

# HIGH-LEVEL, “TENURED” LAWYERS

THOMAS W. MERRILL\*

## I

### INTRODUCTION

Government lawyers can be broadly categorized as either political or civil service appointees. The political appointees constitute a thin layer at or near the top of the hierarchy of government lawyers. They include, most prominently, presidential appointees—“Officers of the United States” who must be nominated and confirmed by the Senate prior to their appointment.<sup>1</sup> They also include a variety of lesser lawyers who are exempt from most of the civil service laws.<sup>2</sup> Such exempt “inferior Officers” include, for example, the lawyers in the White House Counsel’s office and so-called “Schedule C” lawyers who hold positions “of a confidential or policy-determining nature” scattered throughout the bureaucracy.<sup>3</sup>

The civil service lawyers form the much larger base of the hierarchy below the thin top layer. They shall be referred to here as “tenured lawyers,” because, as in the case of tenured academics, they have an expectation of continued government employment unless and until they are terminated for cause following cumbersome due process formalities.<sup>4</sup> These tenure rights, which are created by the civil service laws and regulations,<sup>5</sup> do not confer the right to continue in any particular job or function. Tenured lawyers can be removed from their position if their agency is abolished or is subject to a reduction in force.<sup>6</sup> Generally speaking, however, they cannot be fired, demoted, or have their pay reduced unless they have been proven guilty of some dereliction of duty.<sup>7</sup>

---

Copyright © 1998 by Law and Contemporary Problems

This essay is also available at <http://www.law.duke.edu/journals/61LCPMerrill>.

\* John Paul Stevens Professor of Law, Northwestern University. Deputy Solicitor General, 1987-90.

The author would like to thank his colleagues at Northwestern who took part in a faculty workshop, and to give special thanks to Carl Auerbach and Steve Calabresi for their input on an earlier draft.

1. U.S. CONST. art. II, § 2, cl.2.

2. See 5 C.F.R. § 213.3301 (1998).

3. *Id.*

4. In fact, the leading due process authorities include cases spawned by adverse employment action taken against both civil service employees and teachers working for public institutions of higher learning. See *Board of Regents v. Roth*, 408 U.S. 564 (1972) (academic employee); *Perry v. Sindermann*, 408 U.S. 593 (1972) (same); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (civil service employee).

5. See *Arnett*, 416 U.S. at 140-46.

6. In which case they have certain priority rights to employment elsewhere in the government. See 5 C.F.R. § 359.601 (1998).

7. See generally ROBERT M. O’NEIL, *THE RIGHTS OF PUBLIC EMPLOYEES* 122-23 (2d ed. 1993) (summarizing procedures).

Although most tenured lawyers perform tasks that would be regarded as routine from the perspective of high political theory, at the upper echelons of the civil service, there are a significant number of lawyers—members of what is called the Senior Executive Service—who hold positions of significant responsibility. In the Justice Department, for example, there is a “mixing zone” of lawyers at the bottom of the thin political layer and the top of the civil service base—roughly speaking, the layer consisting of deputies to presidential appointees—where some lawyers are political appointees and some are civil servants, and each performs comparable functions.

One example of such a mixing zone is provided by the office in the Justice Department with which I am the most familiar, that of the Solicitor General. The Solicitor General’s office represents the United States before the Supreme Court and supervises appellate litigation in the lower courts. The office is headed by the Solicitor General, who is a presidential appointee and is the fourth-highest ranking officer in the Justice Department. Immediately below the Solicitor General are four Deputy Solicitors General. One, the Deputy Solicitor General and Counselor to the Solicitor General, informally known as the “Political Deputy,” is a non-career member of the Senior Executive Service. The other three deputies all hold what are called career-reserved positions in the Senior Executive Service, that is, they are tenured civil servants.<sup>8</sup> Although the Political Deputy becomes Acting Solicitor General when the Solicitor General resigns or is disqualified, when both the Solicitor General and the Political Deputy have resigned or are disqualified, which happens not infrequently, especially during the transition between administrations, one of the tenured deputies becomes the Acting Solicitor General.<sup>9</sup> For most day-to-day purposes, such as arguing cases in the Supreme Court and approving the content of the briefs filed in the Court, the Political Deputy and the tenured deputies perform indistinguishable tasks and have the same degree of responsibility.

The functional justification for using civil service lawyers to perform such high-level tasks has received very little scholarly attention. A better understanding of the rationale for having such lawyers is sorely needed, because civil service lawyers are often the target of criticism. As James Q. Wilson has noted, “[n]o politician ever lost votes by denouncing the bureaucracy,”<sup>10</sup> and the impulse to poor-mouth the bureaucracy often carries over to include lawyer-

---

8. On the distinction between non-career and career-reserved Senior Executive Service (“SES”) appointments, see 5 U.S.C. § 3134 (1994); 5 C.F.R. § 214.410 (1998). By law, no more than 10% of SES positions can be filled by political appointees.

9. For example, in the transition period between the Reagan and the Bush Administrations, a tenured Deputy, William Bryson, served as Acting Solicitor General for almost half a year. Among the sensitive tasks he discharged during this period of time included the filing of the government’s brief in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), which asked the Court to overrule its decision in *Roe v. Wade*, 410 U.S. 113 (1973). Bryson served again as Acting Solicitor General in the transition between the Bush and Clinton Administrations. He is now a judge on the United States Court of Appeals for the Federal Circuit.

10. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 235 (1989).

bureaucrats. Generally speaking, two types of criticism have been made,<sup>11</sup> both having some force.

The first is based on the lack of accountability of high-level tenured lawyers. Presidential elections occur at four-year intervals, and, as we know, they often result in a change of party control of the White House. When this happens, new presidential appointees are installed in the departments and agencies, and there is often a discernible shift in the direction of policy. Presidential appointees can usually count on political lawyers to carry out these new policies. But high-level tenured lawyers are often regarded with suspicion. Because they have tenure, they cannot be removed as a consequence of the result of the elections, even if they are suspected of hostility toward the policies of the incoming administration. High-level tenured lawyers thus can pose an impediment to democratic change.

The second criticism is based on the inefficiencies associated with any system of tenure.<sup>12</sup> It is extremely difficult to remove tenured civil servants from office.<sup>13</sup> Their security, combined with relatively little room for significant pay differentials or bonuses based on performance,<sup>14</sup> eliminates much of the incentive for high productivity. Thus, as will be familiar to anyone who has participated in debates over academic tenure, one considerable cost of any such system is that tenured employees may behave opportunistically by shirking or performing only the minimal amount of work necessary to avoid dismissal or demotion. Granting tenure to high-level lawyers may therefore impair the general efficiency of the workforce.

The often unstated conclusion drawn from these criticisms is that we should expand the use of political lawyers in performing high-level tasks and either eliminate tenure for lawyers or push the use of tenured lawyers further down the legal hierarchy.<sup>15</sup> However, this conclusion presupposes that there are no significant countervailing reasons for having high-level tenured lawyers. In this essay, I will seek to identify and evaluate the most plausible justifications for using tenured lawyers to perform high-level tasks within the executive branch

---

11. See generally RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY* 1-10 (1994) (summarizing the accountability and productivity critiques of bureaucracies).

12. For a general discussion of the efficiency arguments for and against employment tenure, see Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 *EMORY L.J.* 1097 (1989).

13. It has been reported that "[d]uring fiscal year 1990, of well more than a million and a half covered federal employees, only 370 were removed and 128 were demoted for poor performance." O'NEIL, *supra* note 7, at 122. This means that 99.97% of covered civil servants sailed through the year with no adverse employment action against them.

14. See JOHNSON & LIBECAP, *supra* note 11, at 170.

15. I am here concerned primarily with the use of tenured lawyers in high-level positions that entail the exercise of a significant measure of discretionary authority. With respect to lower-level civil servants, the accountability critique carries less force, but the efficiency concern may loom large. Indeed, it is possible that the efficiency concerns warrant significant modifications of the tenure system for lower-level employees. See *id.* at 170-71. After all, universities do not grant full tenure rights to administrative personnel and maintenance workers, presumably because the efficiency costs would be too high.

legal system. Uncovering such justifications does not, of course, dispose of the question of whether or to what extent we should deploy tenured lawyers to perform high-level roles. The accountability and inefficiency critiques must be given their due before reaching any final evaluation of how best to structure the government. Before we jump on the bandwagon in support of a return to the patronage system, however, it is important to try to develop the best case for preserving a significant role for upper-level civil service lawyers.

In Part II, I consider the traditional functional justification for the civil service, which I will call the impartiality argument. This justification posits that tenured employees are preferred to political or patronage employees because they will discharge their duties free of favoritism or partisan bias. Without suggesting that this justification is wholly meritless, I will argue that in our post-Legal Realist Age it is not a very powerful one as applied to high-level tenured lawyers. At the upper reaches of the legal hierarchy, one person's political bias is another person's democratically sanctioned policy change. The idea that tenured lawyers are more impartial in their discernment of the requirements of the law therefore provides a rationale that is probably too weak to overcome the accountability and efficiency concerns created by any system of tenure.

In Part III, I turn to a different rationale for tenure systems, one based on the tendency of a such systems to encourage employees to adopt a long-term perspective about the needs of the institution they serve. Tenured lawyers tend to be repeat players rather than short termers, and as such they have an incentive to build and preserve the institutional capital of the Executive Branch. Because of their efforts in building this institutional capital, the Executive Branch is arguably a stronger and more effective instrument for realizing the goals of each successive administration than would be the case if every newly elected President had to assemble a cadre of lawyers from scratch as under the patronage system. I consider this rationale a more powerful justification for using tenured lawyers in certain high-level positions, one sufficiently important to warrant some compromise with the accountability and efficiency arguments favoring the use of at-will employees.

In Part IV, I briefly consider how the institutional capital justification for tenured lawyers might fit into the on-going debate over how best to conduct investigations into alleged criminal wrongdoing by high-level executive branch officials—the problem of Watergate, the Iran-Contra affair, the Whitewater investigation, and now the Monica Lewinsky scandal. The current solution to this problem embodied in the Ethics in Government Act—the appointment of an “Independent Counsel” by an Article III tribunal—has probably given rise to more difficulties than the problem it is designed to solve. The source of these difficulties is that Independent Counsels combine the worst features of tenured lawyers and political lawyers. Like tenured lawyers, they lack political accountability and are prone to inefficiency. Like political lawyers, however, they also lack the long-term perspective that repeat players enjoy. I suggest that a superior solution to the problem of criminal investigations of high government officials would be to have such investigations conducted by tenured lawyers

within the Justice Department who are at least indirectly accountable to elected officials.

## II

### THE IMPARTIALITY JUSTIFICATION

The most familiar rationale that has been advanced for the civil service is what I will call the impartiality justification: Tenured employees are more likely to discharge their duties without having their judgment influenced by political or partisan considerations. This is the reason most commonly cited in support of the abolition of the Jacksonian spoils system and the creation of the civil service in the Pendleton Act of 1883.<sup>16</sup> The ideal of administrative impartiality probably reached its apogee with the “scientific management” school of government associated with Woodrow Wilson<sup>17</sup> and Herbert Hoover,<sup>18</sup> and carried over into the celebration of administrative “expertise” that was a prominent aspect of the New Deal.<sup>19</sup> It remains today the officially recognized rationale for giving government employees tenure protection.<sup>20</sup>

In many areas of public administration, the ideal of impartiality continues to hold sway. Most people would probably agree that new drug applications, motor vehicle safety standards, DNA testing standards, and changes in the money supply should be determined with at least significant input from persons chosen for their objectivity and technical expertise rather than their political views. Indeed, Justice Stephen Breyer has recently written an influential book arguing for the creation of a super-agency of insulated experts to establish national priorities for the regulation of environmental risks.<sup>21</sup> So impartiality as an ideal for government employees is far from dead.

Underlying the impartiality ideal is the distinction between political and nonpolitical decisionmaking. According to the scientific management conception, politics has its proper role in setting the basic direction of policy. But once the policy is fixed, the details of implementation and application of that policy should be determined by impartial experts. Thus, in order to foster and protect the ideal of objective implementation of policy, we have created the civil service system.

Whatever its status in fields that intersect with scientific and technological expertise, the impartiality ideal is under considerable stress as applied to high-

---

16. See generally ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT 1965-1883* (1968); JOHNSON & LIBECAP, *supra* note 11, at 12-41.

17. See Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887).

18. Hoover's endorsement of scientific management was most pronounced in his roles as administrator and chair of various commissions devoted to administrative reform. See PAUL C. LIGHT, *THE TIDES OF REFORM* 21-25 (1997).

19. See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23-24 (1938).

20. See 5 C.F.R. § 214.402(b)(2) (1998) (noting that positions in the SES must be reserved for career appointees when necessary “to ensure impartiality, or the public's confidence in the impartiality, of the Government”).

21. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993).

level government lawyers.<sup>22</sup> In the legal context, the impartiality vision presupposes some form of “legal right-answerism.” That is, one must believe that there is an activity called “politics” that consists of making or creating new rules, and that there is a distinctive activity called “law” that consists of discovering or identifying preexisting rules, and one must further believe that objective and appropriately trained lawyers can agree in most instances on the right answer to the question “what is the law with respect to *x*?” One implication of this perspective is that those engaged in rule creation should be politically accountable: Preferably they should be elected officials (members of Congress or the President and Vice President), but at the very least they should be answerable to such elected officials. In contrast, those engaged in discovering or identifying existing rules should be insulated from political influences in order to keep their vision clear of extraneous factors clouding their ability to see the right answer.

This strong distinction between politics and law is a staple of our legal culture and its influence is not hard to find.<sup>23</sup> Yet there is reason to think that its influence is on the wane. We live in a post-Legal Realist Age, when most legal commentators take it for granted that law cannot be disentangled from politics and that legal judgment is driven by the political beliefs of the decisionmaker.<sup>24</sup>

This disparagement of the politics/law distinction is most prominently associated with (or at least acknowledged in) the work of critical and post-modern scholars, but it is by no means confined to them. It is also one of the lessons of recent struggles over the confirmation of judges. The struggles started with the Bork confirmation hearings, where the nominee sought to cast himself as an anti-Realist who would always enforce the law according to its “original intent.”<sup>25</sup> A majority of the Senate and virtually the entire Democratic establishment scoffed at this profession of faith, and succeeded in portraying Bork’s commitment to law as a cover for a conservative political agenda. Not to be outdone, the Republicans, once they took control of the Senate after 1994, have sought to portray Clinton’s judicial nominees as activists bent on transforming

---

22. When I refer to government lawyers, I am speaking only of those employees who perform roles as legal advocates for and advisors to various government agencies. Insofar as legally trained employees serve in a decisionmaking capacity within government agencies, the impartiality ideal arguably takes on greater significance. The clearest example would be the cadre of government lawyers known as Administrative Law Judges. Extensive measures are taken to assure the independence of ALJs from political control and oversight, see, for example 5 U.S.C. § 557(d)(1) (1994) (prohibiting *ex parte* communications), in order to promote the sense they are impartial and hence worthy of being regarded as “judge-like.” I do not consider in this paper the arguably distinct rationale for assuring the impartiality of these lawyers.

23. It is, for example, the vision that underlies the famous *Chevron* decision in administrative law. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). There, the political function is identified as belonging to elected politicians and their political appointees, while the rule discovering function is identified as belonging to the Article III judiciary. See Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHL.-KENT L. REV. 1039, 1088-91 (1997).

24. I do not number myself among the extreme skeptics about the possibility of legal knowledge, at least in most instances. But that is a subject for another day.

25. For the apology, see ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

the law to suit their own liberal ideological commitments.<sup>26</sup> We have now reached the point where few elected politicians believe that a lawyer who is a member of the opposing political party can distinguish between politics and law.

The spread of Legal Realist ideas leads to a conception of the role of the government lawyer that devalues impartiality. Again, we do not have to scour the literature of the left to find support for this proposition. It is fully revealed in an essay by Geoff Miller, a conservative law and economics scholar, about whether it is ethically proper for tenured government lawyers to adopt a view of the law's requirements at odds with the policy preferences of their politically accountable superiors.<sup>27</sup> Miller argues that this kind of independent judgment is improper:

Although the public interest as a reified concept may not be ascertainable, the Constitution establishes procedures for approximating that ideal through election, appointment, confirmation, and legislation. Nothing systematic empowers government lawyers to substitute their individual conceptions of the good<sup>28</sup> for the priorities and objectives established through these governmental processes.

Implicit in Miller's account is the same proposition endorsed by the left: that "law" does not exist separate and distinct from politics. To the contrary, judgments about law are ultimately political judgments. Because our Constitution establishes a framework of elections, legislation, and administration by officers accountable to the President for establishing political judgments, the proper role of the government lawyer is faithfully to carry out the political instructions received from superiors, not to interpose objections based on the lawyer's reading of the requirements of "the law."

This theoretical critique of government lawyers exercising independent judgment about the requirements of the law has been extended to the Solicitor General's office by John McGinnis, another conservative scholar.<sup>29</sup> McGinnis argues that the President is entitled to his own understanding of the meaning of the Constitution, and that the Solicitor General, as a subordinate officer to the President, should function as a "paladin who attempts to impress the President's undiluted constitutional vision upon the Court."<sup>30</sup> Prudential concerns about winning cases and maintaining good will among the constitutional branches, according to McGinnis, should take a back seat to advocacy of the President's constitutional vision.

Not surprisingly, McGinnis views the tenured lawyers in the Solicitor General's Office as an impediment to reorienting the Office in this fashion. He ex-

---

26. See Joan Biskupic, *Hill Republicans Target 'Judicial Activism'; Conservatives Block Nominees; Threaten Impeachment and Term Limits*, WASH. POST, Sept. 14, 1997, at A1; Linda Greenhouse, *Why Bork is Still a Verb in Politics, 10 Years Later*, N.Y. TIMES, Oct. 5, 1997, § 4 at 3.

27. See Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

28. *Id.* at 1295.

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

30. *Id.* at 807.

plains the recalcitrance of these lawyers in terms of theories of bureaucratic behavior. The tenured lawyers in the Solicitor General's Office, by professing fidelity to Supreme Court precedents—which they claim a unique capacity to interpret—are aggrandizing their own power and influence within the bureaucracy.<sup>31</sup> Although McGinnis does not suggest that all tenured lawyers in the Solicitor General's Office be fired and replaced with political appointees,<sup>32</sup> he does recommend that new civil service hires be screened for their “jurisprudential views,” noting that “[t]he President's jurisprudence would be advanced more readily by a staff whose inclinations and methodology are closely aligned with the President's philosophy.”<sup>33</sup> Thus, McGinnis, like Miller, sees no role for the exercise of autonomous legal judgment by civil service lawyers.

The loss of faith in impartiality as an ideal of government lawyering is not confined to theory; it has also been extended to practice. Presidents appear increasingly to share the view that all administration of the law is political. Starting with President Nixon, if not before, the ratio of political appointees to tenured appointees has steadily increased.<sup>34</sup> The rationale for this increasing penetration of political appointees has been to assure “control” of the administrative process by the President. Specifically, tenured lawyers are assumed to make decisions based on political criteria, and are further assumed to harbor the political values of the outgoing administration (or of the Congress, if it is controlled by the other political party). To counteract this perceived threat of “sabotage” by civil service lawyers, larger and larger numbers of political lawyers are being added to the administrative structure.

This process of increased political oversight is vividly illustrated by the famous *Bob Jones University* case<sup>35</sup> that arose in the early years of the Reagan presidency. Bob Jones was a fundamentalist Christian university that followed certain racially discriminatory practices. When the IRS, enforcing a policy imposed on it by the courts and having scant textual basis, revoked the school's tax exempt status, the school sought review of the policy by the Supreme Court. The Solicitor General, Rex Lee, disqualified himself from participating in the

---

31. See *id.* at 810-11. Other commentators have observed that the independence of the Solicitor General's office is related to the fact that “the bulk of the Solicitor General's staff consists of civil service employees who are not subject to removal for political or ideological reasons.” Richard G. Wilkins, *An Officer and An Advocate: The Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1167, 1170 (1988). The traditional view, of course, regarded such independence as a good thing.

32. He notes that it would violate the civil service laws to dismiss incumbent lawyers “for their jurisprudential views.” McGinnis, *supra* note 29, at 812 n.70.

33. *Id.* at 812.

34. See James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, in THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY, 144-45 (Richard J. Stillman III & Frederick C. Mosher eds., 1989).

35. *Bob Jones University v. United States*, 461 U.S. 574 (1983). For an account of the internal politics in the Justice Department regarding the case and the role of Acting Solicitor General Wallace, see LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 51-64 (1987).

case. Acting in his place was Lawrence Wallace, senior Deputy Solicitor General and the quintessential tenured civil service lawyer.<sup>36</sup>

At the *certiorari* stage, Wallace argued that the IRS's policy was correct. However, after review was granted and certain members of Congress criticized the IRS's position, a group of political appointees in the Justice Department known as the "Bob Jones team" launched an effort to get the Department to change its position. Attorney General Smith eventually sided with this group and ordered Wallace to file a brief supporting the university. Wallace did so, but only after including a footnote describing the brief as stating the "position of the United States" but not that of "the Acting Solicitor General."<sup>37</sup> Wallace thus publicly signaled that the legal argument of the Administration was not endorsed by the tenured lawyers in the Solicitor General's office.

The brief and the footnote sparked a firestorm of controversy, as the Reagan Administration was castigated by the *New York Times* and other voices of the opposition for supporting "racism."<sup>38</sup> Given the outcry, it is not surprising that the Court, in an opinion by Chief Justice Burger, reaffirmed the policy of the IRS. The vote was 8-1, with only Justice Rehnquist dissenting. The "Bob Jones team" had suffered a resounding defeat.

The response of the political appointees who had instigated this debacle was, of course, to blame Wallace. They argued that Wallace, as a holdover from prior administrations, was hostile to the philosophy of judicial restraint espoused by the Reagan Administration and was so committed to judicial activism in support of civil rights that he could not be trusted fairly to represent the views of the Administration to the Court. The upshot was that Wallace was reassigned to handle matters other than civil rights cases. More significantly, the Administration created a new position, the Political Deputy, who would henceforth act in any case in which the Solicitor General was disqualified. Thus, the perceived political bias of the career attorney was solved by expansion of the number of political appointees in the office.

One could of course draw the opposite lesson from *Bob Jones*, and conclude that the episode shows that political lawyers should heed the advice of tenured lawyers if they want to stay out of trouble. Wallace, on this view, was the legal "expert" who had an accurate sense of how willing the Court would be to repudiate the IRS's policy on discriminatory educational institutions. Wallace's resistance arguably should have been regarded as a warning to the political lawyers that they were embarking on a suicide mission.

Yet the enduring lesson of *Bob Jones* has not been a restoration of faith in the judgment of tenured lawyers. Rather, it has been that career lawyers are a

---

36. Wallace started working in the Solicitor General's office in 1968 and holds the record for the most oral arguments before the Court in the Twentieth Century. See Al Kamen, *Milestone for Wallace Today at Supreme Court*, WASH. POST, Dec. 8, 1997, at A17.

37. CAPLAN, *supra* note 35, at 51.

38. See, e.g., Richard Cohen, *Ronald Crow*, WASH. POST, Jan. 12, 1982, at B1; Tom Wicker, *Subsidizing Racism*, N.Y. TIMES, Jan. 12, 1982, at A15; *Tax-Exempt Racism Revisited*, N.Y. TIMES, Sept. 10, 1982, at A22.

dangerous political fifth column who should be carefully subordinated to politically accountable lawyers. For example, former Solicitor General Charles Fried, in his reflections on the *Bob Jones* episode, agrees that the government's brief was "wrongheaded."<sup>39</sup> But he also concurs in the assessment that the positions urged by career lawyers in the office were "clogged with commitments and assumptions that were in fact political," and he therefore endorses the conclusion that a Political Deputy was needed.<sup>40</sup> Significantly, although the Clinton Administration has been less aggressive in subordinating the career lawyers in the Solicitor General's Office than the Reagan and Bush Administrations,<sup>41</sup> it has not made any move to abolish the position of the Political Deputy.

Whatever the correct lessons to be drawn from the *Bob Jones* episode, it is clear that there are occasions when the policy views of tenured lawyers can create a problem for Presidents. The Environmental Protection Agency ("EPA") serves as a good illustration. There is no doubt that career lawyers working for EPA tend to be strongly committed to aggressive enforcement of the environmental laws. This is partly a function of self-selection: Young attorneys who choose to make a career of service with EPA are typically motivated in part by their personal attachment to environmental values. It is also partially a function of the close relationship that often develops between career EPA lawyers and lawyers for environmental groups and congressional staffers who are sympathetic to the environmental cause. Thus, an administration that decides it is appropriate to adopt a policy that balances environmental protection against other economic goals is likely to find that these tenured lawyers are, at best, unenthusiastic about such an accommodationist policy and, at worst, that they actively work to subvert it.<sup>42</sup> The only solution to such obstruction would appear to be to increase the level of penetration of political lawyers into the bureaucracy.

---

39. CHARLES FRIED, *ORDER & LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 29 (1991).

40. Fried also offers the view that if there had been a Political Deputy in place when the episode arose "there might even have been some small chance that the *Bob Jones* brief would never have been filed." *Id.* at 28. Fried suggests, in other words, that a Political Deputy, like the career Deputy, would have seen the folly of switching sides and supporting Bob Jones—but would have had more credibility in talking the departmental activists out of doing so. This is possible—the Political Deputies on the whole have been a very impressive collection of lawyers, and have enjoyed the respect of both political appointees and career lawyers. But the immediate lesson drawn from *Bob Jones* was not that a Political Deputy was needed in order to constrain the ill-considered impulses of political appointees, but the exact opposite: that it was important to make the Office of the Solicitor General more responsive to the wishes of political appointees.

41. During the Reagan and Bush years, vacancies that occurred within the ranks of the career Deputies were filled by appointing persons from outside the Office. These were academics or private practitioners who served fairly short terms of office (three years, typically) and then returned to their prior walks of life. Arguably, these Deputies (including the author), being relative short-termers, functioned somewhat more like the Political Deputy than the traditional civil service Deputies had done. The Clinton Justice Department, in contrast, has filled vacancies among the tenured Deputies in the traditional manner by promoting attorneys from within the Office.

42. See B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Act Enforcements*, 82 AM. POL. SCI. REV. 213 (1988) (finding that EPA bureaucrats continued to bring enforcement actions even after the Reagan Administration installed political appointees hostile to such actions).

In sum, impartiality appears to be an enfeebled justification for utilizing tenured lawyers in high-level government positions. The crux of the problem is a declining faith in law as something that exists and can be discovered independently of political values. If one believes that law cannot be divorced from politics, then the meaning of law becomes something that should be settled at the ballot box or through other political processes, not in the law library. If the meaning of law is to be settled through the ballot box, then what we need are government lawyers who respect the results of elections, not government lawyers who exercise impartial judgment about the requirements of the law. What we need, in other words, are more political lawyers in high-level positions.

### III

#### THE INSTITUTIONAL CAPITAL JUSTIFICATION

A second and less commonly encountered justification for the civil service is based on what I will call the institutional capital argument. This justification focuses not on the independence of tenured employees, but rather on their longevity in office. Because tenured employees often make government employment a career, they tend to adopt a longer-term perspective than that characteristic of political appointees, who expect to remain in office only for the duration of one administration (if that). This longer-term perspective of tenured employees translates into certain behaviors that enhance the reputation of their office in the eyes of other governmental actors, and hence make the office a more effective instrument for realizing the policy objectives of the incumbent administration, whatever those objectives may happen to be.

It is well known that political appointees have a very short tenure—about two years on average.<sup>43</sup> They are “in-and-outers.”<sup>44</sup> Tenured employees, in contrast, particularly at the more senior level, often serve in government for their entire careers.<sup>45</sup> This longer-term, multi-administration service gives high-level tenured lawyers a perspective arguably more attuned to the limits and the needs of government as an institution. As James Pfiffner has observed:

[P]residential appointees [want] to make their mark quickly and to move on, either to a higher position in the government or back to the private sector to make more money. Much of the appointees' agendas are driven by the mandate to reelect a president or to leave a good record to run on for the partisan heir-apparent.

---

43. Pfiffner, *supra* note 34, at 149.

44. *Id.*

45. Largely because government salaries have not kept pace with private sector salaries, fewer tenured lawyers are making a career of government service than was true in an earlier generation. The consequence is that many civil service lawyers have time horizons not much longer than the typical political lawyer. Two factors offset the effect of this more rapid turnover, however. First, this short-termism is largely confined to entry-level legal positions. The civil service lawyers promoted to higher-level positions still tend to be careerists. Second, the culture of the civil service continues to be shaped and maintained by employees who have a long-term perspective on institutional service, and entry-level employees tend to assimilate the values instilled by this culture, even if they stay around only a few years.

Career executives, in contrast, have a longer-term perspective. They will still be operating programs and administering agencies after the political birds of passage have left. This causes them to pay attention to the health of institutions and to the integrity of the processes that assure nonpartisan implementation of the laws.

The longer-term perspective of tenured lawyers suggests that the critical distinction between political lawyers and tenured lawyers is not so much one of partisan politics versus neutral expertise, but rather one of different loyalties. To put the contrast in the broadest possible terms, the political appointee is loyal to the President, that is, the current incumbent in the office, while the civil servant is loyal to the presidency, that is, the institution that includes not only the incumbent but also all past and future Presidents. The fact that their primary loyalty is to the institution rather than the person suggests that tenured lawyers may perform an important function in building and maintaining the institutional capital of the Executive Branch. If so, then having high-level tenured lawyers may make the Executive Branch a more effective instrument to the advantage of whoever happens to hold the office of the Presidency at any given point in time.

There are at least two mutually reinforcing theories that would explain why tenured lawyers might adopt a longer-term perspective than political lawyers, and hence why they would be more likely to invest in building and maintaining institutional capital. One is grounded in the economics of human capital.<sup>47</sup> Employees who have tenure and hence anticipate remaining with their employer for many years will rationally adopt a different strategy for investment in institution-specific human capital than will employees who anticipate only a short term of service.<sup>48</sup> This is because tenured employees can foresee reaping the benefits of such investment down the road, whether it be in the form of greater prestige and power for their office and hence derivatively for themselves, or in terms of fewer hassles in dealing with other institutions, or simply in terms of learning shortcuts that allow for more leisure time.

The other explanation is provided by game theory. It has been shown that players in a noncooperative game like the prisoner's dilemma are less likely to cooperate when they participate against each other in just one round of the game than if they play multiple rounds against each other.<sup>49</sup> One-shot players tend to pursue a strategy designed to maximize their immediate individual gain, whereas repeat players are more apt to pursue a strategy that maximizes pay-outs over the long-run. This phenomenon has been used to explain a variety of observed behaviors in the law<sup>50</sup> and can be used to explain the behavior of gov-

---

46. *Id.*

47. See generally GARY S. BECKER, *HUMAN CAPITAL* (2d ed. 1975).

48. Cf. Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993) (explaining how tenure affects the optimal investment strategy for employees).

49. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 10 (1984).

50. For example, the reluctance of parties to long term contracts to litigate disputes over contractual terms, see Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963), and the tendency of neighbors to resolve boundary disputes in accordance with

ernment lawyers as well. Political appointees—the “in-and-outers”—are like one-shot players who seek immediate payoffs and give relatively little attention to long-term institution building. Tenured lawyers are like repeat players who adopt a long-term perspective and hence are more likely to devote themselves to building and maintaining institutional capital.<sup>51</sup>

Institutional capital in this context has several dimensions. One is commonly referred to as “institutional memory.” In any governmental office, history has deposited many layers of past decisions, which leave behind them different degrees of settled practices. As many a short-termer will attest, the senior civil servants are an invaluable storehouse of this office lore. Practices followed in the past may or may not be optimal solutions to problems. But they are usually at least functional solutions, and it is always worth knowing that they exist before embarking on a different course. The institutional memory of these practices, of which the high-level tenured lawyers are often the sole repository, has proven invaluable in preventing many a political lawyer and younger civil service lawyer from reinventing the wheel, and in keeping them out of trouble.

Another aspect of institutional capital involves the training and mentoring of young lawyers. One would predict, on average, that tenured lawyers will devote more time and energy to mentoring young lawyers than will political lawyers. This is partly because they have more information to impart, and partly because they have a larger stake in seeing that younger lawyers learn to perform their jobs properly. Thus, the legal staff serving the President will be better trained if a significant portion of the senior lawyers are tenured than if all are political appointees.

I would like to concentrate, however, on two other claims about how tenured lawyers function to build and maintain institutional capital that are likely to be more controversial. The first is that tenured lawyers are more likely to invest in practices that enhance the reputation of the Executive Branch in the eyes of other institutional actors. The second is that tenured lawyers are more likely consistently to defend the prerogatives of the Executive Branch against encroachments by other institutional actors. In making these claims, I will draw almost exclusively on illustrations from the Solicitor General’s Office, so there is necessarily a question about how far my contentions are generalizable across the entire range of government offices.

#### A. Reputation Building

The Solicitor General’s Office provides some especially good illustrations of how tenured lawyers work to build and maintain the reputation of the Ex-

---

informal norms, see ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

51. The distinction drawn here in terms of game theory is similar to that developed by Marc Galanter between “one-shot” and “repeat” litigants, used explain litigant behavior. See Marc S. Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974).

ecutive Branch with other institutional actors. It is a commonplace that the Solicitor General's behavior as a litigant deviates in several significant ways from that of every other litigant who appears before the Supreme Court.<sup>52</sup> Perhaps most importantly, the Solicitor General exercises extreme self-restraint in selecting cases to present to the Court for review: Only a small portion of the cases that the government loses in the courts of appeals become petitions for *certiorari*. Moreover, the Solicitor General is especially scrupulous to draw the Court's attention to facts and precedents adverse to the government's position.<sup>53</sup> This affirmative disclosure policy benefits the Court by giving it a more accurate picture of the legal dimensions of the case, but would seem to increase the odds of the government losing in any particular case where such a disclosure is made. In addition, the Solicitor General, unlike most other litigants, will occasionally acquiesce in another party's petition for *certiorari*, even if this puts at risk a favorable judgment obtained in the lower courts. Finally, and most strikingly, the Solicitor General in a very few cases each Term "confesses error," and asks the Court to reverse and remand a favorable judgment obtained by the government in the lower courts because it is based on an error of law or fact or is contrary to Justice Department policy.<sup>54</sup> Needless to say, no other litigant asks the Court to rule against it.

These behaviors have been cited by commentators for the proposition that the Solicitor General has divided loyalties. Some commentators claim that the Solicitor General owes a duty of loyalty both to the Executive Branch and directly to the Court—hence the moniker the "Tenth Justice."<sup>55</sup> Others argue more vaguely that the Solicitor General must represent the interests not just of the Executive Branch but of the entire "United States,"<sup>56</sup> or that the Solicitor

---

52. See generally REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* (1992); CAPLAN, *supra* note 35.

53. General rules of legal ethics require that lawyers "disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1983). Lawyers in a private practice, with the acquiescence of courts, often interpret this duty narrowly. See Risa B. Lischkoff, *Recent Decisions on Citing Authorities to Courts: Model Rule 3.3(a)(3) of the Model Rules of Professional Conduct*, 19 J. LEGAL PROF. 315, 319 (1994). Lawyers in the Solicitor General's office, in my experience, uniformly adopt a generous interpretation of the duty.

54. See generally David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO L.J. 2079 (1994). Confession of error in the sense of disclaiming a favorable judgment on grounds of miscarriage of justice should be distinguished from cases where the Solicitor General refuses to defend a duly-enacted federal statute on the ground that he concludes it is unconstitutional. Usually this happens when the Solicitor General concludes that the statute interferes with executive branch prerogatives. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 659 (1988) (Solicitor General Fried argues for United States against the constitutionality of the independent counsel provisions of the Ethics in Government Act). But occasionally a Solicitor General will decline to enforce a statute on the ground that it has no plausible defense under established principles of constitutional law. This has happened, for example, with respect to gender discriminations found in Social Security laws. See *Heckler v. Edwards*, 465 U.S. 872, 873 n.2 (1984).

55. CAPLAN, *supra* note 35.

56. See, e.g., Erwin N. Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 533 (1969).

General has a special duty to uphold and enforce “the law”<sup>57</sup> (this being an especially quaint pre-Bork notion).

It is not necessary, however, to adopt any of these theories of divided loyalty in order to explain the Solicitor General’s unique litigating behavior. Each of the cited anomalies—the self-restraint in seeking *certiorari*, the affirmative disclosure of adverse authority, acquiescence in review, and confession of error—are behaviors that enhance the Solicitor General’s reputation with the Justices for being an “honest broker” or a “straight shooter.” Having such a reputation undoubtedly increases the degree of overall deference that the Court gives the Solicitor General, as reflected in the government’s very high overall win rates in the Court.<sup>58</sup> It also increases the probability that the Court will defer to the wishes of the Solicitor General in special circumstances where it is especially vital to the incumbent Administration that the Court grant review or issue a stay in a given case.

The advantages that come from having a reputation for good faith and honesty have not been lost on the more thoughtful lawyers who have served as Solicitor General. Shortly after he left office Rex Lee observed:

There has been built up, over 115 years since this office was first created in 1870, a reservoir of credibility on which the incumbent Solicitor General may draw to his immediate adversarial advantage. But if he draws too deeply, too greedily, or too indiscriminately, then he jeopardizes not only that advantage in that particular case, but also an important institution of government.<sup>59</sup>

What has not been noted, to my knowledge, is the connection between these reputation-building behaviors and the prevalence of tenured lawyers in the Office. Virtually every exercise of self-abnegating behavior originates with the civil service appointees—the Assistants to the Solicitor General or the career deputies. The most vivid example is provided by confessions of error. It almost never happens that a recommendation to confess error comes from one of the litigating divisions, such as the Criminal Division of the Justice Department. The lawyers who tried and won the case in the lower courts are never eager to undo their own success. And only rarely does the initiative for confessing error come either from the Solicitor General or from the Political Dep-

---

57. See *Memorandum Opinion for the Attorney General: The Role of the Solicitor General* 1 OP. OFF. LEGAL COUNSEL 228, 231-32 (1977).

58. Empirical studies show that the Solicitor General succeeds in getting *certiorari* granted 70% of the time (compared to about eight percent for other litigants); prevails on the merits about 67% of the time; and supports the winning side with *amicus curiae* briefs about 75% of the time. See Jeffrey A. Segal, *Supreme Court Support for the Solicitor General: The Effect of Presidential Appointments*, 43 W. POL. Q. 137, 139-40 (1990); see also Steven Puro, *The United States as Amicus Curiae*, in COURTS, LAW AND JUDICIAL PROCESSES 220 (S. Sidney Ulmer ed., 1981); Reginald S. Sheehan et al., *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464, 465 (1992).

59. Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 601 (1986); see also Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1105 (1988).

uty. Both are usually too busy with higher profile matters to dig into the record in the way required to initiate the process of considering a confession of error.<sup>60</sup>

What happens in most cases resulting in a confession of error is as follows. The case arrives in the Office, usually in the form of a draft opposition to a petition for *certiorari* prepared by the litigating division, and is assigned to a tenured Assistant. The Assistant studies the draft opposition in light of decision and the record below, and discovers what appears to be a miscarriage of law or justice. The Assistant then recommends to the relevant Deputy that the government file a confession of error rather than an opposition. The Deputy (typically also a tenured lawyer), will scrutinize such a recommendation skeptically, recognizing that the litigating division will strongly object to any confession of error. But if the Assistant convinces the Deputy that a miscarriage of justice has truly occurred, the Deputy will then take the matter to the Solicitor General. Often a vigorous discussion tantamount to an oral argument then takes place between the tenured lawyers in the Solicitor General's office and the lawyers in the litigating division, with the Solicitor General acting as "judge." If the tenured lawyers in the Solicitor General's office convince the Solicitor General they are right, then the government confesses error.

It is difficult to imagine this process occurring very often if all lawyers in the Solicitor General's office were political appointees. A confession of error always generates short-term costs in the form of hard feelings within the Department. The ability to incur these short-term costs is made possible primarily because the tenured Deputy who concurs in the Assistant's recommendation (nearly always the Deputy who handles criminal cases) has built up a large store house of good will with his or her counterpart in the litigating division. The top-level civil service lawyers in the litigating division respect and trust the

---

60. A recent exception to this generalization underscores the perils that arise when inexperienced political lawyers overrule the career lawyers and insist on an abrupt change in position in the middle of a case. Near the beginning of his service as President Clinton's first Solicitor General, Drew Days filed a confession of error in a brief on the merits in *Knox v. United States*, 510 U.S. 939 (1993), a child pornography conviction. Although the career lawyers in the Bush Administration had argued that the conviction should be upheld, Days—reportedly at the urging of his new Political Deputy Paul Bender—argued that the lower courts had applied an improperly broad interpretation of the statute. See Joan Biskupic, *Politics Still Plays a Role in Solicitor General's Office*, WASH. POST, Feb. 22, 1994, at A1. According to the new Solicitor General's position, free speech considerations required that the "lascivious exhibition of the genitals or pubic area" of children be interpreted to mean exhibitions in which the genital areas are fully exposed. In the films produced by Knox, by contrast, young girls were shown cavorting in tight bathing suits, leotards, or underpants. See Brief for the United States, at 10-13, 20-23, *Knox v. United States*, 510 U.S. 939 (1993) (No. 92-1183). Upon receiving this confession or error, the Court vacated and remanded the conviction for reconsideration by the lower court.

Days' action was undoubtedly motivated by sincere concerns about free speech values. But it proved to be deeply embarrassing to the Clinton Administration. Republicans had a field day suggesting that the Administration favored coddling child pornographers, and secured a unanimous resolution in the Senate condemning the new interpretation. See Biskupic, *supra* note 26. When, on remand, the Third Circuit rejected the new interpretation and reaffirmed Knox's conviction, Attorney General Reno took the highly unusual step of publicly repudiating the Solicitor General's prior position, and signing the opposition to *certiorari* herself. See David G. Savage & Ronald J. Ostrow, *U.S. Won't Fight Pornography Conviction*, L.A. TIMES, Nov. 11, 1994, at A34. The Court then denied *certiorari* without comment. See *Knox v. United States*, 513 U.S. 1109 (1995).

judgment of the tenured Deputy and know that the Deputy is acting with the best long-run interests of the litigating division in mind. If everyone involved were a political appointee, this basis of trust grounded in long-term interaction would be missing, and the short-term political costs would loom much larger.

A similar if less dramatic story can be told with respect to the other self-abnegating behaviors of the Solicitor General's office: self restraint in seeking *certiorari*, affirmative disclosure of adverse facts and authority, and acquiescence in opponents' petitions for *certiorari*. The tenured lawyers are the key participants in producing each of these behaviors. The functional consequence of using tenured lawyers, therefore, is that the government adopts litigating behaviors that translate into short-term setbacks or reversals (unusually in insignificant cases), but the government emerges with an immensely enhanced reputation for honesty and good faith that translates into powerful litigating advantages overall.

#### B. Defense of Prerogatives

The connection between tenured lawyers and defense of executive branch prerogatives is less apparent than that with respect to reputation-building. Nevertheless, I believe there is a connection here too. Many readers will find such a claim to be highly counter-intuitive. The common assumption is that only political appointees can be trusted vigorously to defend the prerogatives of the President, whereas tenured lawyers will be quick to seek accommodation or compromise with the other branches. Yet for reasons analogous to those regarding long-term reputation-building, it may be that tenured lawyers are in fact more likely to be steadfast in the defense of the presidency than political appointees will be.

The difficulty of using political lawyers to defend executive branch prerogatives has been acutely analyzed in an important article by Nelson Lund.<sup>61</sup> Lund describes how President Bush made a conscious decision at the outset of his Administration to use the lawyers in the White House Counsel's Office and the Office of Legal Counsel ("OLC") in the Justice Department vigorously to defend the constitutional prerogatives of the Executive Branch, which Bush regarded as being under assault by Congress and the courts. To this end, a plan was devised that included a much more aggressive use of the veto, presidential signing statements, and litigation in an effort to fend off encroachments on presidential powers.

As Lund describes it, the net result of this campaign was largely a disaster. Over the course of the next four years, the veto was used only rarely and mostly for minor encroachments;<sup>62</sup> warnings delivered in signing statements were not followed up with action;<sup>63</sup> the Administration ended up defending in

---

61. See generally Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17.

62. See *id.* at 40-43, 63-64.

63. See *id.*

court the most serious encroachments on the President's authority;<sup>64</sup> and the separation-of-powers team precipitated a judicial confrontation over the independence of the Post Office that backfired badly and ended up eroding presidential prerogatives.<sup>65</sup>

Lund's explanation for this dismal record is in effect that political lawyers are too preoccupied with short-term consequences to engage in long-term institution building. He notes that the rewards for defending presidential prerogatives

would mostly be reaped at some remote period of time, after the defenders of the theory had left office. The costs of pursuing a serious defense of the presidency, however, would tend to be immediate and tangible. These costs would include the expenditure of political capital that might have been used for more pressing purposes, the unpleasantness of increased friction with congressional barons and their allies, and the sheer expenditure of time by extremely busy people on uninvitingly dry legal issues.<sup>66</sup>

In short, political lawyers cannot be expected to make significant investments in long-term defense of the presidency for the same reason that tenants holding year-to-year leases cannot be expected to make significant improvements in land: The costs would be fully internalized by the improver while the benefits would largely be externalized to someone else.

If Lund's diagnosis of the problem is correct, then this suggests that tenured lawyers may again be part of the solution. My own experience in the government suggests that there are at least some occasions when tenured lawyers will weigh in more vigorously to support executive prerogative than political lawyers. Of course, they will not often (or even usually) prevail. Controversies that implicate the defense of presidential prerogatives—in contrast to those that lead to confessions of error, acquiescences, and the like—are often high-profile disputes that attract the close attention of the political lawyers and even cabinet officers and the President. Consequently, the tenured lawyers are more likely to be overruled in cases involving defense of presidential prerogatives. Nevertheless, I believe that the input of the tenured lawyers in these controversies may have a salutary influence in keeping the longer-range issues in the forefront of the discussion.

An illustration of this phenomenon occurred during my tenure in the Solicitor General's office in the late 1980s. It involved what is usually the most routine task performed by the Solicitor General's office: authorizing an appeal from a federal district court to the court of appeals. In such matters, the recommendation of the staff is nearly always accepted by the Solicitor General. In very rare cases, the Solicitor General's decision will be challenged by a disappointed Department or agency, in which case it may be resolved by the Deputy Attorney General or even the Attorney General. In this particular case, the

---

64. *See id.* at 70-79.

65. *See id.* at 79-83; *see also* Neal Devins, *Tempest in an Envelope: Reflections on the Bush White House's Failed Takeover of the U.S. Postal Service*, 41 UCLA L. REV. 1035 (1994).

66. Lund, *supra* note 61, at 35.

Solicitor General's decision in favor of an appeal was challenged by the State Department all the way to the desk of President Ronald Reagan.

The case involved an appropriations rider called the "Anti-Terrorism Act of 1987," which in unequivocal terms required that the Palestine Liberation Organization's ("PLO's") observer-mission to the United Nations be closed.<sup>67</sup> After President Reagan signed the Act into law, the Civil Division of the Justice Department dutifully filed suit in federal court in the Southern District of New York seeking an injunction closing the mission. Notwithstanding the unambiguous legislative mandate, Judge Palmieri denied the requested relief.<sup>68</sup> Judge Palmieri reasoned that the PLO had a customary right to maintain the observer-mission under the United Nations Headquarters Agreement,<sup>69</sup> an international treaty ratified by the United States, and that Congress could not pass a law abrogating a provision in an international treaty unless the statute expressly acknowledged the conflict with international law.<sup>70</sup>

The Civil Division recommended that this decision be appealed to the Second Circuit. In the Division's view, the Headquarters Agreement did not establish the PLO's right to maintain an observer-mission, and even if it had, there is no requirement that Congress expressly acknowledge it is abrogating a treaty provision before unambiguous legislation inconsistent with a treaty will be given effect. The State Department opposed an appeal. The Department placed primary reliance on the damage to U.S. foreign relations that would be ensue if the U.S., as the host nation to the United Nations, unilaterally expelled a foreign entity to which the United Nations had granted observer status.

It was in this posture that the matter arrived in the Solicitor General's Office. What was odd about the appeal request, from the perspective of the tenured lawyers in the Solicitor General's Office, was that the papers gave no consideration to the constitutional concerns raised by a congressional enactment directing the President to shut down a diplomatic mission in the United States. Under the Constitution, the President is given the power to "receive Ambassadors and other public Ministers,"<sup>71</sup> and this has been understood to give the President broad and exclusive power to determine what sort of diplomatic agents may enter the country.<sup>72</sup> The Anti-Terrorism Act appeared to usurp this

---

67. 22 U.S.C. § 5202 (1994). The Act, which is still on the books, makes it unlawful: notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest of or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof.

*Id.* The Attorney General is directed to "take the necessary steps and institute the necessary legal action to effectuate the policies and provisions of this chapter." *Id.* at § 5203(a).

68. *See* United States v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y. 1988).

69. *See id.* at 1465-68.

70. *See id.* at 1468-71.

71. U.S. CONST. art II, § 3.

72. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) (noting in *dictum* that President has exclusive authority to recognize foreign governments); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (1987).

function insofar as agents of the PLO were concerned. Yet the political lawyers in the Civil Division gave no weight to the adverse precedent that would be created for future claims of presidential control over diplomacy by prominently seeking an appellate decision vindicating a congressional directive to close a diplomatic mission. The precedent was especially problematic given that the State Department seemed to be saying that closure of the PLO mission was contrary to the foreign policy interests of the United States.

In fact, from the time the Anti-Terrorism Act was passed, it was primarily the tenured lawyers within the Justice Department who gave voice to the constitutional concerns presented by the Act. Staff lawyers in the Office of Legal Counsel raised the constitutional issue immediately after the Act was passed. This resulted in some cautionary language being included in President Reagan's signing statement, but did not dissuade the Civil Division from seeking an injunction enforcing the Act. When the Civil Division sought authority to appeal Judge Palmieri's decision, staff lawyers in the Solicitor General's office raised the issue once again. This time the issue did not go away. Solicitor General Fried eventually authorized an appeal, but added the significant qualification that an such appeal could be forgone if the President was willing to state that enforcement of the Anti-Terrorism would be unconstitutional as applied to the PLO mission—a step that would require formal notification of Congress.<sup>73</sup>

Heartened by Fried's equivocation, the State Department asked the Attorney General to overrule the appeal authorization. The Attorney General declined. Secretary of State George Shultz then took the matter to the President.<sup>74</sup> The day the notice of appeal was due to be filed, President Reagan overruled the Attorney General and Fried, and decided against an appeal.<sup>75</sup> The President did not state, as Fried had thought was required, that he was invoking his Article II authority to disregard a statute that violated presidential prerogatives. Thus, this was hardly the finest hour for the bold defense of the presidency. Essentially, the President was hiding behind the legal reasoning of Judge Palimieri, which every senior lawyer in the Justice Department regarded as untenable.

On the other hand, the decision not to appeal avoided creating a stronger precedent that would legitimize congressional efforts to interfere with diplomatic missions that the President did not wish to close. For this, the tenured lawyers in the Justice Department may deserve some small credit. Their articulation of the constitutional objections to an appeal provided a legal argu-

---

73. Each year, in its annual appropriation of funds for the Justice Department, Congress requires the Attorney General to notify both Houses of Congress whenever the Attorney General concludes in a contested case that a statute of the United States cannot be defended on constitutional grounds. See 28 U.S.C. § 519 (1994) (note).

74. See Robert Pear, *U.S. Officials Split over Whether to Appeal Ruling on P.L.O.*, N.Y. TIMES, Aug. 28, 1988, at A5.

75. See John M. Goshko, *PLO Mission to Stay Open; U.S. Won't Appeal Ruling; Decision Based on Foreign Policy Considerations*, WASH. POST, Aug. 30, 1988, at A2; Norman Kempster, *U.S. Drops Effort to Oust PLO's U.N. Mission in N.Y.*, L.A. TIMES, Aug. 30, 1988, § 1 at 1; Robert Pear, *U.S. Will Allow P.L.O. to Maintain Its Office at U.N.*, N.Y. TIMES, Aug. 30, 1988, A1.

ment lending credibility to the State Department's purely prudential concerns. I have no idea what weight, if any, the President and his advisers gave to the constitutional implications of an appeal. It is possible that they were a factor in the discussions, which is more than could be said of the situation when the request for authority to appeal first emerged from the front office of the Civil Division.

Why might tenured lawyers be more concerned with preserving the President's constitutional prerogatives than political lawyers? On the face of the matter, it appears mysterious. Yet the political reality that unlocks the mystery was in fact reasonably clear to everyone involved in the internal discussions. The political lawyers were responding to the same forces that had energized the members of Congress who had voted for the Anti-Terrorism Act, namely, that there was more political support to be garnered by taking a hard line against the PLO. Specifically, the America-Israel Political Action Committee ("AIPAC") was at that time on a crusade to get the United States to isolate the PLO diplomatically and had made closure of the United Nations mission its top priority.<sup>76</sup> Ambitious political animals in Washington had good reason to want to stay on the good side of AIPAC, which had enough influence to be able to advance or thwart future political careers.<sup>77</sup>

The tenured-lawyers, in contrast, could care less what AIPAC thought about the PLO. Their perspective was institutional. They were concerned that a high-visibility appeal seeking to enforce the statute would create an important precedent ratifying Congress's intrusion into presidential diplomacy. Given their independence from short-term political considerations, they had greater incentive to stand up for the President's constitutional powers than the political lawyers did.

The moral of this story is obviously not that tenured lawyers will always protect presidential prerogatives. Presidential prerogatives will often be challenged in cases, like the closure of the PLO mission, with high political stakes, and the political lawyers will have the last word in such cases. It does not follow from this, however, that tenured lawyers exert no influence in support of presidential prerogatives. It was my experience that tenured lawyers are highly sensitive to the need to protect presidential prerogatives. After all, this is the ultimate source of their own authority and prestige. And it was my experience that tenured lawyers are often far more steadfast in their support of these prerogatives than are the "in-and-outers." So, although the use of tenured lawyers cannot guarantee the defense of presidential prerogatives, it nevertheless makes a positive contribution toward that end.

---

76. See E.A. Wayne, *U.S. Searches for a Way Around Law That Will Close PLO Office*, CHRIST. SCI. MON., Jan. 13, 1988, at 5; *Ending an Embarrassment*, L.A. TIMES, July 4, 1988, at 6.

77. John Bolton, who was the head of the Civil Division at the time, had ambitions to secure a high-level diplomatic post. He was later was nominated and confirmed as Assistant Secretary of State in the Bush Administration.

### C. Institutional Capital in the Balance

I have suggested that tenured lawyers contribute to the institutional capital of the Executive Branch in a variety of ways. They provide a source of institutional memory, and are more likely to mentor young lawyers. More controversially, they may be more likely to engage in behaviors that enhance the reputation of the Executive Branch in the eyes of other institutional actors and may be more stalwart in their defense of executive branch prerogatives than are political lawyers. These justifications for tenured lawyers strike me as more powerful than the impartiality justification, at least in an era that has suffered a loss of faith in the ability of lawyers to discover the law independent of political considerations.

To say that there is a justification for having tenured lawyers does not, however, mean that every lawyer who serves in the government should be tenured. Political lawyers, who are much more sensitive to the policy preferences of elected officials, introduce an important element of democratic accountability that would be missing if all lawyers were life-long civil servants. And any system of tenure creates inefficiencies in the form of the increased opportunities for shirking. The point, rather, is that there is an optimal mix of political lawyers and tenured lawyers. If we focus only on the impartiality justification, it might seem that the optimal mix would call for an expansion of the ranks of political lawyers, because this ensures greater political accountability and efficiency, and no one puts much stock in impartiality these days. However, once we introduce the contributions that tenured lawyers make toward building and maintaining institutional capital, including the reputation of the Executive Branch and defending executive branch prerogatives, then the optimal mix appears to shift back in the direction of using relatively more tenured lawyers.

## IV

### REPLACING THE INDEPENDENT COUNSEL WITH TENURED LAWYERS

I will close with some observations about how the foregoing framework applies to what is undoubtedly the most controversial issue of our time regarding the role of government lawyers: the investigation and prosecution of alleged criminal activity by high-level executive branch officials.

The current system for handling this problem is set forth in the Ethics in Government Act.<sup>78</sup> The Act is a product of post-Watergate suspicion of all things governmental. It calls for the appointment of Independent Counsels who operate outside the supervision of the Justice Department. If the Attorney General receives an allegation of possible criminal activity by a high-level executive official, the Attorney General must seek the appointment of an Independent Counsel if there are "reasonable grounds to believe that further in-

---

78. 28 U.S.C. § 591-599 (1994). For an overview of the Act's current provisions, see John Q. Barrett, *All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct, and Judgment in Relation to the Work of an Independent Counsel*, 49 MERCER L. REV. 519 (1998).

vestigation is warranted.”<sup>79</sup> The actual appointment of the Independent Counsel is made by a special panel of the United States Court of Appeals for the District of Columbia Circuit, which also defines the Independent Counsel’s jurisdiction.<sup>80</sup> Once appointed, the Independent Counsel can be dismissed by the Attorney General only “for good cause,” in which case the dismissal is subject to judicial review.<sup>81</sup> Otherwise, the special panel determines when the Independent Counsel’s investigation is over.

To say that this system has worked badly is a considerable understatement.<sup>82</sup> Without suggesting that every investigation shares all these shortcomings, there is a general consensus that the current system results in the following problems, among others: too many criminal investigations of top executive officials;<sup>83</sup> criminal investigations into alleged misdeeds that would ordinarily be regarded as too trivial to warrant prosecution; investigations that drag on for an inordinate length of time; extraordinarily expensive investigations running into tens of millions of dollars; routine charges that the investigators are politically motivated and countercharges that investigated are engaged in obstruction of justice; the erosion of norms surrounding the confidentiality of grand jury investigations; and a general poisoning of the Washington political climate caused by the criminalization of ordinary political disagreements.

How could such a well-intentioned statute produce such an unfortunate set of results? The one problem would seem to be that the Act single-mindedly pursues the goal of impartiality at the expense of all accountability. As suggested earlier, in structuring the duties of high-level government lawyers, there is always a tradeoff between impartiality and accountability. The more independent the lawyer, the less accountable. Sacrificing all accountability in this context would make sense only if in doing so we could obtain true impartiality. But the function of investigating criminal accusations directed at high-level politicians is not an activity that is susceptible to objectively determinable, politically neutral, right answers. Alleged crimes like perjury or obstruction of justice—the usual grist for the independent counsel mill—will always entail a subjective element, in which prosecutorial judgment must be exercised in deciding whether charges should be brought. Thus, the Act’s quest for the completely independent lawyer to decide whether to bring criminal charges against high-ranking executive officials is fundamentally misconceived.

---

79. *See id.* § 592(c)(1)(A).

80. *See id.* § 593(b)(3).

81. *See id.* § 596(a)(1), (3).

82. For earlier reviews of the problems created by the Act, see TERRY EASTLAND, *ETHICS, POLITICS AND THE INDEPENDENT COUNSEL* 121-135 (1989); KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 117-167 (1992). More recently, even erstwhile ardent supporters have expressed their doubts. *See, e.g.*, Archibald Cox, *Curb-ing Special Counsels*, N.Y. TIMES, Dec. 12, 1996, at A37.

83. *See* Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489, 515 (1998) (“Before 1978 there were three scandals deemed worthy of independent investigation. Since the passage of the Act, there have been nineteen with the campaign finance issue left to be resolved.”).

We have also learned by now—or should have learned by now—that making the Independent Counsel completely unaccountable actually weakens the institution. There was a taste of this with Lawrence Walsh’s investigation of the Iran-Contra affair, as Republicans lashed out at Walsh for conducting a biased investigation designed to influence the 1992 elections, and Walsh never seemed fully to regain his public standing. But the Clinton White House’s strategy for attacking Kenneth Starr’s investigations have fully revealed the fallacy of relying on a totally independent prosecutor. Starr has been subjected to a relentless White House attack on his motives and methods. Because he has no electoral mandate, these attacks have been highly successful. A high percentage of the public evidently regards Starr’s investigation as the product of a “right-wing conspiracy” bent on upsetting the results of a national election. A prosecutor who is accountable to elected public officials would be less vulnerable to this kind of campaign.

Exactly how accountable we should make the lawyers that investigate allegations of high-level executive crimes is a more difficult question. It would make no sense to make such lawyers immediately accountable to the President, by, for example, putting the investigative function in the White House Counsel’s office. This would assure that no politically embarrassing criminal activity would ever come to light. On the other hand, it is important that those who control “perhaps the most potent weapon the government can wield against a private citizen—the power to bring criminal charges” should be answerable, at least indirectly, to elected public officials.<sup>84</sup> The proper solution would seem to require some compromise between independence and accountability.

What is less recognized is that the Ethics in Government Act, in its pursuit of extreme independence, creates a second problem: It ignores the importance of the values that I have associated with the institutional capital justification for tenured lawyers. This was perceived many years ago in a commentary written by two former Deputy Solicitor Generals, Andy Frey and Ken Geller. Nothing that has transpired in recent years undermines the wisdom of their perceptions:

Because each independent counsel is appointed on an ad hoc basis for the limited purpose of investigating specific allegations against one individual or a small group of individuals, his decisions are made without resort to any institutional memory and without the ability (or the need) to place a case within the broader framework that has evolved in the course of exercising prosecutorial discretion in large numbers of cases. . . .

A seasoned federal prosecutor in the handling of numerous criminal cases acquires a sense of perspective, fairness[,] and judgment, which a one-shot prosecutor necessarily lacks. . . . [T]he objective of the exercise should be to apply the normal standards of investigation and prosecution evenhandedly to those in high government circles (taking into account that it may be appropriate to hold such individuals to a somewhat higher standard of conduct), not to loose on them some avenging angel free from traditional constraints on the exercise of the prosecutive power.<sup>85</sup>

---

84. See Andrew L. Frey & Kenneth S. Geller, *Better Than Independent Counsels*, WASH. POST, Feb. 14, 1988, at C7.

85. *Id.*

In other words, the Independent Counsel is an “in-and-outer.” He or she has little or no incentive to abide by Justice Department policies, to adhere to traditional prosecutorial norms that have evolved over time, to conserve resources, to wrap-up business expeditiously, or to preserve principles like the confidentiality of grand jury proceedings.

In effect then, the Ethics in Government Act manages to combine the worst features of political lawyers and tenured lawyers. It creates an office that lacks political accountability and is prone to inefficiencies—the problems associated with tenured lawyers. Yet it also creates an office having the short time horizons and lack of institutional memory associated with political lawyers. No wonder the Act has been such a disaster for our polity.

Since the Act gives us the worst of all possible worlds, there are many ways to improve it, including outright repeal. One suggestion that merits further consideration would be to confer the function of investigating executive crimes upon an office of high-level tenured lawyers in the Justice Department.

This is not the time and place to spell out the details of how such an office might be organized. The general idea would be to create an office of career prosecutors within the Criminal Division of the Justice Department who would devote themselves full-time to the investigation of allegations of high-level criminal activity by elected politicians. All lawyers in this office would be tenured civil servants, and all would be required to log a certain minimum number of years as line prosecutors, ideally spanning multiple administrations, before they would be appointed to the special office. They would be the quintessential “lifers”—professional prosecutors thoroughly imbued with the norms of their trade and having no aspirations for private employment or political advancement.

I see no constitutional reason why the head of this office could not also be a tenured lawyer.<sup>86</sup> When Frey and Geller made a similar proposal in 1988, they assumed that such an office would have to be headed by a presidential appointee. But this was before the Supreme Court, in *Morrison v. Olson*,<sup>87</sup> rejected the Appointments Clause and other serious constitutional challenges mounted against the independent counsel idea. If an Independent Counsel appointed by an Article III court is constitutional, then an office of public investigations headed by a tenured Justice Department lawyer is constitutional. Certainly, there would be no constitutional problem presented in having such an office headed by a tenured lawyer, as long as the Attorney General (or some other accountable official) could reassign the particular tenured lawyer serving as the head of the office and replace them with another tenured lawyer.

---

86. Making the head of this office both tenured and permanent would run the risk of creating another J. Edgar Hoover, who could collect embarrassing information about elected politicians and use it to build an independent political empire. Thus, some type of rotation or term limits for the head of the office—who would nevertheless retain his or her tenure rights to continued employment elsewhere in the government—might be desirable.

87. 487 U.S. 654 (1988).

The basic point is that high-level tenured lawyers can serve important and useful purposes, and one of them may be getting us out of the independent counsel mess.<sup>88</sup> What is needed is an investigative office that strikes the right balance between accountability and independence, has significant accumulated experience in reviewing multiple cases of alleged political corruption, is populated with individuals who have no aspirations for higher office, knows how to function under a fixed budget, and will aspire to build a reputation for the highest standards of integrity. The time-tested device for achieving these sorts of objectives is to staff the office heavily with high-level tenured lawyers. Like other human contrivances, tenured lawyers are not perfect. But they have some important strengths, and those strengths are sorely needed if we are to escape from the dysfunctions created by the Ethics in Government Act.

## V

### CONCLUSION

Debates over the future of the civil service are usually couched in terms of a trade-off between accountability and impartiality. If that were all at stake, I would tend to take the accountability side, at least insofar as government lawyers are concerned. To put the matter in the larger framework so ably developed by my colleague Steve Calabresi in this symposium, government lawyers must serve as “advocates” and “ambassadors” for the incumbent Administration’s political/legal viewpoints, and these roles surely require a strong dose of accountability—stronger than one ever gets from tenured lawyers.<sup>89</sup>

I have argued, however, that there should be another dimension to the debate: what might be called the trade-off between transience and stability. High-level tenured lawyers bring a long-term perspective to legal problems that is lacking in political lawyers. This long-term perspective generates various forms of institutional capital associated with the values of predictability, consistency, protection of reliance interests, and respect for tradition.

These values are especially important in matters of government. Government ultimately rests on coercion. With the threat of coercion in the background, legal arguments will be more persuasive if they are leavened with a healthy respect for continuity with the past. Thus, political lawyers will perform more effectively if they are backstopped by high-level tenured lawyers, who bring with them a natural tendency to promote continuity. This enhanced effectiveness applies, moreover, regardless of which function political lawyers are asked to perform—including advocating the President’s constitutional vision.

---

88. Cf. Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988) (addressing primarily the mess in constitutional law created by the Supreme Court’s decision upholding the independent counsel statute, but also the mess it has created for our political system).

89. Steven G. Calabresi, *The President, the Supreme Court, and the Constitution: A Brief Positive Account of the Role of Government Lawyers in the Development of Constitutional Law*, 61 LAW & CONTEMP. PROBS. 61 (Winter 1998).