had written notes to Lavelle instructing her to recuse. The Perry-Lavelle correspondence was not part of the withheld documents. Simms instructed Malson to get these memoranda from EPA officials. Olson personally reviewed the questioned documents and found no direct evidence of wrongdoing by Lavelle. When the EPA representatives could not find the letters, Olson felt that the matter did not warrant releasing the document to Congress.

Simms read Perry's testimony before the Dingell subcommittee upon returning from New York on December 11th. In the transcript, Simms found evidence that Perry had committed perjury. Simms felt that the OLC could not sustain the executive privilege claim in the face of these problems. Perry was a crucial participant in the privilege claim of December 2nd. Suspicion of perjury put Simms in a difficult position. Simms would be a potential witness if Congress pressed prosecution of Perry. The OLC, in defending the executive privilege claim, also was acting as Perry's counsel before the Levitas and Dingell subcommittees. Though concerned that Perry was evasive in his testimony, Olson saw no direct evidence of perjury.

The OLC pushed the test-case forward. The OLC suggested filing a civil suit for injunctive relief against the House subpoenas. The Justice Department did not intend to enforce the congressional contempt statute. To ensure that the district court would hear the dispute, the OLC even recommended a statute conferring jurisdiction.[54] The Justice Department abandoned the proposed statute, but the Civil Division filed suit on December 16th to enjoin enforcement of new subpoenas issued by the Levitas Subcommittee.[55]

The OLC clearly wanted the court to decide the matter on the merits. Olson recommended amending the complaint to list an inferior congressional officer as the defendant.[56] This tactic would minimize the possibility that the court would avoid the dispute on grounds of non-justiciability.

The executive privilege claim soon unravelled. The Dingell Subcommittee, attempting again to obtain

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[54] Draft Statute, "An Act to Confer Jurisdiction Upon the District Court of the United States of Certain Civil Actions Brought by the House Committee on Public Works and Transportation, and for Other Purposes," December, 1982, in Withholding EPA Documents, 1334-5.

[55] United States of America v. The House of Representatives, et. al., 556 F. Supp. 150 (D.D.C. 1983).

[56] Memorandum, Olson to McGrath, December 20, 1982, in Withholding EPA Documents, 1444-5.

the documents, served a subpoena to Gorsuch. In letters to Gorsuch on January 14th and 25th, Chairman Dingell told the EPA that the subcommittee suspected political misconduct by EPA administrators. Suspicions that EPA and Lands Divisions officials had months ago finally surfaced in correspondence with Congress. These letters again raised suspicions at OLC. Nevertheless, the White House briefing on January 24th focused exclusively on the merits of withholding enforcement sensitive documents.[57] Justice Department officials had not briefed White House aides on any evidence or suggestions of political wrongdoing. Instead, the discussion focused on political strategy if the pending civil suit was unsuccessful.

The Justice Department did react to Dingell's letter. Upon learning of accusations of legal and ethical violations at EPA, Olson and Simms realized that Malson may have interpreted correctly the implications of Document 38. Deputy Attorney General Edward Schmults took a more active role in the dispute after learning of Dingell's accusations. Schmults organized a meeting of members of the EPA, Lands

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[57] Note, McGrath to Ken Starr with Summary of White House Briefing Agenda, January 21, 1983, in Withholding EPA Documents, 1918-1920.

Division, and the OLC for January 26th at which these representatives formed a working group to coordinate interagency communications. Before the deputy attorney general's involvement, the agencies handled communications on an ad hoc basis. At the meeting, the working group pieced together the allegations and evidence underlying wrongdoing by Lavelle. Officials from Lands and OLC believed that other violations may have occurred, but the evidence against Lavelle was sufficient to warrant reconsideration of the OLC's position on the privilege claim.

Schmults ordered the OLC to reexamine the documents related to the Stringfellow site. In two withheld documents, Malson discovered more specific evidence of political manipulation in the administration of the Stringfellow cleanup. These references had not drawn Malson's attention in earlier reviews. The intervening controversy apparently had sensitized the OLC to references of political wrongdoing.

The OLC representatives recognized that any basis to claim executive privilege was collapsing. The collapse extended beyond those documents containing evidence of wrongdoing. After the district court approved the House motion to dismiss the department's

civil suit, Schmults, Dinkins and Olson agreed that the Department must negotiate with the House subcommittees.[58]

OLC lawyers disagreed about how to handle the incriminating evidence. Though the OLC opinion had accepted the historical practice that agencies must provide Congress with all documents relating to violations of law, Olson sent the documents to the Justice Department Criminal Division before releasing them to Congress. Simms argued that the OLC must immediately release the documents to Congress. Olson, contrary to his earlier stand that evidence of wrongdoing must be disclosed to Congress[59], now argued that the Criminal Division should handle the investigations. A fortnight later, the Dingell subcommittee received the documents from Olson--too late, by Olson's own public standards, to allay suspicions of a Justice Department coverup.

What finally caused Olson to relent? Intervention by the White House Counsel is apparently the answer. This action followed the pattern

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[58] United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).

[59] Cf., Memorandum, Theodore Olson to President Ronald Reagan, October 25, 1982, in Withholding EPA Documents, 1021.

established during the Watt controversy. The Counsel supported the defense of constitutional prerogatives until the political costs became unbearable. In the Gorsuch controversy, Fred Fielding, the Counsel to the president, entered the conflict after the damage was done. During Fielding's absence, the Justice Department had dominated the issue. Only White House attorney Richard Hauser had been aware of the dispute and even Hauser was not fully informed of the possibility of wrongdoing until a very late stage in the dispute.

Fred Fielding, learning of this evidence while attending scheduled negotiations between Schmults and Levitas, entered negotiations with the two subcommittees. Justice Department officials did not participate. Fielding's negotiation produced a settlement with Congress, which provided Congress with redacted versions of all withheld documents. As in past conflicts over executive privilege, Congress ultimately gained complete access to the executive papers at issue.

The House Judiciary Committee then undertook an extensive investigation of a possible coverup at the Justice Department. Simms, fearing the impact on Olson and the reputation of the OLC, advised Olson to

cooperate with the subcommittee. During the course of this investigation, political officials at the Justice Department, including Olson, would face charges of perjury. Congress would appoint a special prosecutor to investigate Olson. Olson's challenge to the constitutionality of that officer resulted in a major defeat for the strict doctrine of separated powers championed by the Justice Department.[60] Olson and Dinkins would pay dearly for defending the Department's action. Undaunted, the OLC would continue to push other test-cases defending the constitutional prerogatives of the president.

Conclusions

The partisanship thesis cannot explain the conflict over separation of powers issues in the late seventies and eighties. A Democratic administration initiated the test-case strategy. A Democratic Congress fought the Carter Justice Department. The Reagan Justice Department consistently advocated the position of many earlier administrations on executive

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[60] Morrison v. Olson, 108 S.Ct. 2597 (1988). Chapter 6, above, discusses the effect of this litigation on the OLC test-case strategy.

privilege claims. Only political norms dictating cooperation prevented the conflict from emerging earlier.

Nor can the leadership thesis explain the different outcomes of the test-cases. The failure of the executive privilege test-case resulted from breakdowns in organizational cooperation. In the legislative veto case, high officials in the Carter administration ensured that the agencies maintained working relations with Congress before the test-case moved forward. Recognizing needs of the agencies ensured cooperation despite inevitable political pressures. In the executive privilege case, by contrast, White House staffers and the attorney general did not participate until very late stages. The results were poor calculation of the political consequences and failures in interagency cooperation.

The changing orientation of the OLC is a better explanation of increased confrontations over the separation of powers. The OLC, the White House Counsel, and executive agency personnel showed consistent behavior across the two administrations. In the wake of Watergate, President Carter and Attorney General Bell advocated principled interpretation of the law as an administration objective, as distinct from

the melding of politics and law of earlier OLCs. This changed orientation cemented distinctions between the institutional roles of the White House Counsel and the OLC within the executive branch. The OLC forced confrontations to reinforce the Justice Department's interpretation of the president's power. By contrast, the White House Counsel acted to mediate controversies with Congress or at least to minimize the political capital lost in the legal disputes. Agency personnel similarly acted to minimize the loss of political status with congressional committees. Institutional norms of these organizations were strong forces shaping their behavior throughout the conflict.

A case study of the executive privilege claim for EPA documents illustrates the shortcomings of the test-case strategy in the separation of powers arena. Though the OLC may adopt an independent, principled approach to advising the president, the political costs of a confrontation stance fall on the White House and executive agencies who must deal with Congress. These institutional interests of presidents and executive agencies heads provide strong resistance to the OLC strategy.

This dispute had far-reaching effects on constitutional law, interbranch politics, and the

organizational stability of the OLC. Congress appointed Special Prosecutor Alexia Morrison to investigate the conduct of Edward Schmults, Theodore Olson, and Carol Dinkins in withholding evidence of misconduct by EPA administrators. Olson would challenge the constitutionality of the special prosecutor. The Court sustained the statute by an overwhelming 8-1 majority, marking a retreat from the formalist conception of the separation of powers endorsed in INS v. Chadha.[61]

The conflict between the Justice Department and Congress spread rapidly. Soon after this episode, many Justice Department officials resigned. Though Attorney General William French Smith and Theodore Olson intended to leave following Reagan's first term, the EPA controversy escalated the flow of lawyers from Justice. Reagan subsequently appointed Edwin Meese and William Bradford Reynolds to fill vacancies at the upper reaches of the Department. The distrust that emerged from the EPA document dispute and the controversial civil rights record of Reynolds combined to create a contentious atmosphere surrounding the

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[61] Morrison v. Olson, 487 U.S. 654 (1988); INS v. Chadha, 462 U.S. 919 (1983). See the discussion of these case in chapter 6, above.

administration of justice. The end result was deteriorated relations between Congress and executive branch lawyers, as well as sagging morale within the newly "professionalized" units of Justice, namely OLC and the Solicitor General's Office.[62]

The OLC underwent tremendous turnover at all staffing levels. Interim appointees headed the OLC for most of Reagan's second term. During this time, the professionalist orientation that characterized the service of Harmon and Olson shifted to an institutional ideology of presidential power that supported the broader conservative movement of the Reagan administration in the second term.[63] The new lawyers

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[62] Burt Solomon, "Meese Sets Ambitious Agenda That Challenges Fundamental Legal Beliefs," National Journal, 23 November, 1985, 2642. Charles Fried challenges these categorizations in Fried, Order and Law: Arguing the Reagan Revolution (New York: Simon & Schuster, 1991).

[63] One attorney-advisor at the OLC under Harmon and Olson, and an admitted Democrat, stayed in the office because he felt that Olson was committed to the independent, professionalist orientation of the Carter years. Toward the end of Olson's tenure, amid the controversy surrounding the EPA documents and the Meese appointment, many of these holdovers left because the OLC underwent this institutional transformation. Thus, it was not the election of Reagan or the conservative agenda that forced OLC lawyers to leave, but the change of organizational norms from an emphasis on professionalism to attempts to politicize. This distinction is crucial to my criticisms of Caplan. Chapter 6, above, details more broadly why these attempts failed and how Congress and courts rebuked efforts to use this office to further the political agenda of the

at OLC and Justice would transform this strongly professional and principled approach to legal interpretation into a conservative political tool. Charles Cooper, a chief assistant to William Bradford Reynolds in the Civil Rights Division, eventually headed the OLC.[64] Congress confirmed Cooper along with many other Justice officials in a mass confirmation designed to restore stability to an ailing and aimless Justice Department. Despite the need for greater stability, Congress expressed serious reservations at Cooper's appointment because of his service under WIlliam Bradford Reynolds in the Civil Rights Division. In this period of turmoil and conflict, several forces worked to restore a balance to interbranch relations and to the roles and behavior of the OLC.

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conservatives on issues of presidential power. OLC Attorney-advisor, interview with author, August 29, 1990.

[64] Attempts at politicizing the OLC and defense of presidential prerogatives did not occur until the end of the Reagan presidency. Contrast this with the findings of Lincoln Caplan and Marissa Martino Golden with regard to the Civil Rights Division. Caplan, The Tenth Justice (New York: Alfred A. Knopf, Inc., 1987); Golden, "How Reynolds Beat the Bureaucrats with Brains, Zeal and Long Hours," Public Affairs Report, 32 (November, 1991), 8-9.

Chapter Six

Restoring the Balance with Political Solutions

As we have seen, from the Carter administration through Reagan's first term, an assertive and independent Justice Department stood poised to resolve interbranch and intrabranch power struggles in courts. The Burger Court decisions in Chadha and Bowsher further spurred the Office of Legal Counsel to favor litigation as a method of challenging legislation and maintaining control over policy. Though the Reagan White House initially backed away from direct legal confrontation, by the second term Reagan policy advisors and Justice Department loyalists, such as Charles Cooper at the OLC, saw litigation as a means to support presidential prerogatives. The OLC and White House counsel under President Bush largely abandoned

the litigation strategy and sought political compromise with Congress. This chapter explores the forces that restored political solutions as the preferred method of resolving institutional conflict.

Two factors motivated the move from legal confrontation to political accommodation. First, Congress and courts rejected the OLC strategy for judicializing interbranch conflict. The earlier case studies demonstrated that partisanship and personalities were not sufficient explanations of legal conflicts within the executive branch and between Congress and the president. Scholars and observers alternatively suggest that institutional changes in congressional-executive relations are the main source of the increased conflict. According to this perspective, changing institutional arrangements, such as the evolution of institutional counsel and a more assertive judiciary, explain the emerging pattern of shifting disputes to the courts. Geoffrey Miller suggests that congressional and executive counsel and courts have operated uniformly in legalizing interbranch relationships.[1] This study suggests flaws in the institutionalized counsel thesis advanced by

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[1] See Chapter 1, at 15, above.

Miller. In fact, congressional counsel have behaved very differently from lawyers in the Office of Legal Counsel. The institutional thesis needs modification to account for the differences in institutional behavior and mandates.

Federal institutions have not supported uniformly the transfer of intergovernmental conflicts to the judicial forum. Recently, courts and Congress have cooperated in a more symbiotic relationship to keep political conflicts out of federal courts. While executive-branch norms led to greater conflict, the creation of a litigating arm for Congress helped to stem rising litigation by minority factions and allowed judges to avoid institutional conflicts. The development of the Senate Legal Counsel and a judiciary reluctant to intervene in political disputes restricted the channels and muted the confrontational tone of constitutional dialogue.

Second, shifts in presidential style prompted the move toward political accommodation. The Carter administration was firmly committed to an independent, principled, and professional administration of the law. As part of this commitment, President Carter supported the OLC despite objections from White House counsel and policy staffers. The virtue of this professionalist

orientation was heightened fidelity to the law and a vigorous defense of presidential power. This approach, however, entailed a tendency toward excessive formalism that prevented the White House from achieving its policy goals. The OLC in the early Reagan administration furthered the test-case strategy, but received support only when this strategy was congruent with White House policy goals. White House counsel under Reagan worked to avoid confrontation unless the presidential prerogatives were central to the administration's objectives in foreign affairs and regulatory policy. Thus, the congruence between White House policy goals and OLC professionalism allowed the test-case strategy to continue for certain presidential prerogatives.

By contrast, the pragmatic style of the Bush administration, particularly in domestic politics, was incongruent with the confrontational stance of the highly professionalized or politicized model of the OLC. Changes in presidential style reinforce the negative feedback received from Congress and courts. Despite revived interbranch accommodation, nonetheless, the conflict within the executive branch continues unabated. With the rising importance of the White

House counsel, the OLC still searches for a role that balances political and professional norms.

This chapter analyzes these two factors in sequence. To test Miller's institutional thesis, I analyze the behavior of judges and congressional counsel to show that federal courts and Congress avoided institutional litigation and reinforced norms of balancing politics and professionalism in the OLC.[2] Then, I analyze the effect of Bush's pragmatic leadership style on OLC behavior and assess present tensions over the OLC's role.

Barriers to Congressional Litigation: Standing and Role

Miller argues that Congress and congressional counsel also attempted to transfer interbranch disputes

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[2] Quantitative analysis of the congressional counsel's and court's docket is an alternative method of inquiry not pursued at length in this work. Early efforts to measure quantitatively the impact of the House and Senate Legal Counsel did not prove fruitful for my purposes here. Many cases in the federal district courts simply involve representation of members of Congress or staff under subpoena in private litigation. While the defense of legislative immunities in these cases constitutes an important and central function of the Senate Legal Counsel, most of these cases are not germane to the focus of this study. Analysis of the conflicts between the Congress and the President in the area of separation of powers warrants emphasizing the major cases in that area.

to the courts. During the Nixon administration, the increased confrontation between the Justice Department and Congress led to shifting judicial standards of access in cases of institutional review.[3] Individual members of Congress brought suit to challenge the actions of the Nixon administration. Some judges began to hear complaints from congressional litigants.[4] Yet, Congress and courts never uniformly welcomed increasing institutional review. The legalistic battle over congressional standing reflects the attempts of judges to avoid institutional conflicts between Congress and the president or within Congress. Similarly, the role of congressional counsel prohibits aggressive litigation. By removing these cases from courts, both judges and congressional counsel reinforce political solutions to conflict.

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[3] Institutional review, as distinct from private rights, refers to cases involving conflicts over government powers, including both separation of powers and federalism.

[4] In parliamentary systems such as Great Britain or Italy, legislative litigation even by a minority faction functions smoothly and aids in the legislative process. In our system of separated powers, Congressional litigation by individual members became a mechanism to shift the burden of constitutional interpretation to the courts, because legislators were unwilling or unable to settle the matter within Congress.

The 1970's saw a sharp rise in litigation by individual members of Congress challenging the action of the executive branch.[5] Initially, the lower courts did not dismiss all of these cases for lack of justiciability. The rise of the congressional suit fluctuated with liberalizing of standing by the Court.[6] Litigation by members of Congress surged after opening of the judicial forum. In response to this growing litigation, judges quickly restored and reiterated the traditional barriers to Congressional lawsuits.

Presently, statutory interpretations, custom, and standards of justiciability present several obstacles to the expansion of Congressional litigation before the courts. Just as politics and power were the central motivators in the decline of norms and the growing confrontation between Congress and the president, judicial norms reflecting self-preservation operate to limit the scope of participation in

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[5] For a review of the cases before the creation of the Senate Legal Counsel, see Note "Congressional Access to Federal Courts," Harv. L. Rev. 90 (1977): 1632.

[6] McGowan, "Congressmen in Court: The New Plaintiffs," Ga. L. Rev. 15 (1981): 241 at 253-254. Courts require the complaining party to demonstrate a real or threaten injury to have standing to sue. Judges previously refused to grant standing to individual members challenging presidential action, because they lacked the requisite injury.

institutional review. Few judges condoned the transfer of interbranch conflict to courts. Litigation by individual legislators posed similar problems as the OLC test-case strategy. Suits by individual members required courts to intervene in deliberations of Congress and encouraged losers in Congress to appeal the decision to the courts.[7] In both cases, the OLC and individual members sought to use courts to circumvent the normal policymaking processes.

Courts worked to stop the flow of cases involving institutional review. Litigation by institutional counsel of Congress permitted Congress to present justiciable claims to the judiciary. The assertiveness of the executive branch caused judges to reexamine questions of standing and the litigating authority of each branch. Despite the lowering standards of justiciability, institutional counsel or Congress litigated only in response to dissident members of Congress and the changing posture of the Office of Legal Counsel.

Traditionally, courts relied on standing or political question doctrine to dismiss suits brought by members of Congress. Dissatisfied with the traditional

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[7] Ibid., at 263.

approaches, Judge Carl McGowan, of the Court of Appeals for the District of Columbia Circuit, articulated an alternative means for courts to avoid institutional litigation. Drawing on Professor Louis Henkin's criticism of the political question doctrine, Judge McGowan suggested using equitable discretion as a more appropriate and forthright means of gatekeeping. Judge McGowan was receptive to litigation by Congress as an institution, but not for individual members. In Barnes v. Kline, for instance, he upheld Congress's challenge to the pocket veto of legislation restricting aid to El Salvador.[8] Judge Robert Bork, in dissent, suggested that the court "ought to renounce outright the whole notion of congressional standing."[9] For Bork, judges lack constitutional authority to adjudicate lawsuits between Congress and the president. McGowan responded:

> In congressional lawsuits against the Executive Branch, a concern for the separation of powers has led this court consistently to dismiss actions by individual congressmen whose real grievance consists of having failed to persuade their fellow legislators of their

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[8] 759 F.2d 21 (D.C. Cir. 1985). Importantly, the Executive Branch did not challenge the standing of the Congressional plaintiffs. The pocket veto controversy arose in the midst of the series of victories for the Justice Department.

[9] Ibid., at 41.

> point of view, and who seek the court's aid in overturning the results of the legislative process .... There could be no clearer instance of a"constitutional impasse" between the Executive and the Legislative Branches than is presented by this case.... The court is not being asked to provide relief to legislators who failed to gain their ends in the legislative arena. Rather, the legislators' dispute is solely with the Executive Branch.[10]

McGowan's approach could have great impact on the role of Congressional counsel. By reducing standing barriers, the judicial forum would open to institutional counsel of the Congress. If the Senate did not authorize intervention by the Senate Legal Counsel, courts plausibly may conclude that Congress is insufficiently interested as an institution even though some members may be.[11] In direct confrontations

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[10] Ibid., at 28.

[11] The Senate Legal Counsel relied on equitable discretion to stem the tide of lawsuits by individual members of Congress. The Senate Legal Counsel successfully defended against challenges by minority members or factions of Congress to Federal Salary Act procedures to raise government salaries, the Tax Equity and Fiscal Responsibility Act of 1982, and the procedures used by the Acting Public Printer to produce the congressional Record. These successes are particularly important because of it overcame statutory grants of standing as political bargaining chips to satisfy dissenting coalitions. Humphrey v Baker, 848 F.2d 211 (D.C. Cir. 1988); Moore v. The United States House of Representatives, 733 F.2d 949 (D.C. Cir. 1984); Gregg v. Barrett, 771 F. 2d 539 (D.C. Cir. 1985).

between the executive branch and a united Congress, courts would reinforce political representation by forcing accommodation of conflicting powers.[12]

More recently, Judge Harold Greene, though dismissing congressional challenges to President Bush's unilateral action ordering forces to Saudi Arabia, indicated his support for McGowan's approach to resolving interbranch conflicts.[13] Nonetheless, neither the Supreme Court nor a full appeals court has endorsed a more interventionist position in interbranch conflict. These theories are conflicting approaches running against the broader trend of courts avoiding intervention in political conflict between Congress and the president.

Courts instead have used the doctrine of equitable discretion mostly to halt litigation by individual members of Congress. From 1983 to 1988, the Court of Appeals for the District of Columbia dismissed

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[12] This representation reinforcing behavior directly parallels the approach of the Court in Garcia v. SAMTA, 469 U.S. 528 (1985). See chapter 4 above. Blackmun's approach suggested that the Court was a secondary check on national powers over the states under the Commerce Clause. The Court would intervene only if evidence existed that the political processes failed.

Similarly, McGowan was arguing for the Court to intervene when the normal political negotiations between Congress and the president fail.

[13] Dellums v. Bush, 752 F.Supp. 1141 (D.D.C. 1990).

four suits challenging the president's authority to commit troops abroad. Though the appeals courts relied on the doctrine of political questions to dismiss the suits, lower courts used equitable discretion to avoid the issue. In Crockett v. Reagan,[14] for example, the District Court suggested that the members of Congress should exhaust legislative remedies before seeking judicial remedies. These suits effectively closed the door on litigation by individual members of Congress and institutional counsel. Thus, courts would not allow the judicialization of conflict that Miller's thesis suggests.

Justiciability standards are not the only barriers to litigation by congressional counsel. Unlike the Justice Department, the Senate Legal Counsel did not pursue a litigation strategy following the initial success in Barnes. Congressional counsel appear before the courts to defend the constitutionality of statutes. The Senate Legal Counsel's statutory mandate limits the office's participation to defense of statutes challenged by outside parties. Its litigation role thus is responsive and defensive. Consistent with this mission

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[14] 558 F. Supp. 893 (D.D.C. 1982).

and its genesis as a reaction to adverse court decisions, the Senate Legal Counsel tends to avoid direct confrontation by relying on standards of justiciability. Though the statutory mandate of the Counsel to the Clerk of the House does not preclude aggressive litigation, these lawyers adopted a similarly defensive posture in practice.[15] The behavior of congressional counsel in separation of powers cases provides evidence that contradicts Miller's institutional counsel thesis.

In INS v. Chadha, for example, congressional counsel argued for dismissal on two grounds. Senate counsel Michael Davidson argued that the severability issue prevented adequate adjudication of the legislative-veto issue.[16] If the Court rendered the whole statute as unseverable, Davidson reasoned, a statutory right to suspend deportation does not exist

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[15] As noted in Chapter Three, the House Counsel may intervene with the consent of the majority leadership alone. Cursory evidence suggests that House Counsel more frequently litigates on behalf of the House as an institution.

[16] For an analysis of the Senate Legal Counsel's role in the Chadha decision, see Barbara Hinkson Craig, Chadha: The Story of an Epic Constitutional Struggle (New York: Oxford University Press, 1988), 201-208. Justice Rehnquist later dissented based on the severability issue. INS v. Chadha, 462 U.S. 919, at 931 (1983).

and the Court should dismiss the case for want of a judicial remedy. House Counsel Eugene Gressman urged the Court to dismiss the suit for failing to meet the "case or controversy" requirement because neither party to the litigation continued to suffer injury.[17]

Two other examples illustrate the congressional counsel's defensiveness. To defend Senator Carl Levin from allegations of congressional interference in a contractor's debarment hearing, the Senate Legal Counsel argued that the appellee had not exhausted administrative remedies and thus the case was not ripe for adjudication.[18] The Senate Legal Counsel relied on mootness to quash a subpoena against Senator Bingaman and three legislative aides and to prevent the District of Columbia Court of Appeals from reaching the constitutional issue of the scope of protection afforded Senator Bingaman and his aides by the Speech and Debate Clause.[19] In short, the roles of

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[17] House of Representatives motion to dismiss, in Congress, House, Judiciary Committee, Special Report Identifying Court Proceedings and Actions of Vital Interest to Congress, Committee on the Judiciary of the House of Representatives, 98th Cong., 2d sess., (1985), 509.

[18] Peter Kiewet Sons' Co. v. Army Corps of Engineers, 714 F.2d 163 (D.C. Cir. 1983).

[19] In the Matter of City of El Paso, 887 F.2d 1103 (D.C. Cir. 1989).

congressional counsel prevent them from encouraging the transfer of institutional conflict to the courts.

The Roles of Congressional Counsel and Courts in Separation of Powers Conflicts

Cases involving institutional review during the 1980's provided the opening for conflict between the OLC and congressional counsel. Justice Department lawyers, relying on OLC opinions, pushed institutional review cases in federal courts. Congressional counsel suffered some early defeats and the Supreme Court sided with the Justice Department in the initial test-cases. Encouraged by the positive results, OLC lawyers broadened the battle over presidential prerogatives. Finding support among Reagan policy advisors eager to gain increased control over the regulatory state, the Justice Department pushed forward by refusing to defend duly enacted statutes. Subsequently, courts rejected the theories advocated by the OLC in several major cases. These defeats discouraged future challenges by the OLC to legislative compromises struck between Congress and the president.

Congressional counsel, to be sure, faced a challenging initiation period. In a direct

confrontation with OLC Deputy Attorney General Larry Simms, Davidson and Gressman argued and lost the Chadha case. The Court agreed with the Justice Department that the legislative veto was an unconstitutional violation of the presentment and bicameralism clauses. Chief Justice Burger, writing for the majority, adopted a formalist and static approach to separation of powers issues. He wrote:

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary government acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by Congress or the President.[20]

This attitude suggested that negotiated compromises between Congress and the president would have to pass through each step of constitutional procedure to become law. The decision encouraged the OLC to seek judicial invalidation of legislative bargains that restricted presidential power. By striking down every form of legislative veto, a mechanism Congress used to maintain

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[20] INS v. Chadha, 462 U.S. 919, at 959 (1983).

control over administrative rulemaking, the Court implicitly supported the Reagan deregulation agenda.

Justice White's vigorous dissent highlighted the dangerous activism inherent in the majority's approach to the separation of powers. For White, the legislative veto was an acceptable compromise that, though not contemplated by the framers, reconciled a developing administrative state with viable checks and balances. "It is an important if not indispensable political invention," said White,

> that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking. . . . [T]he Executive has more often agreed to legislative review as a price for a broad delegation of authority.[21]

The opinion explicitly sanctioned political compromises promoting comity between the branches.

Shortly thereafter, the Supreme Court issued its decision in Bowsher v. Synar.[22] The Court did not heed White's warnings against excessive activism in interbranch disputes. The Balanced Budget and Emergency Deficit Control Act of 1985 authorized the

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[21] Ibid., at 972, 974.

[22] 478 U.S. 714 (1986).

Comptroller General to sequester funds if the budget exceeded a maximum deficit target. A minority faction in Congress attacked the legislation as an unconstitutional delegation of executive power to a legislative officer. As part of the compromise to pass the bill, Congress granted standing to the minority faction to challenge this provision. The Senate Legal Counsel filed an amicus brief, urging the Court to accept the legislative scheme. Congressional counsel defending the legislation faced stiff opposition in Bowsher from dissident members of Congress, the executive branch,[23] and private litigants. The Court, again adopting a formalist approach, struck down those provisions of the act. The majority held that the Comptroller General is a legislative official and may not exercise any nonlegislative power. The Supreme Court was sending signals to continue the battle.

Victories in Chadha and Bowsher encouraged proponents of executive power to push cases to the courts. The Justice Department also refused to defend portions of the Competition in Contracting Act and the

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[23] Ironically, because of the existence of institutional counsel, the Justice Department, again supported by an OLC opinion, argued against the statute that President Reagan had signed. The Senate designed institutional counsel to prevent the Justice Department from refusing to defend duly enacted statutes.

Federal Judgeship Act of 1984, which resulted in cases being brought by private litigants.[24] At the onset of Reagan's second term, Davidson wondered if the OLC and Justice Department planned to have the president refuse to defend the constitutionality of statutes as a means to blunt legislative initiatives.[25]

Even so, the Justice Department could not sustain the momentum of these early victories. The Court's formalist approach proved an aberration amid larger trends of realism, functionalism, and judicial restraint in separation of powers conflicts. Congressional counsel successfully thwarted the Justice Department's actions, as the Courts of Appeals supported their defense of these statutes. In a series of cases involving the constitutionality of a stay provision in the Competition in Contracting Act (CICA), both the Third and Ninth Circuit Courts upheld provisions that assigned the Comptroller General the

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[24] On the CICA Act Provisions, Ameron, Inc. v. United States Army Corps of Engineers, 787 F.2d 875 (3rd Cir. 1986) (Ameron I), rehearing at 809 F.2d 979 (3rd Cir. 1986) (Ameron II); Lear Siegler, Inc., Energy Products Div. v. Lehman, 842 F.2d 1102 (9th Cir. 1988). Challenges to the Federal Judgeship Act include In re Benny, 791 F.2d 712 (9th Cir. 1986); Matter of Koerner, 800 F.2d 1358 (5th Cir. 1986).

[25] Michael Davidson, phone interview with author, July 24, 1990.

power to stay bid awards if challenged by a losing bidder.[26] Again, these cases involved the central theme of the Reagan presidency, control of the regulatory state. Each case involved a direct confrontation between the Justice Department and the Senate Legal Counsel, though the nominal appellants were the contracting firms in the cases.

This conflict between executive and legislature[27] began when, after signing the CICA as part of the Deficit Reduction Act of 1984, President Reagan, relying on a legal opinion by the OLC, asserted that the stay provisions of CICA unconstitutionally delegated executive authority to the Comptroller

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[26] Ameron, Inc. v. United States Army Corps of Engineers, 787 F.2d 875 (3rd Cir. 1986) (Ameron I), rehearing at 809 F.2d 979 (3rd Cir. 1986) (Ameron II); Lear Siegler, Inc., Energy Products Div. v. Lehman, 842 F.2d 1102 (9th Cir. 1988).

[27] Miller relies on this case study to illustrate the role of congressional and executive offices in the transfer of policy disputes to legal battles and to legal forum. Curiously, Miller suggests that the dispute over the Competition in Contracting Act "was largely one of principle, and did not involve a vibrant ongoing conflict between branches." "From Compromise to Confrontation," Geo. Wash. L. Rev. 57 (1989): 406, n. 26. However, he uses the CICA to illustrate the impact of these offices on legal battles that followed and notes the political maneuvering by Congress and the President to support their relative legal positions. That private litigants brought the issue before the courts does not render the Justice Department refusal to enforce and defend the stay provisions less confrontational.

General. The Justice Department circulated a memorandum opinion to this effect to the executive agencies involved. Attorney General William French Smith subsequently informed Congress that the executive branch refused to implement the unconstitutional portions of the law. Office of Management and Budget Director David Stockman, under duties assigned to him by the Office of Federal Procurement Policy Act, issued OMB bulletin No. 85-8, which stated that "Agencies shall take no action, including the issuance of regulations, based upon the invalid regulations. With respect to the 'stay' provision, agencies shall proceed with the procurement process as though no such provision were contained in the Act." Congress responded with hearings and direct inquiries to the relevant agencies. During his confirmation hearings, Stockman's successor James C. Miller deferred to the Justice Department legal opinion.[28]

Ameron Inc. sought to invoke the stay provisions after losing a competitive bid awarded by the Army Corps of Engineers. In this initial round of

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[28] Miller attributes this deference to respect for the legal opinion of the Office of Legal Counsel. It also may reflect unwillingness to contradict the earlier action of Stockman or a desire to retain favor with the administration.

litigation in 1986, the Third Circuit, affirming the district court, held that the Comptroller General was not an agent of the legislative branch and therefore was permitted to exercise the power delegated by Congress.

Though the Bowsher decision forced reargument of the Ameron case, the Court of Appeals refused to limit the authority of the Comptroller General and of Congress to use such a mechanism to achieve its legislative goal of investigation and "public illumination" of the president's execution of the laws. The Court held that CICA provision was not an attempt to withdraw power already delegated to the executive.

The following year, the Justice Department appealed a similar ruling by a California district court to the Court of Appeals for the Ninth Circuit in an attempt to generate a conflict among the circuits. As intervenors, the Senate Legal Counsel prevailed on different grounds than those relied on by the Third Circuit. The Ninth Circuit, refusing to accept the reasoning of Ameron II, focused on whether the Comptroller General exercised control over the final procurement decision. As the stay provision merely allowed the Congress the power to submit nonbinding recommendations to the executive agency before it

awarded a final bid, it did not constitute an unconstitutional usurpation of executive authority.

The Ninth Circuit took an important further step by awarding legal fees to Lear Siegler, the private litigant in the case. This step is crucial because a finding of bad faith by the executive branch was a prerequisite to award fees. The court held that the president lacked authority to assert as unconstitutional an act duly passed by Congress and signed by the president. The judges characterized the president's action as a failure to fulfill his constitutional duties "to preserve, protect and defend the Constitution" and to "take care that the laws be faithfully executed." To complete the civics lesson, the Ninth Circuit cited the memorandum on this issue by William Rehnquist, then Assistant Attorney General in charge of the Office of Legal Counsel, the very office that issued the justification for Reagan's refusal to implement the provisions: "... it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute

them."[29] The Court directly admonished the OLC's advocacy of nonenforcement.

Justice Department refusals to defend statutes extended beyond the CICA, but so did the success of Davidson and the Senate Legal Counsel lawyers. More important than defending the CICA provisions and the Federal Judgeship Act was the successful challenge to Reagan's pocket veto of a law restricting aid to El Salvador, another central issue to the Reagan agenda. The OLC consistently maintained that the president could pocket veto legislation during an adjournment of Congress. In the past, however, the Justice Department had backed down from direct legal challenges. During the Ford administration, Solicitor General Robert Bork had argued that the Justice Department should not

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[29] Miller argues that though both appeals courts sustained the Comptroller General provisions, Congress backed away from a direct confrontation on the issue at the Supreme Court. The Senate Legal Counsel intervened at the lower levels to defend their statutory proposal, but Congress was reluctant to push the legal issue to the full conclusion. The Supreme Court granted certiorari on Ameron II on petition by the Justice Department, but Congress amended the statute to eliminate the Comptroller General's power to delay bid awards for ninety days pending investigation.

According to Senate counsel Michael Davidson, the Comptroller General never had invoked the power and the authority was not necessary to accomplish the legislative goal. Michael Davidson, interview with author, July 24, 1990.

appeal a decision limiting the use of the pocket veto. The Justice Department's professional opinion was that the president had firm constitutional grounds for a pocket veto during any adjournment of Congress. Still, political factors forced Bork to advise Attorney General Edward Levi to abandon the defense of the pocket veto. The primary factor was fear that the appeals court might grant standing to congressional litigants, which had broader implications for interbranch conflict.[30]

During the era of direct confrontation, the OLC and the Justice Department pushed the pocket veto issue to court. In Barnes v. Kline[31], the Court of Appeals for the District of Columbia Circuit struck down a pocket veto exercised during a three-day recess of Congress. Judge McGowan, speaking for the court, argued that judicial intervention was necessary to promote efficiency in the legislative process.

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[30] Memorandum, Robert Bork to Edward Levi, 29 January, 1976, reprinted in Congress, House, Committee on Rules, H.R. 849, Hearing before the Subcommittee on the Legislative Process of the Committee on Rules of the House of Representatives, 100th Cong., 1st sess., (1989), 125-135.

[31] Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), dismissed as moot sub nom Burke v. Barnes, 479 U.S. 361 (1987).

Judge Bork attacked the court's activism. Defending judicial restraint in institutional review, the future Reagan Supreme Court nominee wrote:

> The majority finds . . . the idea of political struggle between the branches distasteful, at best "time-consuming", at worst involving "retaliation." . . . That is what politics in a democracy is and what it involves. It is absurd to say, as the majority does, that a "political cure seems to us worse than the disease. . .." That is a judgment about how the Constitution might better have been written and it is not a judgment this or any other court is free to make. Moreover, I know of no grave consequences for our constitutional system that have flowed from political struggles between Congress and the President.[32]

Bork's opinion echoes White's restraintist approach in Chadha.

Ironically, both sides advocate resolving interbranch conflict through the political process. Though they reached different substantive conclusions on the merits of the pocket veto, both Bork and McGowan urged judges to reinforce norms promoting bargaining between the branches. The activist approach in this case reinforces the legislative process. For the majority, sustaining a pocket veto validated executive power to avoid the standard legislative process. By exercising the pocket veto, President Reagan would

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[32] Ibid., at 55.

force the Congress to pass the statute again. If the president exercised a normal veto, Congress could simply vote to override. In these circumstances, McGowan argued that judicial intervention is essential to resolving impasses between the legislative and executive branches.

Moreover, the majority supported McGowan's substantive decision limiting the use of the pocket veto. The Reagan administration could not achieve its foreign policy agenda by circumventing Congress. The OLC could not get support for its view of presidential prerogatives. The test-case strategy was failing for the professionals at Justice and the ideologues in the Reagan White House.

After Chadha and Bowsher, judicial support for executive branch challenges to legislative authority waned. The Court of Appeals decisions restored a balance to executive-legislative relations that were shifting strongly in the executive's favor. Morrison v. Olson[33] and United States v. Mistretta[34] continued the swing of the pendulum. Morrison involved three former Assistant attorneys general in charge of OLC.

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[33] 487 U.S. 654 (1988).

[34] 488 U.S. 361 (1989).

Theodore Olson faced investigation by a special prosecutor as a result of his testimony before Congress during the EPA documents controversy, discussed in Chapter 5. Olson sued to enjoin prosecution by Special Prosecutor Alexia Morrison. He argued that the independent counsel provisions of the Ethics in Government Act violated the appointment and removal clauses of the Constitution and the doctrine of separated powers.

William Rehnquist, head of the OLC during the Nixon administration, spoke for eight members of the Court.[35] The majority opinion sustained the provisions as an acceptable legislative compromise. Unwilling to disturb the Chadha and Bowsher decisions, Rehnquist nonetheless rejected Olson's claim that the scheme violated the separation of powers doctrine. "We observe first," he wrote,

> that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. Unlike some of our previous cases, most recently Bowsher v. Synar, this case simply does not pose a "dange[r] of congressional usurpation of Executive Branch functions."[36]

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[35] Morrison v. Olson, 487 U.S. 654, at 659 (1988).

[36] Ibid., at 694.

Rehnquist would allow the Court to police separation of powers arrangements but leave room for legislative compromise. Justice Scalia, former head of the OLC under Ford, issued the lone dissent in the formalist style characteristic of the Chadha and Bowsher majorities.[37] Similarly, in United States v. Mistretta, the Court resoundingly rejected a challenge to legislation that delegated authority to the United States Sentencing Committee.[38] Eight justices endorsed a realist approach to the separated powers doctrine.[39]

The return to the realist approach in these cases, reinforcing legislative bargains struck between Congress and the president on institutional prerogatives, was a resounding defeat for the OLC's test-case strategy. The deluge of refusals to enforce the law by the Justice Department has slowed significantly since these decisions. Congressional counsel successfully stifled litigation as a means of moving beyond traditional mechanisms of institutional bargaining.

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[37] Ibid., at 697.

[38] 488 U.S. 361 (1989).

[39] Scalia again filed the lone dissent. Ibid., at 413.

The Roles of Congress and Courts in Intrabranch Legal Conflict

Courts and Congress also have reinforced norms promoting resolution of intrabranch legal disputes through the political processes. Though the case involved principles of federalism, the decision had direct impact on the OLC's role in resolving intrabranch disputes. The Garcia decision reinforced political solutions. The Court sustained the Fair Labor Standards Act provisions that applied minimum wage, maximum hours requirements to municipal mass transit workers. Speaking for the majority, Justice Blackmun rejected the state's argument that setting wages was essential to state sovereignty.

Blackmun's solution to the states' dilemma was a high point in judicial deference to the political process. "[T]he principal means chosen by the Framers," he suggested,

> to ensure the role of the States in the federal system lies in the structure of the Federal government. It is no novelty to observe that the composition of the Federal Government was designed in part to protect the states from overreaching by Congress. The Framers thus gave the States a role in the selection both of the

Executive and Legislative Branches of the Federal Government.[40]

By removing litigation as an option, the Court forced states to lobby the executive agencies and Congress for redress, which they did.

The Justices may not have known of the intense battles over Garcia within the executive branch, discussed in chapter 4. Even so, their decision tipped the scales toward political accommodation and mediation in intrabranch disputes. Knowing that the Court would stay its hand became an incentive for all parties to compose their differences. The OLC, unable to vindicate its legal opinions in the courts, would have to find support within the administration or from Congress.

The Court three years later more directly addressed the problem of intrabranch disputes in United States v. Providence Journal Co.[41], a case involving enforcement of a judicial contempt citation by the special prosecutor. Though the case involved conflicting powers of the judiciary and the executive, the Court addressed the need for more centralized control of the government's legal state. In considering the exclusivity of the Justice Department's

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[40] Ibid.

[41] 485 U.S. 693 (1988).

litigation of United States interests, the Court reinforced the role of the Justice Department in resolving intrabranch conflict. The Supreme Court's interpretation of the Title 28 requirement that the attorney general shall argue all cases "in which the United States is interested" again indicated that it is not receptive to litigation between government agencies, nor to litigation by Congress as an institution.

By custom and statutory interpretation, only the attorney general and solicitor general officially argue the position of the United States in litigation before the Supreme Court. Courts have seldom examined this authority and Congress deferred to the Justice Department's assertion of exclusivity. Justice Blackmun, speaking for a majority of six, found the answer in the Constitution itself. Under the Court's interpretation, exclusive authority to litigate derived directly from the chief executive's duty "to take care the Laws be faithfully executed" in Article II, Sec. 3. Executive duty to represent the United States did not extend to defending of the powers of the other branches of government, here the judiciary's power to enforce the contempt citation. For Blackmun's majority, the statute makes plain the exclusive authority of the

attorney general to litigate all cases "in which the United States is interested," unless Congress provides a specific statutory exception to that authority.[42]

The opinion offered prudential reasons to justify exclusivity:

> Among the reasons for reserving litigation in this Court to the Attorney General and the Solicitor General, is the concern that the United States should speak with one voice before this Court, and with a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people. Without the centralization of the decision whether to seek certiorari, this Court might well be deluged with petitions from every prosecutor, agency, or instrumentality, urging the position of the United States, a variety of inconsistent positions shaped by the demands of the case sub judice, rather than by longer-term interests in the development of the law.[43]

Fear of balkanizing federal law prevents the Court from accepting a babble of legal voices among the several branches. For the Court, Sec. 518(a) does not preclude amicus curiae or intervenor participation by the Congress or judiciary. These branches had ample opportunity for "adding their views in litigation."[44]

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[42] Ibid., at 704-706, esp. n. 9.

[43] Ibid., at 706.

[44] Ibid., at 705-706, n. 9.

The Court is urging the Justice Department to control the flow of agency litigation to the courts. The Justice Department could limit the amount of agency litigation by resolving disputes internally and mediating legal disputes between agencies and outside parties.

Congress, too, favors bargaining over adjudication to resolve intrabranch dispute resolution. During 1980 appropriations hearings reviewing the performance of the Justice Department, the Senate Judiciary Committee urged Solicitor General Rex Lee to promote greater coordination of agency counsel. Democratic Senator Max Baucus showed bipartisan support when he quoted Senator Republican Strom Thurmond:

> It seems to me we have a lot of litigation that ought to be settled administratively by the Justice Department, by the White House, and by somebody without having one government agency suing another. It does not look right.[45]

At present, Congress limits exceptions to Title 28 to independent regulatory agencies such as the Interstate Commerce Commission or the Securities and Exchange Commission.

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[45] Congress, Senate, Committee on the Judiciary, Department of Justice Authorization and Oversight, 1981, Hearings before the Committee on the Judiciary of the United States Senate, 96th Cong., 2d sess., (1980), 25.

Though solicitors general would willingly share litigating authority with Congress and executive agencies,[46] both Congress and the Supreme Court resist attempts to disperse litigation powers throughout the executive branch. The Court's decision in Providence Journal and Congress's unwillingness to extend exceptions under Title 28 are evidence that both Congress and courts reinforce political accommodation to resolve interbranch and intrabranch legal disputes before recourse to litigation as a last resort.

Impact: Is the Balance Restored?

The Office of Legal Counsel under President Bush initially indicated its intent to pursue the institutional ideology of separation of powers. Support for constitutional confrontation spread to the White House Counsel. C. Boyden Gray joined Attorney General Richard Thornburgh and William Barr, then chief of the OLC and now Attorney General, in renewing direct

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[46] Solicitor General Charles Fried supported exceptions to centralized litigating authority and argued for a restricted reading of the phrase "in which the United States is interested." United States v. Providence Journal Co., 485 U.S. 693, at 701 (1988). This reading would give the solicitor general greater discretion in choosing litigation and thus greater freedom to pursue the administration's policy agenda.

challenges to statutory limits on presidential power. The unity of opinion between Bush's White House Counsel and the Justice Department extended to all separation of powers issues. This development marked a significant departure from past practice. As Barr noted: "The Reagan administration never had this kind of cohesion."[47] Whereas preceding White House Counsel had urged the president to avoid the political costs associated with frontal challenges, Gray openly criticized White House policy advisors for conceding a limited congressional veto in exchange for renewed funding of the Contras. The Justice Department continues to assert the president's authority not to execute unconstitutional legislation prior to judicial review.

White House political advisors, on the other hand, continued to oppose these direct confrontations. John Sununu, Bush's Chief of Staff, and State Department officials, ignoring the pleadings of Gray and Thornburgh, accepted the congressional veto in exchange for Congress's refunding of the Contras. Notwithstanding the loss in Barnes, Barr and Gray

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[47] Quoted in Chuck Alston, "Bush Crusade on Many Fronts to Retake President's Turf," Congressional Quarterly Weekly Report, 3 February, 1990, 291 at 292.

claimed the president's authority to exercise a pocket veto when Congress recesses for three days. After Barr presented the Justice Department's view on pocket vetoes in testimony before Congress,[48] Bush exercised pocket vetoes on House Joint Resolution 390, a provision to bring agreement on the savings and loan bailout, and House Bill 2712, a law to permit Chinese students to remain in the United States after the Tianamen Square incident.

Despite the rhetoric of confrontation, which characterized interbranch relations throughout history, the Office of Legal Counsel and the president have backed away from direct confrontations. William Barr summarized the return to a balancing of political and professional norms when he declared in 1990: "The emphasis has not been on picking gratuitous fights, but to work out a standard approach. We try to accommodate as best we can. We look for compromise that will avoid

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[48] Congress, House, Committee on Rules, H.R. 849, Hearings before the Subcommittee on the Legislative Process of the Committee on Rules of the House of Representatives, 100th Cong., 1st sess., (1989), 55; Congress, House, Committee on the Judiciary, Pocket Veto Legislation, Hearings before the Subcommittee on Economic and Commercial Law of the Committee on the Judiciary of the House of Representatives, 100th Cong., 2nd sess., (1990), 20.

violating our constitutional objectives."[49] Bush avoided a constitutional confrontation in court on pocket veto measures through political compromise. Legislation mooted the House Resolution, and Bush successfully fought attempts to override the veto. Neither matter went to court.

On institutional issues, the Bush administration initially threatened to force a conflict, but eventually the White House negotiated a compromise with congressional leaders. After Iraq's invasion of Kuwait, President Bush did not consult or inform Congress, refusing to comply with the Wars Powers Act requirements. Members of Congress sued in district court to force the president to follow the strictures of the Wars Powers Act. Judge Greene, dismissing the suit for lack of ripeness, suggested that the legislators had not gained the support of the whole Congress.[50] If the majority of Congress had voted to intervene, Greene was willing to resolve such a

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[49] Quoted in Alston, "Bush Crusade on Many Fronts to Retake President's Turf," Congressional Quarterly Weekly Report, February 3, 1990, 291 at 292.

[50] Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

conflict.[51] Bush, acting quickly, mooted the dispute by informing congressional leaders and asking for a joint resolution in support of the United Nations resolution as a surrogate for a declaration of war supporting future actions in Kuwait.

On other issues involving executive privilege and foreign policy, the Justice Department and White House Counsel Boyden Gray have negotiated with Congress rather than seeking judicial review.[52] Conservatives derided the Bush administration lawyers for bargaining away presidential authority. "My main criticism," said Bruce Fein, legal scholar at the Washington Legal Foundation and former member of the Reagan Justice Department, "is that the President has refused to take a public stand on his prerogatives."[53]

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[51] Ironically, if Congress had the votes to initiate a suit on behalf of the institution, it would not need to go to court. See, John Hart Ely, "Kuwait, the Constitution and the Courts," Constitutional Commentary, 8 (1991): 107.

[52] These incidents involved House member Jack Brooks seeking documents related to an investigation that Justice Department officials stole software from a private computer firm, access to documents in the Iran-Contra investigation, aid to the contras, and limits on covert operations. W. John Moore, "The True Believers," National Journal, 17 August, 1991, 2018, at 2021.

[53] Ibid.

The recent furor over civil rights policy shows the changing orientations of executive branch lawyers in the Bush administration. White House counsel Gray drafted a policy statement calling for an end to using racial preference in hiring federal government employees. The outrage of civil rights and congressional leadership forced Bush to chastise Gray for his actions. The OLC and the Justice Department were conspicuously absent from the controversy. As the White House counsel's office became increasingly ideological in the Bush administration, Gray became conservative lightning rod, deflecting pressure and attention from the OLC.[54] Gray's confrontational stance not only stands in direct contrast to the actions of Lloyd Cutler and Fred Fielding, both of whom sought compromise with Congress, but represents a role reversal with recent OLCs.

The result of this shift is that the OLC is freed from organizational competition and better able to balance professional and political values. Gray's actions notwithstanding, the Bush administration's

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[54] W. John Moore, "The True Believers," National Journal, 17 August, 1991, 2018; Andrew Rosenthal, "President Tries to Quell Furor on Interpreting Scope of New Law," New York Times, 22 November, 1991, A1: 1, A20: 6.

behavior reflects the traditional practice of presidents, White House staffers, and Justice Department lawyers of the pre-Carter era, who attempted to avoid direct confrontations. In legal briefs at the OLC, the lawyers argue for strong presidential authority but temper their actions with an understanding of the political consequences. Congress, perhaps noting Barr's orientation toward interbranch compromise while head of the OLC, reacted favorably when President Bush nominated him to head the Justice Department.[55]

It is impossible to say in what degree the new conciliation reflects political calculations of the White House or the performance of congressional counsel and adverse court decisions. These are matters of political degree. Just as the political benefits of interbranch comity and negotiation still are primary for many White House policy advisors, so policy staffers in the White House and lawyers in the Justice Department, including those in OLC, now include the likely success of pushing test-cases into the courts in their political calculations. Anticipated reactions of

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[55] Fred Strasser and Martha Coyle, "Attorney General Nominee Greeted With Relief," National Law Journal, 28 October, 1991, 5, 9.

courts and congressional counsel inevitably influence the president's decision to pursue direct confrontations.

Conclusions and Theoretical Implications

By resisting attempts to judicialize interbranch and interagency conflict, both Congress and courts have played an important role restoring the balance of institutional values among OLC lawyers. The resurgence of executive power during the Reagan years witnessed more frequent assertions of independent constitutional interpretations by the Executive. Refusals to enforce statutes especially demanded a congressional response.

In fact, the creation of the Senate Legal Counsel and the emergence of the House counsel responded to the changing posture of the Justice Department regarding congressional-executive relations in earlier administrations. Congress sought to use nonjudicial mechanisms, such as the legislative veto or commissions, to reach compromise in areas of shared powers. Changes in the roles and orientations of executive branch lawyers following the emergence of the

White House Counsel and the post-Nixon reforms forced intrabranch and interbranch conflict into courts.

The Senate Legal Counsel and its counterpart, the General Counsel to the Clerk of the House, served as watchdogs, carefully guarding against executive encroachments on legislative prerogatives and powers. In certain circumstances, legal conflicts over constitutional principles deflected and diminished political tensions between Congress and the president. Successful defense of statutes restored a pattern of institutional bargaining that had eroded into direct, legal confrontation with the Justice Department.

While cases brought by private litigants will cause confrontation between the branches in the future, courts are unlikely to encourage their litigation of interbranch disputes, unless a pattern of direct confrontations between the president and a united Congress emerges. By using justiciability standards to dismiss cases or sustain legislative compromises, judges reinforce norms that encourage Congress and the executive branch to reach a settlement, thus reinforcing norms of balancing political and professional ideals among executive branch lawyers. To the degree that Congress and the executive branch transfer political conflict to the courts for

resolution, judges would become the dominant interpreters of the Constitution and legal forms of conflict resolution predominate over political compromise. Transferring these conflicts to the judiciary hinders independent interpretation by the Congress and the executive branch and diminishes political dialogue over constitutional powers. Judges, too, have had an important role in reinforcing norms of cooperation between Congress and the president's lawyers.

Despite brief forays into judicialization of conflict in the seventies, the empirical evidence here suggests that courts and Congress recently have reinforced political compromises between Congress and the president on separation of powers issues. Whatever legal limitations that courts placed on executive power resulted less from congressional action to judicialize interbranch conflict than from calculated gambles by Justice Department lawyers and presidents, who pursued administrative strategies and litigation in lieu of political solutions to interbranch conflict. This evidence contradicts some central assumptions of the institutionalized-counsel and divided-government explanations. Congressional counsel conforms to its defensive, statutory role. Legal constraints on the

president resulted from the Justice Department's unwillingness to bargain directly with Congress on legislative proposals and its judicialization of interbranch conflict, not from Congress or activist judges. Congress and courts also avoid resolving intrabranch conflicts by reinforcing centralized control of government litigation by the Justice Department and by abandoning judges' roles in policing federal-state relations.

Chapter Seven

Conclusions:
The OLC as a Interpretive Institution:
Balancing Professionalism and Politics

Two themes dominate this study. First, Office of Legal Counsel lawyers are important in shaping constitutional development. The people who interpret and their processes of interpretation are central determinants of our constitutional law. In interpreting the Constitution, OLC carefully balances political and professional roles. Second, institutions are central to the study of government lawyers. Even so, the institutions shaping government lawyers vary widely. Organizations have different histories and thus different values, norms and rules that govern

their behavior. To adequately understand the behavior of government lawyers like those in the OLC, we need to investigate their historical origins and their organizational setting.

OLC Lawyers and the Constitution

Office of Legal Counsel lawyers regularly interpret the Constitution in meaningful ways. Recent scholarship suggests that the political branches give definitive meaning to and are essential to understanding our Constitution. This study confirms the importance of government lawyers in developing the body of constitutional principles. By adjudicating interagency disputes and challenging legislative compromises, the OLC forced courts to consider constitutional issues.

Beyond creating cases and controversies, the OLC has an important role in constitutional interpretation. In providing advice to the president and administrative agencies, the OLC affects how executive officials implement our constitutional principles. OLC lawyers translate judicial decisions, applying their logic to the everyday practice of the administrative agencies and White House policy specialists.

Evaluating Theories of Legal Administration

Existing theories use politicization by the president, partisanship and divided government, and personalities and ideology to explain the behavior of Justice Department lawyers like those at the OLC. These theories lack historical and empirical support in the data presented here. These theories are inadequate because they cannot explain the continuities in behavior across administrations and political eras.

Historical Evidence

The history of the Justice Department provides no support for the politicization thesis. The roles and values constraining the behavior of the attorney general and Justice Department lawyers have changed little since the origins of the Republic. From the outset, the roles of the attorney general had political and professional components. Congresses and presidents repeatedly have endorsed an attorney general and Justice Department that is responsible and responsive to the president.

The president appoints the attorney general to serve as his legal counsel. As the president's lawyer,

the attorney general must serve his client. But the attorney general is more than the hired legal gun of the president. As the chief legal officer of the United States, the attorney general has a broader statutory mandate. He must serve the interests of the country as a whole. Moreover, a loose set of professional ethics bind government lawyers to legal interpretations that they can support in good conscience.

The changes in the role of lawyers at the OLC responded to the rise of organizational competitors within the White House. While some observers date the onset to the Nixon era and the Watergate scandals, relations between the Justice Department and White House changed with the creation and evolution of the White House Counsel. The White House Counsel upset the role orientation of Justice Department lawyers because the attorney general was no longer the president's closest legal advisor. Without the broader institutional mandate, the White House Counsel was free to fill the role of hired gun more loyally than Justice Department lawyers.

Three changes resulting from Watergate cemented the role changes started by the emerging White House Counsel. The role of Justice Department lawyers in

investigating the Watergate scandals caused White House officials to doubt their commitment to the president. As the investigation pressed forward, relations worsened between the Justice Department and the White House. Moreover, the legal issues involved in Watergate cut across functional boundaries that traditionally separated the roles of the White House Counsel and the OLC. The executive privilege claims became personal as well as presidential matters. Lastly, a positive public perception of the Justice Department's role in investigating Nixon reinforced the agency's independent orientation.

These developments sharpened the public image of an independent Justice Department. The Carter administration, responding to perceived public support, then made an independent Justice Department a campaign priority. For the first time, a president endorsed an independent Justice Department. For lawyers in the OLC, independence differentiated them from the presidential sycophants in the White House Counsel. Searching for a role in the wake of organizational turmoil, lawyers at the OLC abandoned the practice of balancing political and professional values in favor an ethic of independent, principled interpretation of the law. The OLC lawyers believed in their independent

conception of the Constitution and the professionalist ideology of the legal process. The result of these changes was an OLC willing to adjudicate interagency disputes and pursue direct legal confrontations with Congress.

This new role orientation of the OLC did not result from the factors suggested by the existing theories. The politicization thesis would suggest that OLC lawyers maintained an independent stance prior to recent administrations and distanced themselves from the influence of the president. But, history clearly shows that government lawyers in the Roosevelt administration and before freely aligned themselves with White House policy goals. Moreover, Congress repeatedly rejected legislation that would have created an independent Justice Department.

The thesis of partisanship and divided government suggests that the Nixon era produced a realignment of the Congress, the presidency, and the political parties. Watergate and the administrative presidency polarized Congress and the president. From this perspective, the changed orientation of the OLC resulted from declining comity between the two branches. The alignment of the presidency with the Republican party and the entrenchment of Democrats in

Congress only worsened the conflict. Still, the divided government thesis cannot explain the change in relations among executive branch lawyers before the Nixon administration. The White House distrust of Justice Department lawyers actually begins with the rise of the White House Counsel. Alternatively, the White House Counsel emerged because of the growing presidential perception of a disloyal Justice Department. In either scenario, the partisan, divided government thesis overlooks the impact of the changing role orientations of government lawyers in producing these changes.

Nor can the personality thesis explain the persistence of organizational norms and behavior across political eras and administrations. The changes in the OLC role orientation did not result from the guiding hand of an assistant attorney general. Instead, the changes resulted from the gradual evolution of the OLC's organizational relationships with agency lawyers, the White House, and Congress. Changes in lawyers at the White House and the Justice Department did not stop the rising rivalry between the two counsellors. Nor did changes in Congresses produce any sentiment to grant the Justice Department greater independence from the president. Across the political generations,

Congress always supported a politically responsible Justice Department.

The Modern Era

The evidence from the case studies also highlight the inadequacies of these theories in explaining the behavior of OLC lawyers. The politicization thesis suggests that Justice Department lawyers historically rendered legal judgments that were free of presidential influence. To the contrary, when OLC lawyers adopted an independent stance in interagency adjudication and as legal advisors to the president, they encountered resistance and conflict with other government lawyers and policymakers.

In attempting to resolve interagency conflict, OLC lawyers adopted an adjudicatory approach. The result of this approach was to allow the White House Counsel to displace the Justice Department as the arbiter in these agency disputes. The OLC's independent stance had a similar effect on their role in separation of powers conflicts. By distancing themselves from the president's policy agenda and neglecting the needs of executive agencies, the OLC failed in its attempt to push its interpretation of the

Constitution. In short, the Justice Department cannot remain independent of the president and executive agencies if it is to maintain its status and usefulness in the system.

Moreover, the partisanship thesis cannot account for the changes in congressional-executive relations during the Carter and Reagan administrations. The test-case strategy originated in the Carter administration when Democrats controlled the Presidency and both Houses of Congress. In the Reagan years, House Republicans consistently joined Democrats in opposing the Justice Department's actions. Moreover, congressional counsel and courts have not acted to heighten conflict. This evidence suggests that the creation of institutional counsel did not uniformly promote conflict between the branches. The divided government thesis cannot explain fully the rise of separation of powers cases.

The case studies also show the weakness of personality theories in explaining OLC behavior. Larry Simms orchestrated both the legislative veto and executive privilege test-cases. Despite the continuities in leadership throughout Reagan's first term, the OLC experienced very different results in the numerous separation of powers conflicts. The norms

shaping the behavior of OLC lawyers differed significantly from the expectations of those with whom the OLC frequently interacted. In interbranch conflicts, the success of the White House Counsel was not a result of better leadership, but from an orientation toward mediation that dated to earlier administrations.

Implications, Theoretical and Normative

The inapplicability of the theoretical alternatives to OLC legal behavior does not invalidate those approaches or findings. The institutionalist theory presented here suggests that the legal behavior of government lawyers would vary across government organizations. Roles, norms, rules, and values are specific to the organizational setting in which they evolve. The interaction of government lawyers with other actors determines their roles and behaviors of government lawyers and thus the importance of variables explaining that behavior. In some government units, leadership and personalities might be stronger influences on behavior. In others, partisan divisions might shape constitutional interpretation.

The findings of this study suggest the need for

a decentralized approach to studying government legal institutions. If institutions and organizational settings are important, then studying historical development will improve our understanding these institutional arrangements, as will focusing on the culture of the organization in which lawyers perform their role.

This study also suggests that these structures, i.e. roles, values, and norms, are stable determinants of organizational behavior in the Office of Legal Counsel. This finding implies another avenue for further research. If organizational variables are fixed, then individuals in these roles must adapt to those organizational settings and expectations. In the case studies presented here, OLC lawyers, acting outside their role expectations, created conflict in the legal administrative system. If presidents, attorneys general or observers want to understand relations among government lawyers, then they need to pay attention to the appointment and recruitment of government lawyers. Contemplating these roles will help presidents and their advisors match individuals to offices. Understanding how individuals react inside the normative constraints of organizations like the OLC improves our theoretical knowledge of the behavior of

legal professionals in government.

The findings presented here also raise a series of normative questions about the role of OLC lawyers and constitutional interpretation generally. After uncovering the values underlying the origins and development of OLC lawyers, the desirability of these values remains unanswered. Congress and the president repeatedly endorse and reinforce a politically responsive and responsible Justice Department. Even so, no normative justification compels balancing political and professional roles in the Justice Department. A more independent Justice Department might prevent undue political manipulation of law enforcement and promote principled interpretation of the Constitution. Or conversely, a more political Justice Department might promote more direct accountability by becoming more directly associated with the president's policy agenda. At the same time, the President certainly has a right to expect that all Justice Department officials will support, or at least not obstruct, his policy agenda.

Understanding the behavior of OLC lawyer's opens questions about the role of the courts in separation of powers conflicts. Recently, scholars have suggested that courts should avoid interbranch adjudication. The

empirical evidence here suggests a substantial role for the court in separation of powers conflicts. Courts do enforce norms of cooperation and resort to the legislative processes, but what effect does this have on the courts? Unearthing the values and the interrelations of governmental lawyers is an essential step in finding answers to these normative questions.

Conclusions

In 1789, the attorney general was the sole legal officer of the United States. Over two hundred years later, lawyers work in every executive agency and Congressional subcommittee. The Justice Department of today employs over 20,000 lawyers with diverse duties and statutory mandates. Observers of the modern political scene justifiably decry the growing judicialization of American politics. Despite the changes, the tension between politics and legal professionalism remains the central tension shaping interpretation by Justice Department lawyers in the Office of Legal Counsel. A study of OLC lawyers confirms the influence of institutions on the interpretive behavior of government lawyers.

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