

# THE PRESIDENT, THE SUPREME COURT, AND THE CONSTITUTION: A BRIEF POSITIVE ACCOUNT OF THE ROLE OF GOVERNMENT LAWYERS IN THE DEVELOPMENT OF CONSTITUTIONAL LAW

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Think of the American Republic as a railroad train, with the judges sitting in the caboose, looking backward. What they see are the mountains and valleys of our dualistic constitutional experience, most notably the peaks of constitutional meaning elaborated during the Founding, Reconstruction, and New Deal. As the train moves forward in history, it is harder for the judges to see the traces of volcanic ash that marked each mountain's emergence onto the legal landscape. At the same time a different perspective becomes available: As the more recent eruptions move further into the background, it becomes easier to see that there is now a mountain range out there that can be described in a comprehensive way.

As this shift is occurring, lots of other things are happening. Most obviously, old judges die, and new ones are sent to the caboose from the front of the train by those who happen to be in the locomotive. These newcomers' view of the landscape is shaped by their own experiences of life and law—as well as the new vistas constantly opened up on the mountains by the path that the train takes into the future. The distinctive thing about the judges, however, is *that they remain in the caboose, looking backward*—not in the locomotive arguing over the direction the train should be taking at the next crossroads, or anxiously observing the passing scene from one of the passenger cars. Despite their rearguard position, they are not without a certain power over the course of events.

[Sometimes] the folks on the caboose begin to apply the brakes. . . . The train travels more slowly; the distance between stations shortens. When the engineers come down from the locomotive, they have two choices. They may be apologetic about their poor service. Or they may bitterly accuse the old-timers in the caboose of slowing down progress. If they take the latter course, the passengers have more than the usual amount of thinking . . . to do. It's their train, isn't it?

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I would like to thank Thomas Merrill, Robert Bennett, Andrew Koppelman, Gary Lawson, James Lindgren, Daniel Polsby, Annelise Riles, and Henry Smith for helpful suggestions and comments.

1. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 546-47 (1989); see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 98-99 (1991) (reprinting parts of this passage in a narrower context).

## I

## INTRODUCTION

A key feature of the American system of the separation of powers is the role that our Presidents play in shaping the future of American constitutional law, of the Supreme Court, and of the lower federal judiciary. Through his power of nomination and appointment, his power to shape the litigation policy of the United States, and his ability to propose constitutional amendments and statutory revisions of constitutional importance, the President inevitably plays a central role in shaping the constitutional constraints that will confront his successors.

This constitution-shaping role of the President is ironic because Americans take great pride in the fact that “ours is a government of laws and not of men” and that no one in our constitutional system, not even the President, is above the law. The fact that the President is simultaneously subject to constitutional law and is a maker of constitutional law inevitably creates awkwardness and difficulties.

Government lawyers, and particularly the Solicitor General of the United States, are inevitably caught up in the tensions created by the President’s uncertain relationship with the Supreme Court. In recent years, scholars of that relationship have put forward three normative theories suggesting how government lawyers, particularly the Solicitor General, should resolve the President’s and the Court’s sharply contrasting constitutional visions. Unsurprisingly, some argue that government lawyers ought to take their lead from the President,<sup>2</sup> others that they ought to take their lead from the Court,<sup>3</sup> and still others, such as former Solicitor General Charles Fried, that they should act as partially independent Burkean representatives “elected” by the President to “represent” him before the Court.<sup>4</sup>

In this short essay, I want to step back from the normative fray and provide a brief positive account of the complicated relationship between the President and the Supreme Court with respect to the development of constitutional law. That relationship has different implications for different individuals who happen to be government lawyers at any given point in time.

My thesis is that the normative writing to date is fundamentally flawed because it assumes that all government lawyers play the same role at all times. I argue that this rarely, if ever, happens. Instead, some government lawyers al-

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2. See John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799 (1992).

3. See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987). But see Roger Clegg, *The Thirty-Fifth Law Clerk*, 1987 DUKE L.J. 964 (reviewing Caplan's book critically).

4. See CHARLES FRIED, *ORDER & LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 172-205 (1991). For an exception to these normative accounts, see Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273 (1993), providing a striking and thought-provoking positive account consistent with much of what I say in this article.

ways take on the role of presidential advocate, others take on the role of Court-oriented conservative, and still others serve as ambassador or middleman between the first two. These categories are adapted from Nancy Baker's superb book about different types of Attorneys General.<sup>5</sup> I begin in Part II with a description of the relationship between the President and the Supreme Court in developing constitutional law and with a discussion of the implications of that relationship for different government lawyers. Part III discusses the different roles that government lawyers inevitably will play as a result of that relationship. Both Parts draw upon my own experiences working in the Reagan and Bush Administrations.<sup>6</sup>

My positive account suggests reasons why it will always be in the interest of at least some government lawyers to pursue one of the three roles described above (advocate, conservative, or ambassador), and I will argue that this dynamic is an inevitable and unavoidable byproduct of the incentives created by the underlying institutional distributions of power. Normative sloganeering about a single inherent ideal role for executive branch lawyers is thus revealed to be a form of rhetoric that should be viewed with skepticism.<sup>7</sup>

I conclude that all administrations will have some officials who play each of these three roles to some degree and that the tension among the roles is likely to be sharpest early in an administration's history. In addition, for a number of important government legal offices, some government lawyers are inherently more likely to be advocates, others are more likely to be conservatives, and still others are more likely to be ambassadors. Finally, I conclude it is likely that no two administrations will produce exactly the same balance of advocates, conservatives, and ambassadors. Indeed, it is unlikely that even a single administration will end its term of office with its initial balance of the three groups.

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5. NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990* (1992). Baker discusses two types of Attorneys General in her book: advocates and neutrals. I argue there is a third type as well, ambassadors, and contend that the Baker typology as modified applies to *all* executive branch lawyers holding policymaking appointments and not merely to Attorneys General.

6. I served in the Reagan Administration as a Special Assistant to the Attorney General from 1985 to 1987, and as a Special Assistant to the Assistant to the President for Domestic Affairs from February to June 1987. I served in the Bush Administration as a speechwriter to Vice President Quayle in 1990.

My thoughts in this essay grow out of an effort to generalize from those experiences ten years after most of them occurred, and this essay thus has an autobiographical and even a storytelling element. I have tried, however, as much as possible, to avoid writing a personal statement in favor of discussing and describing more general phenomena which have a greater likelihood of being of permanent interest to others who wish to study the problems this symposium issue addresses.

7. I try scrupulously in this essay to stick to the task of describing the roles I believe are played by different types of government lawyers. I avoid passing judgment on those different types of lawyers and also avoid normative theorizing as much as possible. For a more general critique of the excessive normativity of much recent constitutional law theorizing, see Steven G. Calabresi, *The Crisis in Constitutional Theory*, 83 VA. L. REV. 247 (1997).

## II

## THE RELATIONSHIP BETWEEN THE PRESIDENT AND THE SUPREME COURT

A core premise of our constitutional system is that the President and his subordinates are subject to the same laws that bind ordinary private citizens. The Constitution itself assumes as much since it obligates the President to “preserve, protect and defend the Constitution”<sup>8</sup> and to “take [c]are that the [l]aws be faithfully executed.”<sup>9</sup> Moreover, the Constitution permits the prosecution of all executive branch officials, except probably for the President, and even he can be prosecuted after leaving office. In the *Steel Seizure Case*,<sup>10</sup> Justice Jackson emphasized that “ours is a government of laws, not of men and . . . we submit ourselves to rulers only if under rules.”<sup>11</sup> “With all its defects, delays[,] and inconveniences, men have discovered no technique for long preserving free government *except that the Executive be under the law*, and that the law be made by parliamentary deliberations.”<sup>12</sup>

The Supreme Court has reaffirmed the principle that the President is bound by the law in countless cases over the last 200 years and has added to this the notion that sometimes the President’s duty to follow the law requires him to execute court judgments with which he disagrees. This principle that the President is subject not only to the law but also that “it is emphatically the province and duty of the judicial department to say what the law is”<sup>13</sup> is associated most famously with *Marbury v. Madison*,<sup>14</sup> *Kendall v. United States*,<sup>15</sup> *The Steel Seizure Case*, *United States v. Nixon*,<sup>16</sup> and *Clinton v. Jones*.<sup>17</sup> In the last of these cases—decided only one year ago—the Court said, “[w]e have long held that when the President takes official action [we have] the authority to determine whether he has acted within the law. . . . [I]t is also settled that the President is subject to judicial process in appropriate circumstances.”<sup>18</sup> In light of these cases, and countless others decided over the last 200 years,<sup>19</sup> there can be no doubt either that the President is bound to follow the law or that on occasion this duty will compel him to follow the mandate of the federal courts by executing their judgments rendered in properly brought cases or controversies.<sup>20</sup>

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8. U.S. CONST. art. II, § 1, cl. 7.

9. U.S. CONST. art. II, § 3.

10. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

11. *Id.* at 646 (Jackson, J., concurring).

12. *Id.* at 655 (emphasis added).

13. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

14. 5 U.S. (1 Cranch) 137 (1803).

15. 37 U.S. 524 (1838).

16. 418 U.S. 683 (1974).

17. 117 S. Ct. 1636 (1997).

18. *Id.* at 1649 (citing *Youngstown*, 343 U.S. at 579; *United States v. Burr*, 25 F. Cas. 30 ((C.C. Va. 1807) (No. 14,692d))).

19. For a reminder of why the gloss of history is important with respect to matters like these, see *Youngstown*, 343 U.S. at 593-628 (Frankfurter, J., concurring).

20. Compare Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996) (stating that the President usually is obligated to execute court

These two duties might fairly be described as axioms of our constitutional system.

At the same time, it is no less an axiom of our political system that "no matter whether th' constitution follows th' flag or not, th' supreme court follows th' ilection returns."<sup>21</sup> In particular, the Supreme Court and the inferior federal courts follow the presidential election returns because the President plays the most important role in reshaping the very federal courts whose mandate he is from time to time called upon to obey. Professors Robert Dahl and Gerald Rosenberg have described the process by which the judiciary is made to follow the election returns in general,<sup>22</sup> and I have previously explained why I think their findings are descriptively accurate.<sup>23</sup> While the Senate plainly is a break on the President's power to reshape the federal courts,<sup>24</sup> it is nonetheless clear that the President plays a bigger role in changing the federal courts than does the Senate. This is partly the result of the great deference with respect to their nominations to the inferior federal courts that presidents receive from the Senate and partly the result of the difficulty the Senate faces in mounting sustained opposition to presidential efforts to alter the judicial philosophy of the Supreme Court.<sup>25</sup>

The public understands that presidents play an important role in reshaping the federal courts and indeed the entire justice system. For this reason, American presidential elections frequently involve debate over legal and constitutional issues. In my relatively short political lifetime, I have had a chance to observe many presidential campaigns which addressed legal issues including

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judgments), with Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (stating that the President is not obligated to execute court judgments).

21. P. Dunne, *The Supreme Court's Decisions*, in MR. DOOLEY'S OPINIONS 26 (1900).

22. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992); see also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

23. See Calabresi, *supra* note 7, at 261-63; Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1451-53 (1997).

24. See, e.g., HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (2d ed. 1985) (summarizing the history of the nomination and confirmation of every Supreme Court Justice in American history up to the date of the book's publication); see also STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994) (describing recent confirmation struggles and tragedies).

25. A Senate majority that disagrees with the President on the direction the Supreme Court should take faces a collective action problem in forcing the President to meet the majority's concerns. The unity of the executive and the presence of 100 members in the Senate tend to give the President the upper hand in any negotiations. Senators will always be tempted to vote against a first nominee with the President's views and in favor of a second nominee because this outcome pleases all sides the most. This allows Senators to be both for and against originalism, for example, an often though not always optimal reelection strategy. Often only a relatively small number of Senators need defect from a majority coalition for this reason in order for a President to get his nominees approved. For these reasons, the Senate is able to function at most as a brake on the President's ambitions to transform the Supreme Court. It is not ordinarily an equal partner in the selection of justices. Only a very large and very determined Senate majority could hope to play such a role successfully.

Richard Nixon's campaign with its emphasis on restoring law and order; Jimmy Carter's emphasis on restoring government under the law; Ronald Reagan's emphasis on judicial activism, abortion, school prayer, over-regulation, and big government; George Bush's emphasis on the Nixonian themes of law and order; and Bill Clinton's emphasis on abortion and women's rights. In other words, every presidential election I can remember has involved, to some extent, the likely impact that the winning candidate will have on the future direction of the Supreme Court and of the legal system in general. Nor does this state of affairs appear to be idiosyncratic to the modern era. Abraham Lincoln,<sup>26</sup> Franklin Roosevelt,<sup>27</sup> and Lyndon Johnson all ran for office in part by promising to make changes in the Supreme Court or in the overall legal system.<sup>28</sup>

It follows thus that American Presidents must, as a practical matter, have some kind of program for the Supreme Court and for the legal system as a whole. This obligation to have a "program" is a real world political obligation; it is different from the more theoretical obligation that Presidents face to interpret independently and to enforce the Constitution and laws of the United States.<sup>29</sup> Whether one agrees or not with the many executive officials and constitutional scholars who have argued for departmentalism or coordinate review, it is emphatically the case that all Presidents must, as a political matter, have some goals in mind while staffing the legal positions in their administrations and while deciding upon their court nominations. As I noted briefly above, this has certainly been the case for the whole of my political lifetime.

There are good reasons why presidential elections often turn to some extent on issues of legal policy and why Presidents must, as a practical matter, have some kind of program for the Supreme Court and for the legal system as a whole. The voters, and particularly the opinion-shaping elite that advises the voters, are aware that the President inevitably plays a major role in shaping the

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26. See Abraham Lincoln, First Inaugural Address, Mar. 4, 1861, in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 268 (R. Basler ed., 1953):

[T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent, practically resigned their government, into the hands of that eminent tribunal.

27. See, e.g., ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS (1941) (describing the intellectual and political events important to President Roosevelt's successful attempt to transform the Supreme Court); Letter and accompanying essay from Professor Felix Frankfurter to President Franklin D. Roosevelt (Feb. 18, 1937), reprinted in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-45, at 383 (Max Freedman ed., 1967) (same).

28. See also FEDERALIST SOCIETY, WHO SPEAKS FOR THE CONSTITUTION? THE DEBATE OVER INTERPRETIVE AUTHORITY (1992) (collecting famous statements by Presidents and their aides made over the last 200 years advocating independent Executive Branch interpretation of the Constitution in the hope that such independent interpretation would eventually lead to changes in Supreme Court doctrine).

29. See *id.* Lawson & Moore, *supra* note 20; Edwin Meese, III, *The Law of the Constitution*, 61 TULANE L. REV. 979 (1987); Paulsen, *supra* note 20. I have long believed that Presidents are obligated to interpret the Constitution independently of the Supreme Court, and I assisted in the development and editing of General Meese's Tulane speech when I served as his Special Assistant.

future of constitutional law. The President's constitutional power over federal judicial appointments, especially Supreme Court appointments, is widely recognized and for many is an important consideration in casting votes for the presidency.<sup>30</sup> In a close election, a presidential candidate's position on issues of judicial appointments potentially could be decisive.

Moreover, the public probably has an intuitive sense that the President can affect the law enforcement philosophy of the Executive Branch. This intuition, of course, is by no means a misguided one. After all, the President appoints all federal judges<sup>31</sup> and the top leadership of the Justice Department, including all of the U.S. Attorneys, as well as the General Counsels of the Cabinet Departments and agencies. He thus appoints virtually all of the leading law enforcement personnel in the government and all of the leading litigators in the government, including most importantly the Solicitor General (who represents the United States before the Supreme Court). Finally, the President, with the help and guidance of his legal advisers, recommends to the Congress new laws<sup>32</sup> and, on occasion, even new constitutional amendments.<sup>33</sup> Some of these laws and amendments seek to overturn federal court decisions through the political process.<sup>34</sup> Thus, through his recommendation power, his veto power, and his ability to control the national policymaking agenda, the President has yet additional levers over national legal policy.

The general public is probably not aware of the more subtle ways in which the President can influence legal policy, but the many journalists who cover the Executive Branch do convey to the public the general sense that who the Presi-

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30. During the Reagan years, for example, widespread interest in and concern over the President's power to reshape the federal judiciary touched off a furious explosion of pamphleting. Compare DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992); HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION (1988), with GARY L. MCDOWELL, CURBING THE COURTS: THE CONSTITUTION AND THE LIMITS OF JUDICIAL POWER (1988); THE JUDGES WAR: THE SENATE, LEGAL CULTURE, POLITICAL IDEOLOGY AND JUDICIAL CONFIRMATION (Patrick B. McGuigan & Jeffrey P. O'Connell eds., 1987).

31. For thorough historical discussions of how Presidents have used their power of judicial appointment to implement ideas about the proper judicial role, see HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 371 (3d ed. 1992) ("There is, of course, nothing wrong in a president's attempt to staff the Court with jurists who read the Constitution his way. All presidents have tried to pack the Court, to mold it in their images."); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997).

32. Recent, well known examples of laws that President Clinton sought from Congress include the Line Item Veto Act of 1996, Pub. L. No. 104-130, § 2a, 110 Stat. 1200 (codified at 2 U.S.C. § 691 (Supp. II 1996)); the Personal Responsibility and Work Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (a.k.a. "welfare reform," codified as amended in scattered sections of 42 U.S.C.); and the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251. Although President Clinton recommended these laws, they were of course significantly revised by Congress before it adopted them.

33. President Reagan, for example, endorsed a number of constitutional amendments, including the Balanced Budget Amendment, a Human Life Amendment (to permit the outlawing of abortion), and a School Prayer Amendment (to legalize prayer in public schools).

34. The School Prayer Amendment was so motivated, as was the recent proposed amendment put forward by President Bush to reempower Congress and the States to outlaw burning or desecrating the American flag.

dent is matters for how legal policy issues are decided. In subtle and unsubtle ways, the public learns what the President's views are on matters of legal policy, and this awareness influences decisions about reelection and about the election of successors.

Different Presidents will inevitably have different ambitions when it comes to matters of legal policy. Some administrations—such as Franklin Roosevelt's, Richard Nixon's, or Ronald Reagan's—will have transformative doctrinal aspirations: They made it a major goal of their administrations to change the Supreme Court and to alter its doctrine in specific ways. Other administrations—such as Harry Truman's or Gerald Ford's—have had more modest goals. In Ford's case, the need to restore faith in the rule of law in the wake of Richard Nixon's transgressions and resignation proved to be of overriding importance to any particular substantive end.<sup>35</sup>

An administration's legal policy aspirations are shaped by the political context in which the President attains office and in which he must serve. FDR's depression-era struggle with the *laissez faire* attitudes of the Four Horsemen, Nixon's opposition to the criminal law opinions of the Warren Court, Reagan's opposition to the abortion and Religion Clause jurisprudence of the Burger Court, and Ford's Rule of Law appointments of Attorney General Ed Levi and Associate Justice John Paul Stevens all reflect the political milieu of the times.

Aside from political considerations, some Presidents for personality reasons may want to be remembered as great law givers or constitution shapers. One of the incentives to seek the presidency is the desire for fame and glory. For this reason, most incumbent Presidents spend a great deal of time and energy trying to shape a legacy. One type of legacy is a reputation for having been a great law giver or constitution shaper. The vainglorious Napoleon in exile on St. Helena is said to have "referred to [his] Code as a greater achievement than all his [military] victories: 'One Waterloo wipes out their memory, but my civil code will live forever.'"<sup>36</sup> Similarly, some Presidents may want to achieve fame and greatness in part by being remembered as the Moses or the Solon or the Justinian or the James Madison of their era. Presidents can do this in our system of government is by transforming the Supreme Court and thus remaking constitutional law and the legal system.

Presidents with great historical ambitions (like Washington, Jefferson, Jackson, Lincoln, Franklin Roosevelt, and Reagan) may often have or come to have

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35. Nancy Baker demonstrates that President Ford's post-Watergate scandal desire for a rule of law Attorney General is part of a more general post-scandal pattern. See BAKER, *supra* note 5, at 126-65. Professor Baker notes that President Chester Arthur felt it appropriate to appoint Benjamin Brewster to be Attorney General after the "Star Route" Scandal for similar reasons, and that President Calvin Coolidge similarly chose Harlan Fiske Stone, former Dean of the Columbia Law School, to be Attorney General after the disastrous back-to-back tenures of Harry Daugherty (the scandal-plagued Attorney General under President Warren G. Harding) and A. Mitchell Palmer (President Woodrow Wilson's third and final Attorney General who presided over the Justice Department during the notorious Red Raids).

36. MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 54 (2d ed. 1994).

great constitutional and legal ambitions as well.<sup>37</sup> The two ambitions have always been closely connected over the course of human history, and this connection continues to exist in American constitutional politics. The historical success of the U.S. Constitution makes it difficult for ambitious American politicians to leave a legacy like the Fifth Republic Constitution that Charles DeGaulle bequeathed to France. Ambitious American politicians thus must settle for the next best option of bequeathing a constitutional transformation made up either of judicial appointments or of constitutional amendments and framework statutes. Many have sought and achieved glory in this way. Lincoln and Roosevelt are prime examples, as are, to a more limited extent, Jackson, Taft, Nixon, and Reagan.

Whatever the scope of a President's legal ambitions, he needs lawyers working for him to implement them. No President has the time and skill required to interview scores of judicial candidates,<sup>38</sup> to think up and draft constitutional amendments,<sup>39</sup> framework statutes, and executive orders,<sup>40</sup> to edit or comment upon the United States' briefs in the Supreme Court,<sup>41</sup> or to shape and conduct the general law enforcement and litigation strategies of the federal

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37. All of these Presidents except Roosevelt clearly arrived in office with major agendas for constitutional law, agendas which to a substantial degree they each succeeded in realizing. Whether these agendas were driven by substantive concerns of public policy or by a desire to leave a legacy is difficult to say and the answer may vary according to the President. All of these Presidents, however, either had or came to have major constitutional ambitions that were ultimately realized. Washington put the Constitution in place and legitimized it; Jefferson succeeded for a time in shrinking the role of the national government; Jackson strengthened the presidency and thwarted nullification; Lincoln conceptualized the successful attack on *Dred Scott*, shaped the legal case against the constitutionality of secession, and developed the doctrine of presidential emergency war powers; and Reagan successfully ended the national governments 60-year post-New Deal winning streak before the Supreme Court and for a time curtailed substantive due process. In Franklin Roosevelt's case, it is arguable that his constitution-shaping ambitions postdated his election as President and developed in reaction to the Supreme Court's invalidation of parts of the New Deal legislative agenda. By 1937, however, FDR had become one of our most committed Constitution-shaping Presidents with a desire "to save the Constitution from the Court and the Court from itself" if necessary by packing the Court with "Justices who will act as Justices and not as legislators." 6 *Public Papers and Addresses of Franklin D. Roosevelt* 123-29 (1937 Volume), reprinted in LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 93 (1992).

38. Presidents Reagan and Bush, for example, relied on their legal staffs to interview all judicial candidates, reserving for themselves only a final interview with a handful of contenders for vacancies on the Supreme Court.

39. President Bush, for example, relied on lawyers in the White House Counsel's office to draft his proposed amendment outlawing burning of the American flag.

40. White House and Justice Department lawyers for President Reagan produced important executive orders on subjects ranging from the review of decisions by regulatory agencies, to enforcement by the Executive Branch of principles inherent in the Takings Clause, to enforcement by the Executive Branch of core aspects of American constitutional federalism, and to the prevention of the use of government funds to encourage women to seek abortions.

41. Presidents Reagan and Bush essentially relied exclusively on their lawyers in the Justice Department and mainly in the Solicitor General's office to develop and edit briefs for cases in the Supreme Court. A few of their predecessors have on rare occasion personally reviewed or edited a brief. President Dwight Eisenhower, for example, is reported to have edited the brief in *Brown v. Board of Education*, 349 U.S. 294 (1954), and President Jimmy Carter is reported to have reviewed his Administration's brief in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). See Clegg, *supra* note 3, at 965-66.

government.<sup>42</sup> All of these activities require help from lawyers, and, as a result, all Presidents must make use of the assistance of thousands of lawyers in the Justice Department, the White House Counsel's Office, and the Cabinet Departments and agencies. All exercises of presidential leadership require delegation to subordinates, and the exercises of presidential leadership in the legal policy arena are no different.

Coordinating the activities of the thousands of executive branch employees who are lawyers or even of the hundreds who hold top political legal jobs is a difficult task for any administration; it is especially difficult with respect to legal policy issues. Executive branch lawyers face problems that differ from those faced by lawyers working in private practice, for non-profit corporations, for Congress, and in the federal and state courts. Two problems in particular are worth mentioning.

First, it is sometimes unclear who the client is to whom an Executive Branch lawyer owes loyalty.<sup>43</sup> If the lawyer is a political appointee, he will have obligations both to the United States and to the President (or presidential subordinate) who appointed him. Sometimes different presidential subordinates will have different legal agendas. This can create serious tensions for a conscientious advocate. Moreover, these tensions are augmented by the additional tensions that arise when a President or presidential subordinate has a legal policy that is contrary to the interests of the national government or of the Executive Branch.

Should a lawyer working for Ronald Reagan defend broad new federal statutes that burden the states<sup>44</sup> or that delegate unprecedented and sweeping powers to agencies within the Executive Branch?<sup>45</sup> Should such a lawyer give primacy to Reagan's long-stated goal of shrinking the size of government and of restoring the Constitution envisioned by the Framers? Does it matter if President Reagan himself lobbied for and signed the legislation that appears to conflict with his overall legal philosophy?<sup>46</sup> What should a lawyer working for President Clinton do when faced with the so called "Don't ask, don't tell" gays-in-the-military policy? Defend the policy Clinton sought and the Defense Department supports, or defend what is probably the President's quiet enthusiasm for the social changes hinted at in *Romer v. Evans*<sup>47</sup> (a decision that would have

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42. Presidents Reagan and Bush both, for example, relied on their legal staffs to change law enforcement and litigation policies with respect to such contested matters as the scope of antitrust law, civil rights law, or the U.S. government's posture in takings cases.

43. For a discussion, see BAKER, *supra* note 5, at 28-36.

44. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding strings attached to federal highway funds that put pressure on the States to adopt a drinking age of 21).

45. See *Mistretta v. United States*, 488 U.S. 361 (1988) (upholding sweeping delegation of powers to the U.S. Sentencing Commission, an executive branch entity that—as Justice Scalia's lone dissent pointed out—both the Court majority and Congress wrongly claimed was part of the judicial branch).

46. President Reagan's Administration, for example, lobbied for the creation of the Sentencing Commission, and Reagan himself signed the statutes creating the Commission and putting pressure on the States to raise their drinking ages to 21.

47. 517 U.S. 620 (1996).

been impossible without the votes of his two appointees to the Supreme Court)?<sup>48</sup>

Questions like these must of necessity come up in every administration. This is plainly true for lawyers holding political appointments. It is true to some degree as well even for civil service employees; even if they are only removable for cause, the President is the fountain of the executive power and all who work in the Executive Branch are his subordinates in exercising executive power. The President's understanding of what it means to execute the law is thus always an issue that ought to be of some importance to career executive branch employees.

A second problem executive branch lawyers face is identifying the audience they are ultimately trying to persuade. For many practicing lawyers (although not all), that audience is a judge or several appellate judges. Some high-ranking executive branch lawyers, however, such as the White House Counsel or the Attorney General, may have to worry about multiple audiences, including the current and future Supreme Courts, the inferior federal courts, future historians, the current general public, the media (to the extent it covers legal issues), the Senate (especially the Senate Judiciary Committee through which all judicial and executive branch legal nominations must pass), the House of Representatives and its Judiciary Committee (which has the power of impeachment), and finally the other executive branch lawyers who may or may not agree with the relevant legal agenda.

Lawyers in administrations with ambitious legal agendas will face a much more complicated audience problem. They also have to endure short-term defeats, especially in the courts, while trying to persuade the general public, the Senate, and ultimately future historians and constitutional scholars of the correctness of the administration's constitutional vision. Such a long-term project requires bold statements, briefs, and proposals for amendments or statutes that will frighten or anger the courts. Persuading the courts and other status quo oriented groups like the American Bar Association calls for painting in pale pastels, but persuading future generations often requires painting in bold primary colors.<sup>49</sup>

Administrations with more cautious legal agendas will not face this difficulty, but even they suffer to some extent from audience problems. In an era characterized by split party control of the White House and the Senate, administration lawyers will always face a tough challenge finding suitable judicial nominees to send before the Senate. The lawyers involved in judicial selection are caught between the legal agenda of the President and the often diametrically opposed legal agenda of the opposition political party then dominant in the Senate.

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48. Justices Ruth Bader Ginsburg and Stephen Breyer both joined justice Kennedy's 6-to-3 majority opinion in *Romer*, thus guaranteeing that it would be a majority opinion.

49. This was a favorite metaphor of President Reagan's, repeated often in his early speeches after taking office.

Both President Bush and President Clinton faced this difficulty and paid a political price because of it. The Bush Administration was criticized by conservatives for its disappointing selection of Justice Souter for a seat on the Supreme Court and for its decision to sign and support several statutes expanding business liability for employment discrimination. On the other hand, Senate democrats between 1989 and 1993 were appalled by the Clarence Thomas nomination and found much to object to in many of Bush's other judicial nominations. Similarly, President Clinton has disappointed many liberals who had hoped he would appoint outspoken Brennanites to the federal bench. At the same time, he has incurred the wrath of Republican Senators for appointing too many liberals.

Finally, audience problems inhere in the job that any executive branch lawyer must perform because the Executive Branch cannot write off any of the different audiences it is obligated (at least sometimes) to try to persuade. Every President wants to persuade future Supreme Courts, historians, the general public, and the media of the wisdom of his approach to legal policy and law enforcement. Every President must persuade the Senate to confirm his judicial and executive legal nominees. Every President must persuade the House to appropriate funds for law execution purposes. Every President must persuade the Supreme Court and the lower federal courts to follow at least some of its construction of federal laws. And every President must persuade lower-level executive branch employees to follow his legal agenda at least some of the time.

The fact that Presidents are as a practical matter obligated to worry about all of these different audiences makes the job of executive branch lawyers unusually difficult. Presidents must have both a core legal agenda and a variety of fall back positions, and these different agendas must to some extent be communicated to different audiences at the same time and in public. Presidents with ambitious legal agendas like FDR and Reagan will face an especially trying task.

One tool Presidents have at their disposal for accomplishing this task is appointing different kinds of lawyers to different kinds of legal jobs in their administration. Cautious advocates might be charged with writing briefs for the Supreme Court, for example, while bolder lawyers might be recruited to work on judicial selection. Part III below elaborates this argument; suffice it to say that it is very unlikely that a President would want to have the same kinds of advocates making the same kinds of arguments to all of the many different audiences he is obligated to try to persuade. Thus the President's own needs and the incentive structure he faces are likely to push him and his top legal advisers toward different kinds of attorneys for different executive branch legal positions.

Those lawyers in turn are likely to have different conceptions of which audience they should focus on and on who their client is. For example, executive branch lawyers arguing before the Supreme Court are in general likely to

focus on the present justices as their audience and will often think that the United States is their client. Lawyers involved in judicial selection, on the other hand, may tend to think that future constitutional scholars, future Supreme Courts, historians, the general public, the media, and above all the Senate are their audience, while the President in whose administration they work and the voters who elected him are their clients.

### III

#### THE ROLES OF GOVERNMENT LAWYERS IN MAKING CONSTITUTIONAL LAW

If the supposition of distinct audiences is correct, it poses a major challenge for two different normative theories of the role executive branch lawyers ought to play. The first such theory—the departmentalist theory—was very much in vogue in the Reagan Administration and is one to which I have long subscribed. Believers in departmentalism, or “Coordinate Review,” as Michael Paulsen calls it,<sup>50</sup> accept the following set of propositions: (1) The President has a right co-equal with that of the Supreme Court to interpret the Constitution; (2) all employees of the Executive Branch are legally the President’s subordinates and obtain all their constitutional power by implicit or explicit delegation from the President; and, therefore, (3) all employees of the Executive Branch holding legal jobs should follow the President’s line in every respect on all constitutional issues, and it is the job of the Attorney General (and maybe the White House Counsel) to ensure that every lawyer in every administration toes the President’s line in every respect.

No scholar has made the departmentalist argument in quite this way, but Professor John McGinnis comes close in his superb book review of Charles Fried’s entertaining and thought-provoking memoir of his years as President Reagan’s Burkean Solicitor General.<sup>51</sup> The problem is, however, that the Executive Branch does not work exactly as departmentalists describe it. The Executive Branch is embedded in a three-branch constitutional structure that requires some executive branch lawyers to spend all or most of their time communicating with lawyers in one of the other two branches—the courts or the Congress. It is inconceivable that lawyers in executive positions of that kind will have the same view of the law as nonlitigating, nonlobbying judge pickers or Office of Legal Counsel opinion writers. Each set of lawyers faces a very different set of incentives, has a different perception of who the client is, and works to persuade a different audience.

McGinnis’s position is thus at war with the reality of life in the Executive Branch, a reality which in turn is set in motion by the constitutional separation of powers itself and which the President must take into account if he is to enjoy political success or in some instances if he is to survive in office. The Constitution is not a suicide pact, and it surely ought not to be read as imposing an obli-

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50. See Paulsen, *supra* note 20.

51. See FRIED, *supra* note 4; McGinnis, *supra* note 2.

gation upon the President to insist so rigidly on his views that he is unable to work successfully with the other branches of government. It thus must be permissible in theory for Presidents to do what they have often if not always done in practice: appoint cautious lawyers to legal jobs in their administration that require caution, and more zealous lawyers to jobs that will not get done without the advocate having some "fire in his belly."<sup>52</sup>

The pure normative departmentalist approach is thus at some level an implausible one. It is unlikely ever to describe the actual practice of executive branch lawyering and to comport with the incentive structure that Presidents face and that the constitutional text has created. Whatever its abstract merits, therefore, pure and unbending departmentalism is not a wholly satisfactory approach to these issues.

A second major normative theory that describes the role that executive branch lawyers ought to play might be called the Court-centered approach. This theory embraces roughly the following set of propositions: (1) The courts are the predominant interpreters of the Constitution but generally have the last word on its meaning; (2) our national commitment to the Rule of Law demands that the President and his subordinates be bound by the law; and, therefore, (3) all legal employees of the Executive Branch should pay the utmost respect and deference to judicial interpretations of the Constitution and the law in all of their official actions, and it is the job of the Attorney General (and perhaps the White House Counsel) to make sure this happens.

Again, no individual has made this argument quite so starkly, but Lincoln Caplan has come close.<sup>53</sup> Many who write about the role of executive branch lawyers justifiably worry about Presidents and politicians politicizing the litigation machinery of the government, and they often react by favoring extensive use of permanent career officials who are insulated by civil service laws or independent counsel mechanisms from the political process. The logical culmination of this approach is former Senator Paul Simon's proposal that the entire Justice Department be made an independent agency headed up by an Attorney General removable only for cause and serving perhaps a nonrenewable, ten-year term of office.<sup>54</sup> Under this proposal, a professionalized version of the independent counsel regime would become the norm and all litigation and law enforcement decisions (that is, the duty and power to "take care that the Laws

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52. The phrase is usually used to describe politicians who are gutsy and crazy enough to want to run for President. It might also be used in this context to describe lawyers who believe passionately enough in some kind of legal change to be willing to take substantial career risks to see it adopted. William Bradford Reynolds and Walter Dellinger might, for quite different reasons, be fairly described as being in this category.

53. CAPLAN, *supra* note 3. The most thoughtful and qualified argument of this type that I know of is that of my colleague Tom Merrill in this symposium issue. See Thomas W. Merrill, *High-Level "Tenured Lawyers"*, 61 LAW & CONTEMP. PROBS. 83 (Spring 1998).

54. Such an Attorney General would be even more independent than are FBI directors in the post-J. Edgar Hoover era. Such directors can serve no longer than 10 years in office, but they may be removed by the President sooner if he so chooses.

be faithfully executed”) would be permanently removed from presidential interference or control.

This argument for a professionalized and judicialized approach to law has even been advanced with respect to judicial selection—a domain where presidential prerogative would seem strongest given the President’s textually guaranteed power of appointment. Thus, Ronald Reagan’s approach to judicial selection was at times criticized for being too ideological,<sup>55</sup> just as FDR’s Court-packing plan came in for criticism as being a threat to the rule of law.<sup>56</sup> The essence of these criticisms seems to be that Presidents have no right to use their appointment power to change the direction of the Supreme Court, at least not in any drastic or sudden way. Perhaps some segments of the public expect the Supreme Court to follow the election returns, but they think Presidents ought to pay a price if they try to make that process happen too fast or too overtly. This conclusion requires the assumption that public support for the principle of an independent judiciary is rightly quite strong even at times when some disagree with the constitutional interpretation the judiciary is producing.

The problem with this Court-centered, conservative approach to executive branch lawyering is that, given the incentive structure the President faces, it bears little or no resemblance to the way the Executive Branch actually works or is ever likely to work. Presidents are political officials who are elected by primary and general election voters to carry out a concrete political agenda. Inevitably that agenda will from time to time involve problems of law enforcement, constitutional amendment or reform, or other legal issues. As noted above, most recent presidential campaigns have involved legal issues to some degree ranging from abortion to tort reform. Inevitably, then, Presidents will arrive in office with an agenda for legal change and with a desire to show their supporters that progress on that agenda is being made.

Given our current institutional structures, this desire will inevitably be at least partially realized. Presidents appoint all the top level legal officials in the Executive Branch (except for independent counsels), and they also appoint perhaps twenty-five percent of the federal judiciary in any given four-year term of office. Accordingly, it is highly likely that the President’s legal agenda will have a tremendous impact on the law-oriented institutions of the government. This impact will be greatest in core executive offices like Office of Legal Counsel and the White House Counsel’s Office but it will also and must also be felt in the Solicitor General’s Office, and in the litigating and law enforcement divisions. Different policies on abortion, domestic violence, civil rights, federalism, economic liberties, environmental law, and other issues must be and will be respected throughout all the legal arms of the Executive Branch as one administration comes and another goes. Any theory of executive branch lawyering

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55. See GOLDMAN, *supra* note 31; SCHWARTZ, *supra* note 30.

56. See S. REP. NO. 75-711, at 14 (1937), reprinted in FISHER & DEVINS, *supra* note 37, at 94-96 (blasting FDR’s Court-packing plan as having the real purpose of making “this [g]overnment one of men rather than one of law” and as “a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America”).

that does not or that cannot account for or justify this practice is fundamentally at odds with reality. The Constitution itself sets up the very incentive structure for Presidents that guarantees they will bring fresh popular insights about law into Washington at regular four-year and especially eight-year intervals.

This is not to deny the wisdom of the highly sophisticated argument for tenured lawyers that my colleague Tom Merrill sets out elsewhere in this symposium issue.<sup>57</sup> To the extent Presidents are worried about winning cases here and now, and all Presidents care about that to some extent, there are powerful reasons to have tenured, high-level lawyers around (or at least not to fire these lawyers, who in fact occupy policymaking positions that under Article II are always subject to presidential removal at will). Moreover, as Professor Merrill argues, the very institution of the presidency and other government institutions as well do often benefit from having the insights available due to a career lawyer's beneficially long-term perspective.

Nevertheless, the presidency and the government also benefit from the periodic infusions of fresh blood that come into the Executive Branch as a result of the constitutionally imposed two-term limit<sup>58</sup> and of the tradition, dating back to Andrew Jackson and George Washington, that every President picks his own Cabinet and other policymaking officials.<sup>59</sup> This 200-year-old American tradition contrasts favorably with the British and European traditions of government-by-the-permanent-bureaucracy.<sup>60</sup> Academics know well that just as there is a benefit to having tenured people around with years of experience and a long-term perspective, so too there is a benefit to bringing in fresh blood. The principles of both rotation in office or term limits, and of a professionalized career civil service, have deep roots in this country and serve important values.<sup>61</sup> I sincerely doubt that either will ever or should ever completely prevail over the other.

The constitutionally combined policymaking and law-execution functions of the Executive Branch almost guarantee that we will never have an Article II regime of either pure term limits or pure tenure. For this reason, even unitary executive theorists have conceded that tenure guarantees are permissible and may be even desirable for executive officials in non-policymaking ministerial positions. Once again, the constitutional structure itself, the incentives it creates, and the way those incentives have played out historically combine to sug-

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57. See Merrill, *supra* note 53.

58. See U.S. CONST. amend. XXII.

59. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997).

60. See Steven G. Calabresi, "The Era of Big Government is Over", 50 STAN. L. REV. 1015, 1035 (1998) (book review); accord ALAN BRINKLEY, ET AL., THE NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION 45-49 (1997) (Nelson W. Polsby).

61. The Jacksonian insistence on rotation in office clearly has deep resonance in our constitutional tradition as the strength of the modern day movement for term limits indicates. At the same time, support for a professionalized career civil service dates back to the 1880s, and in some ways to the first six Presidents all of whom exercised their removal power very sparingly out of a desire to create a professionalized civil service administration. See Calabresi & Yoo, *supra* note 59.

gest that a pure Court-centered conservative role for executive branch lawyers is as unrealistic as it would be to expect the President to want to fire all of the career policymaking officials he is constitutionally empowered to fire.

Former Solicitor General Charles Fried, recognizing the flaws inherent in both of the two theories discussed, recently proposed what is in essence a third theory: Burkean representationalism.<sup>62</sup> Fried explains that he regarded his job as Solicitor General as being in essence an ambassadorial one. He viewed himself as being a Burkean representative or ambassador from the Reagan Administration to a quite different and often hostile Supreme Court. In that role, he believed he had an obligation to think independently, creatively, and with his own best judgment about what parts of the Reagan legal agenda should be pushed or which, for strategic reasons, should be abandoned. This third theory of the role of an executive branch lawyer comports with the role that some past Solicitors General appear to have played, as Fried's occasional references to Victor Navasky's book *Kennedy Justice* illustrate.<sup>63</sup>

The executive branch lawyer as Burkean-independent-thinker, ambassador, and translator is an inevitable role for at least some executive branch lawyers. All lawyers sometimes play such a role when they independently present their client's interests in the manner they deem most likely to be well received. In Fried's case, however, as in Stanley Reed's<sup>64</sup> case during the first Franklin Roosevelt Administration, the gap in the visions of constitutional law held by their presidential client and a majority of the Supreme Court was arguably so large that anyone who tried to span it would find himself carving out a third intermediate judicial philosophy.<sup>65</sup> This, Fried admits, is what he did when he tried to get the originalist Reaganites and the evolutionary Brennanites to meet at a Harlanesque middle ground.

Fried's effort was sometimes successful and sometimes not, often for reasons that were largely beyond his or the Reagan Administration's ability to control. Yet the effort was probably inevitable, given both the extraordinary gap that had opened up between the legal views of the President and the Court, and the Administration's imperative need not to lose every case upon which *certiorari* was granted while it embarked upon its long-term project of successfully changing the face of American law. While some Reaganites were laying the groundwork for the successful and revolutionary revival of federalism and separation of powers that has partially come to fruition in cases like *United*

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62. See FRIED, *supra* note 4.

63. See the discussion of Archibald Cox's tenure as Robert F. Kennedy's Solicitor General in VICTOR S. NAVASKY, *KENNEDY JUSTICE* 277-323 (1971).

64. Reed was FDR's first Solicitor General, who, according to legend, picked *Humphrey's Executor* as his first case to argue because he was sure it could not be lost. Of course, to his and FDR's great irritation and chagrin, the government lost. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 64 (1995).

65. For a thought-provoking discussion of mistakes in lawyering during the first Franklin Roosevelt Administration, see Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237 (1996).

*States v. Lopez*,<sup>66</sup> *Printz v. United States*,<sup>67</sup> *City of Boerne v. Flores*,<sup>68</sup> *Washington v. Glucksberg*,<sup>69</sup> and *Plaut v. Spendthrift Farm, Inc.*,<sup>70</sup> others had to engage in damage control in cases like *Bowsher v. Synar*,<sup>71</sup> *Webster v. Reproductive Health Services*,<sup>72</sup> and *Schweiker v. Chilicky*.<sup>73</sup> Fried met this challenge powerfully and with a great deal of theoretical flair, and if the briefs that resulted were not always pleasing to me or to other Reaganite originalists at the time, they were more pleasing than Rex Lee's briefs and, in retrospect, they were the best that could be hoped for at that very difficult period.

Every administration will likely have within it some lawyers who are ardent administration advocates, some who are cautious Court-oriented conservatives, and some who are peacemaking ambassadors representing the administration's views to the outside and transmitting the responses back. Lawyers will gravitate toward these roles in part based on their personalities and on what they feel comfortable doing but also in part on the basis of their claim to expertise and status within the administration.

Every executive branch lawyer has a constituency he has an incentive to please and a reputation with that constituency he wants to maintain. As Professor Merrill rightly notes, tenured career lawyers have an incentive to worry about their long-term reputational capital with the Courts and the judges who sit on them and will make short-term sacrifices accordingly. This admirably serves the Executive Branch's interest in short-term litigation victories but, as Merrill notes, may disserve concerns of democratic accountability. It is in the class interest of career lawyers to pretend that victory today in court is the be-all-and-end-all of successful Article II lawyering. The lawyers' court-win records are also their "meal tickets;" so they will flaunt their successful records with pride at their here-today-gone-tomorrow bosses.

Conversely, ardent "administration advocates" have a strong incentive to worry relatively more about maintaining their reputation within the administration and its electoral and interest group coalitions. In my experience, the Reagan Administration advocates were less likely to brag about the last time they had gotten Lewis Powell's vote and more likely to talk about how they were with Reagan way back in 1976. The advocate's claim to fame and power rests significantly on perceived loyalty to the Administration's legal agenda and electoral platform, as well as honesty, effectiveness, and trustworthiness in carrying those things out. A good and effective advocate and a good and loyal Court-oriented conservative will usually and should usually arrive at similar conclu-

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66. 514 U.S. 549 (1995).

67. 117 S. Ct. 2365 (1997).

68. 117 S. Ct. 2157 (1997).

69. 117 S. Ct. 2258 (1997).

70. 514 U.S. 211 (1995).

71. 478 U.S. 714 (1986).

72. 492 U.S. 490 (1989).

73. 487 U.S. 412 (1988).

sions, but given the incentive structure he faces, the former is obviously a more reliable agent of democratic accountability.

Ambassadorial lawyers by definition have an interest and an incentive in creating and finding middle ground. They thrive in situations like those encountered by Franklin Delano Roosevelt and Reagan where there is a sharp difference between the administration's legal views and the judiciary's, and they have an incentive to maintain a state of Cold War so their peacemaking services will remain in demand. A good ambassador has to be empathetic and be able to see legal issues from a variety of perspectives so he can frame his arguments and theories accordingly. This can be dizzyingly complicated at the level of the Solicitor General's office.

Obviously, there are good and bad versions of the lawyers who fit these three types. A bad advocate is an unqualified partisan hack; a bad Court-centered lawyer is a lazy recalcitrant bureaucrat; and a bad ambassador is a lawyer who has spent so much time with the other side that he has either "gone native" or is in effect a double agent. Conversely, a good advocate is a Lincoln taking on *Dred Scott*<sup>74</sup> or a Robert Jackson taking on the nine old men;<sup>75</sup> a good Court-oriented conservative is a Leon Jaworski bringing Richard Nixon to justice; and a good ambassador is an Archibald Cox arguing for justiciability in *Baker v. Carr*.<sup>76</sup> All three types will always exist in every administration and the respective roles can be played as admirably or as badly as the participants so choose.

One constant feature, in any administration, is that certain legal officers and offices are more likely to play distinct roles. For example, in recent years, the White House Counsel's office, to its great peril, and to a lesser extent, the Office of Legal Counsel have tended to have more advocate-type lawyers. It is no accident that both John Dean and Vince Foster worked in the White House Counsel's office and that Abe Fortas was a former White House lawyer. Nor is it an accident that advocates William H. Rehnquist and Antonin Scalia went from the Office of Legal Counsel to the Supreme Court, as have many advocate Attorneys General<sup>77</sup> and at least one advocate Deputy Attorney General.<sup>78</sup>

Similarly, the career staff in the litigating and law enforcement divisions has always contained a fair number of Court-oriented conservatives. It is no surprise that I have been told that many career lawyers during the Carter Administration were unhappy about their Administration's unwillingness to raise standing problems in litigation (because of theoretical objections to the doctrine), just as many career lawyers during the Reagan years were unhappy about the Administration's willingness to promote anti-federal power legal po-

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74. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

75. See JACKSON, *supra* note 27.

76. 369 U.S. 186 (1962).

77. For example, Roger B. Taney, James C. McReynolds, and Robert H. Jackson.

78. Byron White.

sitions on economic liberty or federalism.<sup>79</sup> For these officials, a Senior Executive Service career Deputy position is a long-sought-after and hard-earned prize, and there is bound to be resentment over the fact that in this country we have civilian control of the Civil Service just as we have civilian control of the Joint Chiefs of Staff.

Finally, certain offices like the Solicitor General's office or the Offices of Congressional Relations or of Public Affairs are always likely to attract ambassadorial lawyers. The heads of these offices are ambassadors from one branch to another branch or to some public audience that the President or the Attorney General cares about. The tensions that exist are more likely at some times than at others to require ambassadorial talent, but even in normal periods some measure of diplomatic skill (and ability to wear formal attire) is required. Some Presidents will not need to have an ambassador in these jobs,<sup>80</sup> and others will choose not to for various reasons.<sup>81</sup> As a general matter, however, these offices seem likely to attract lawyers with an ambassadorial frame of mind or to create such lawyers by the incentive structure presented to them.

The modern trend toward split-party control of the White House and Senate also has had a tendency to push an administration's legal advocates into non-confirmation jobs, such as those in the White House Counsel's office. This explains the role that Boyden Gray and Bernard Nussbaum are reported to have played in selecting Supreme Court nominees during the Bush and Clinton administrations, respectively. Formerly, decisions of that importance were more often made by the Attorney General, but the lessons learned from Watergate and the trend toward split-party control have seemed to force recent administrations to place their advocate lawyers in the White House "bunker" itself rather than in the Justice Department.

This trend is very unfortunate. The traditions and career personnel of the Justice Department teach important lessons to political appointees, and the those appointees bring fresh air into the Department. The physical separation of these different types of lawyers into different buildings on Pennsylvania Avenue should be resisted, because each of the three types has an important role to play and needs the moderating influences of the others. For this reason, and others, it is fortunate that our Justice Department is organized as it is. The tendency for either Court-oriented conservatives or ambassadorial types to take over the Justice Department should be resisted, just as a check should be maintained on military officers at the Pentagon or on the striped pants crowd at the State Department. Civilian control of the government is an important prin-

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79. See FRIED, *supra* note 4, at 182-88.

80. For example, Presidents Franklin Roosevelt (after 1937) and Lyndon Johnson, throughout his tenure in office, could afford to appoint ardent advocates to serve as Solicitors General because they had solid majorities in both houses of Congress as well as strong support from a solid majority of the Supreme Court. FDR appointed ardent advocates to serve as Solicitors General during this period, and LBJ appointed Thurgood Marshall to succeed JFK's Solicitor General, Archibald Cox.

81. President Gerald R. Ford, a militant moderate Republican, chose to retain the arch-conservative, Nixon-appointed advocate Solicitor General Robert H. Bork, who completed his time in that office under the supervision of Ford's eclectic Attorney General, Edward H. Levi.

principle of our democracy and that principle applies to legal policy as well as to foreign and defense policy.

The key flaw of the normative writing on the role of executive branch lawyers is that it tends to assume that one of the three roles is best even though all three are inevitable and will always co-exist. The three roles are inevitable because of the tripartite structure of the government, because each role serves important if at times conflicting values of democratization and professionalism, and because different lawyers will have different temperaments and will face different incentive structures.

At the same time, different circumstances will be relevant because some Administrations will take office during a relatively nonpartisan era of good feelings, like James Monroe's, while others will come in during a constitutional moment, as happened with Lincoln, Franklin Delano Roosevelt, and Reagan, or during a period when rule of law values are paramount, as they were for President Ford. Different Presidents will have different needs and ambitions, and different circumstances will thus produce different ratios of advocates, Court-centered conservatives, and ambassadors. The three types are simply inherent in our Constitution, our needs as a people, and in the personalities and incentives of the executive branch lawyers who are hired to work as our agents.

### III

#### CONCLUSION

This essay has argued that all executive branch lawyers to some degree feel the pull of conflicting loyalties to two quite different centers of power: that represented by the President and that represented by the Supreme Court. Some executive branch lawyers are predominantly loyal to the President, and they become his advocates. Others are predominantly loyal to the Court, and they become a restraining influence. Still others are peacemakers and mediators who try to negotiate compromises between the first two groups. Membership in these groups often depends on whether one holds a political or a civil service position. Political appointees can be cautious and Court-oriented,<sup>82</sup> and civil service appointees can be ardent administration advocates.<sup>83</sup>

This essay began with a quote from Professor Bruce Ackerman, who offers us the metaphor of the Supreme Court as the caboose (and controller of the breaks) on the train that is our federal government. In Ackerman's metaphor, which I only partially endorse,<sup>84</sup> the Court is pulled along behind the policy-

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82. For example, Rex Lee, President Reagan's first Solicitor General.

83. For example, now-Professor Gary Lawson, who held a career-reserved position in the Reagan Office of Legal Counsel even though he is an ardent and pure originalist.

84. The implication of Ackerman's metaphor that I find misleading is his suggestion that the Court always treats recent events like the New Deal as being more important than older events like the Founding. To the contrary, as I have explained elsewhere, I believe the Supreme Court for the last 40 years has been deemphasizing New Deal constitutionalism and returning to pre-1937 insights. See Calabresi, *supra* note 7, at 258-61. For an explanation of why the American people might repeatedly

making branches following dutifully if belatedly the direction in which the policymakers have been told to go by the people, or have otherwise chosen to go. This metaphor, besides being descriptively accurate in this respect, seems apt in describing the orientation of the three types of government lawyers. Some of them are interested only in looking backwards and in servicing the caboose. Others can see or argue about only the path ahead and fight over access to the locomotive. Still others move from one end of the train to the other, facilitating communications and conducting negotiations between the engineers in the locomotive and the brakemen in the caboose.

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tell the Supreme Court to return to originalist/textual constitutional principles, see Steven G. Calabresi, *supra* note 23.