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2012

## Executive Branch Legalisms

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### Recommended Citation

David Fontana, Executive Branch Legalities, 126 Harv. L. Rev. F. (2012).

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## EXECUTIVE BRANCH LEGALISMS

*David Fontana\**

The federal government is full of lawyers. Every business day approximately 20,000 lawyers head to their jobs in the federal government.<sup>1</sup> In the morning, these lawyers assemble their draft briefs and regulations, prepare their business-casual or old-fashioned business attire, and begin their commutes to work for their government jobs. These lawyers work in a range of federal agencies or executive departments. The precise cases they litigate and regulations they write might differ, but all these lawyers share key possessions, like a government identification badge to make it through building security, and key employment terms, like the General Schedule pay scale.

What else do the large majority of these lawyers have in common? They are civil service government lawyers. When Barack Obama won the presidential election in November 2008 and in November of 2012, these lawyers might be personally excited, or dispirited, and their job descriptions might be affected at the margins, but some basic facts remain: these are lawyers who have important executive branch roles that persist regardless of who is President. This simple fact — that executive branch lawyering is still overwhelmingly lawyering by civil service lawyers who are not appointed by the President or substantially affected by the lawyers that the President appoints — has been lost in the focus on the Office of Legal Counsel (OLC) and the White

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\* Associate Professor of Law, George Washington University Law School. Many thanks to Nicholas Bagley, Donald Horowitz, Johanna Kalb, David Law, Chip Lupu, and Sean Murphy, and to the *Harvard Law Review* for the kind invitation to write this and their superb editing during the process.

<sup>1</sup> This estimate derives from several sources, although the precise figure differs from study to study. Most of the best estimates are somewhat outdated, but likely largely still accurate. For representative examples, see, for instance, several studies from the 1980s: Barbara A. Curran, *American Lawyers in the 1980s: A Profession in Transition*, 20 LAW & SOC'Y REV. 19, 33 (1986) (reporting 20,132 lawyers in the federal government); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 952 n.3 (1991) (same); Marvin H. Morse, *The Federal Legal Profession: FBA's Mission and Objectives*, 32 FED. B. NEWS & J. 359, 359 (1985) (reporting 20,621 attorneys in the executive branch). For a more recent journalistic investigation by reporters in Washington, see Erin Delmore & Marisa M. Kashino, *How Many Lawyers Are There?*, WASHINGTONIAN (Dec. 1, 2009), <http://www.washingtonian.com/articles/people/how-many-lawyers-are-there> ("The Office of Personnel Management was able to tell us the number of practicing lawyers in all executive departments and agencies across the country: 31,797."). Note that this figure excludes lawyers who do not work as lawyers. See *id.* ("OPM's figure doesn't include . . . people in government who hold a law degree but aren't classified as lawyers."); John P. Plumlee, *Lawyers as Bureaucrats: The Impact of Legal Training in the Higher Civil Service*, 41 PUB. ADMIN. REV. 220, 222 (1981) (noting that seventy-seven percent of those trained as lawyers in the Department of Housing and Urban Development did not work in positions that were technically legal positions).

House Counsel's Office (WHC) that has dominated legal scholarship and that features in the important and insightful debate between Professors Bruce Ackerman and Trevor Morrison.<sup>2</sup>

The point of this Essay is simply to focus on one element of their debate: the disagreement between Ackerman and Morrison about OLC and WHC.<sup>3</sup> Ackerman is a pessimist about OLC and WHC, seeing "lawlessness"<sup>4</sup> created by certain "institutional conditions"<sup>5</sup> afflicting these offices. Morrison is more of an optimist, seeing OLC as committed to its "independence and professional integrity"<sup>6</sup> and WHC as working more closely with the President but still working enough with OLC to ensure its basic commitment to the rule of law.<sup>7</sup>

My thesis is not that either Ackerman or Morrison is right or wrong; instead, I write to note the limitations of this focus on these two offices as a means of understanding the executive branch's legal operations more generally.<sup>8</sup> OLC and WHC matter, and probably

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<sup>2</sup> See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010) [hereinafter ACKERMAN, *DECLINE*]; Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) (reviewing ACKERMAN, *DECLINE*, *supra*) [hereinafter Morrison, *Alarmism*]; Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13 (2011) [hereinafter Ackerman, *Lost*]; Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62 (2011) [hereinafter Morrison, *Libya*].

<sup>3</sup> As Ackerman notes, his arguments about the executive branch focus on OLC and WHC as symptoms of larger executive branch diseases. See Ackerman, *Lost*, *supra* note 2, at 14 (noting his "multi-dimensional" concerns with the executive branch). I will focus just on the OLC and WHC symptoms, but also discuss how these symptoms are not as serious as Ackerman thinks in part because the executive branch disease does not extend as broadly as Ackerman argues that it does.

<sup>4</sup> ACKERMAN, *DECLINE*, *supra* note 2, at 152.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> Morrison, *Alarmism*, *supra* note 2, at 1730.

<sup>7</sup> See *id.* at 1731–42.

<sup>8</sup> The exact role of OLC and WHC in executive branch legalism depends on whether Ackerman and Morrison are discussing all legal issues or just constitutional issues addressed by the executive branch, a question that remains unclear after reading their exchange. In other words, are we talking about just when civil service lawyers deal with constitutional issues, or when they deal with any legal issues? Ackerman and Morrison both seem to modulate between the former and the latter. See ACKERMAN, *DECLINE*, *supra* note 2, at 89 ("executive constitutionalism"); Morrison, *Alarmism*, *supra* note 2, at 1731 ("executive branch constitutionalism"); *id.* at 1688 ("executive branch lawyering"); *id.* at 1692 ("law . . . actually practiced in the executive branch"); *id.* at 1693 ("reality of executive branch constitutionalism"); *id.* at 1694 ("executive constitutionalism"); Morrison, *Libya*, *supra* note 2, at 62–63 ("ongoing exchange with Professor Bruce Ackerman over legal interpretation in the executive branch"). Both OLC and WHC deal with matters far beyond constitutional law. See MaryAnne Borrelli, Karen Hult & Nancy Kassop, *The White House Counsel's Office*, 31 PRESIDENTIAL STUD. Q. 561, 563–70 (2001) (highlighting the major roles for WHC as "[a]dvising on the exercise of presidential powers and defending the President's constitutional prerogatives," *id.* at 563, "[o]verseeing presidential nominations and appointments to the executive and judicial branches," *id.* at 565, "[a]dvising on presidential actions relating to the legislative process," *id.* at 568, "[e]ducating White House staffers about ethics rules and records management and monitoring for adherence," *id.* at 569, and "[h]andling White House contacts with the Department of Justice and the rest of the executive branch," *id.* at 570); Cornelia T.L. Pillard, *The*

matter more than any other individual legal office in the executive branch.<sup>9</sup> The problem with this emphasis on OLC and WHC, though, is that OLC and WHC are less representative of and less important to executive branch legalism than the near-exclusive attention devoted to them suggests.

In other words, the law created and shaped by civil service lawyers — what I call “civil service legalism” — is a crucial but increasingly unappreciated part of the legal presidency (and different than the more “political lawyers” in OLC and WHC). In particular, there are differences between OLC/WHC and the large majority of other legal offices in the executive branch in terms of their *legal personnel*: how do these lawyers come to work in the executive branch, and what are their incentives once they are working there? Empirical research on these executive branch lawyers exists, but is limited,<sup>10</sup> so this account will largely be like Ackerman and Morrison’s accounts by being “about incentives.”<sup>11</sup>

Ackerman<sup>12</sup> and Morrison<sup>13</sup> reference differences between civil service lawyers and OLC and WHC lawyers often, and they are not the first.<sup>14</sup> But their discussions do not highlight the full range of selection dynamics affecting who these lawyers are, the full range of incentives these lawyers face, and how this is likely to affect lawyering across the many legal offices in the executive branch. My modest goal is not to

*Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 684 (2005) (“[T]he Office of Legal Counsel is the executive’s top legal counselor who delineates constitutional and other legal constraints on . . . conduct.”). There is no reason to think that the arguments presented by Ackerman and Morrison are limited to OLC and WHC behavior with regard to constitutional law specifically, and indeed their debate features discussions of nonconstitutional legal issues. See Morrison, *Alarmism*, *supra* note 2, at 1739.

<sup>9</sup> See, e.g., Borrelli, Hult & Kassop, *supra* note 8, at 561 (“The White House counsel’s office is at the hub of virtually all presidential activity.”); Maryanne Borrelli et al., *The White House Counsel’s Office*, in *THE WHITE HOUSE WORLD* 193, 204 (Martha Joynt Kumar & Terry Sullivan eds., 2003) (“OLC is the single most important legal office in the government.” (quoting Interview by Martha Joynt Kumar and Nancy Kassop with C. Boyden Gray 18–19 (Oct. 4, 1999) (conducted for the White House Interview Program))).

<sup>10</sup> There are some existing and excellent accounts that are starting to put together an empirical picture of executive branch lawyering — for good examples see, for instance, Borrelli, Hult & Kassop, *supra* note 8; Thomas W. Merrill, *High-Level, “Tenured” Lawyers*, *LAW & CONTEMP. PROBS.*, Spring 1998, at 83; Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010); Pillard, *supra* note 8.

<sup>11</sup> Morrison, *Alarmism*, *supra* note 2, at 1721. Morrison also sometimes refers to “norms” in a similar way as he uses “incentives” in his back and forth with Ackerman. See, e.g., *id.* at 1693 (referring to “norms that prize independence and professional integrity, and that require OLC to provide legal advice based on its best view of the law”).

<sup>12</sup> See, e.g., ACKERMAN, *DECLINE*, *supra* note 2, at 12; Ackerman, *Lost*, *supra* note 2, at 16, 32 n.83.

<sup>13</sup> See, e.g., Morrison, *Alarmism*, *supra* note 2, at 1710.

<sup>14</sup> See, e.g., Bradley Lipton, *A Call for Institutional Reform of the Office of Legal Counsel*, 4 HARV L. & POL’Y REV. 249, 254 (2010); Merrill, *supra* note 10, at 99.

argue that we have too many or too few of either kind of executive branch lawyer, but to provide a fuller account of their situations and remind us of executive branch legal offices beyond OLC and WHC. The executive branch is a “‘they,’ not an ‘it,’”<sup>15</sup> and so too executive branch legality is more accurately described as executive branch *legalisms* — a plural and not a singular, with some important implications for our understanding of separation of powers.

### I. THE ACKERMAN AND MORRISON ACCOUNTS OF EXECUTIVE BRANCH LEGALISM

Despite their disagreement about the normative values that OLC and WHC add to executive branch lawyering, both Ackerman and Morrison place OLC and WHC at the core of their accounts of executive branch lawyering. Ackerman’s book and reply to Morrison are based on an overall characterization of trends in the executive branch pushing the presidency toward a form of lawlessness driven by a toxic combination of charismatic and ideological leadership. Political primaries are likely to generate presidential administrations selected based on ideological purity rather than moderation.<sup>16</sup> Blessed with the microphone of the modern media, the President can make more charismatic and more effective appeals to public opinion, and the President can manipulate the military to help execute his agenda.<sup>17</sup>

In this account, OLC and WHC could serve as legalistic constraints on the charismatic and ideological fire, but they now pose greater risks in serving as fuel in the form of legalistic legitimization.<sup>18</sup> The President decides to pursue a course of action, and OLC and WHC engage in a form of “rubber-stamping.”<sup>19</sup> This is because the “existing system”<sup>20</sup> surrounding OLC and WHC is not “basically sound.”<sup>21</sup> OLC is staffed by lawyers rotating in and out of their positions, appointed or otherwise accountable to the President in power.<sup>22</sup> The result is that OLC manufactures a “superpoliticized jurisprudence.”<sup>23</sup>

WHC is full of lawyers who are, as Ackerman highlights, “fierce [presidential] loyalists, working 24-7 to make his Administration a suc-

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<sup>15</sup> I owe this phrasing, of course, to Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

<sup>16</sup> See Ackerman, *Lost*, *supra* note 2, at 13.

<sup>17</sup> See *id.* at 14.

<sup>18</sup> See, e.g., ACKERMAN, *DECLINE*, *supra* note 2, at 3 (“[S]omething is seriously wrong — very seriously wrong — with the tradition of government that we have inherited.”).

<sup>19</sup> See Ackerman, *Lost*, *supra* note 2, at 13, 34.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See ACKERMAN, *DECLINE*, *supra* note 2, at 88.

<sup>23</sup> *Id.* at 220 n.3.

cess.”<sup>24</sup> WHC lawyers face “an overwhelming incentive to tell [the President] that the law allows [him] to do whatever [he] want[s] to do.”<sup>25</sup> This now means that WHC is exercising greater power vis-à-vis OLC, as they are “in constant contact with their counterparts at the OLC”<sup>26</sup> and this presidential pressure is “an inextricable part of ordinary American politics.”<sup>27</sup> While presidential wishes play a central role in guiding OLC and WHC, professional norms do not, because OLC and WHC lawyers face little in the way of sanctions from the legal profession for their flouting of the law.<sup>28</sup>

In Ackerman’s account, the fact that there are other — and different forms of — lawyers in the executive branch is either never mentioned or largely unimportant. Ackerman mentions a “bureaucracy,”<sup>29</sup> which presumably means civil service lawyers and civil service employees beyond lawyers. But this bureaucracy has, according to his account here and elsewhere,<sup>30</sup> increasingly been “politicized.”<sup>31</sup> There is very little in the way of slack in the principal-agent relationship. The President and his wishes and powers make for a “political juggernaut”<sup>32</sup> and so are always “issuing executive orders . . . impose[d] on the federal bureaucracy even when they conflict with congressional mandates.”<sup>33</sup>

To Ackerman, “the foundations of our own republic are eroding before our very eyes.”<sup>34</sup> Ackerman does not articulate concerns with civil service lawyers, except that political lawyers control civil service lawyers. Given his arguments about the flaws of political lawyers, this means political lawyers are responsible for much of our system of government. In this account, then, civil service lawyers play a small role, mostly as compliant and precise agents to the presidential legal principal.

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<sup>24</sup> Ackerman, *Lost*, *supra* note 2, at 33.

<sup>25</sup> ACKERMAN, *DECLINE*, *supra* note 2, at 176.

<sup>26</sup> *Id.* at 231 n.43.

<sup>27</sup> Ackerman, *Lost*, *supra* note 2, at 19.

<sup>28</sup> *See id.* at 23–26.

<sup>29</sup> *Id.* at 14.

<sup>30</sup> *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 696–715 (2000).

<sup>31</sup> Ackerman, *Lost*, *supra* note 2, at 34. Notice the difference between this account of politicization and the one in his earlier article. In this account, the bureaucracy seems to be compelled to abide by the wishes of the President. In his earlier account, the bureaucracy was politicized, but compelled to listen to multiple political actors, including the President and the Congress. *See* Ackerman, *supra* note 30, at 703 (“[F]ragmented accountability forces American bureaucrats to be risk takers and forceful advocates for positions they hold privately.” (quoting JOEL D. ABERBACH, ROBERT D. PUTNAM & BERT A. ROCKMAN, *BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES* 94 (1981))).

<sup>32</sup> Ackerman, *Lost*, *supra* note 2, at 34.

<sup>33</sup> ACKERMAN, *DECLINE*, *supra* note 2, at 9.

<sup>34</sup> *Id.* at 188.

Morrison focuses his argument less on the charismatic and ideological trends that Ackerman argues are capturing the executive branch, but more on “Ackerman’s critique of the current structures for legal advice within the executive branch.”<sup>35</sup> In Morrison’s account, OLC can still function as a source of principled legal advice within the executive branch. This is in part because OLC’s power derives from its perception as an independent legal office, and it is that independence that gives OLC statements legitimacy and thus power.<sup>36</sup> These incentives to maximize power through independence are also backstopped by professional norms that OLC lawyers must fear if they overstep.<sup>37</sup> Morrison is not in total disagreement with Ackerman, though: he is clear that OLC provides *its* best view of the law, which is a view affected by distinctive incentives and traditions that OLC faces and that are different than those that pure legal principle might command.<sup>38</sup>

In Morrison’s account, as contrasted with Ackerman’s account, WHC still works with rather than commands OLC, because OLC provides WHC with “a legitimacy that other executive offices cannot so readily provide.”<sup>39</sup> Even if WHC was supplanting OLC more and more, Morrison would find that less troubling than Ackerman does.<sup>40</sup>

Morrison’s account has more to say about legal offices besides OLC and WHC, but even then these other legal offices are either unaddressed or largely irrelevant, and certainly not legal protagonists. Morrison argues that OLC “is the most important centralized source of such advice in the executive branch.”<sup>41</sup> He notes that OLC and WHC are obliged to address only some legal issues,<sup>42</sup> and so (although this is not stated explicitly) other legal offices in the executive branch presumably must address the other legal issues.<sup>43</sup> He tries to articulate some guidelines for when OLC in particular should decide issues, and when other executive branch legal offices should.<sup>44</sup>

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<sup>35</sup> Morrison, *Alarmism*, *supra* note 2, at 1601.

<sup>36</sup> *See id.* at 1722 (“Put simply, if OLC says yes too readily to its clients, it will no longer be useful to them. OLC maintains its position as the most important centralized source of legal advice within the executive branch . . . because its legal advice is uniquely valuable to its clients.”).

<sup>37</sup> *See id.* at 1728.

<sup>38</sup> *See id.* at 1713 (“OLC’s commitment is to *its* best view of the law — not *the* best view of the law in any decontextualized sense.”).

<sup>39</sup> Morrison, *Libva*, *supra* note 2, at 62.

<sup>40</sup> *See id.* at 71 n.23 (“I see no particular problem with the White House Counsel playing that role.”).

<sup>41</sup> Morrison, *Alarmism*, *supra* note 2, at 1709.

<sup>42</sup> *See id.* at 1732.

<sup>43</sup> Morrison, *Libya*, *supra* note 2, at 67 (“Modern government is vast and diverse. Agencies . . . have their own general counsel’s offices capable of answering many of the issues that arise in the daily course of business.”).

<sup>44</sup> *See id.* at 67–68.

In Ackerman's account, civil service lawyers are largely unmentioned, but when mentioned are bullied and compliant agents of the presidential legal principal. In Morrison's account, it is less coercion and more tradition and legitimacy that places civil service lawyers out of or at the marginalized bottom of the executive branch legal hierarchy. To Morrison (more on this later), only OLC in particular has a "decades-long tradition[] of providing legal advice based on their best view of the law after fully considering the competing positions."<sup>45</sup> Thus, there are other offices, but they have nowhere near the legitimacy, status, and thus finality of OLC (in this regard Morrison is really placing OLC at the top of the pyramid even more so than he does WHC).

Ackerman and Morrison might therefore disagree on whether WHC and OLC undermine or promote the rule of law within the executive branch, but they agree that WHC and OLC are the center of that discussion. The focus on OLC and WHC are predictable outgrowths of developments in our legal intellectual culture. On the demand side, the rise of popular constitutionalism has directed the attention of scholars away from courts, and part of that rise has led to the departmentalist desire to examine specific branches of government that can interpret the Constitution.<sup>46</sup> On the supply side, not only is the executive branch a natural topic for academic focus — because of the sheer amount of its legal activity — but OLC and WHC are familiar institutions for law professors. OLC produces written decisions<sup>47</sup> similar to the court decisions that law professors learn to master. Many of the lawyers in OLC and WHC were either before or will later become law professors, or have biographies similar to those of law professors.<sup>48</sup> And now OLC in particular has the kinds of heroes and villains that make for compelling narratives, with John Yoo in particular "want[ing] you to hate him."<sup>49</sup>

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<sup>45</sup> *Id.* at 64.

<sup>46</sup> See David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2063 (2010) ("Departmentalism refers to the idea that the coordinate branches of government possess independent authority to interpret the Constitution.").

<sup>47</sup> See Morrison, *Alarmism*, *supra* note 2, at 1709 ("OLC's core function is to provide formal legal advice through written opinions.").

<sup>48</sup> Note, for instance, that of the twenty-two lawyers that joined WHC at the beginning of the Obama Administration, nineteen had either gone to a top-five law school or clerked on the U.S. Supreme Court. See Press Release, White House, President Obama Announces Key Additions to the Office of White House Counsel (Jan. 28, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/ObamaAnnouncesKeyAdditionstotheOfficeoftheWhiteHouseCounsel](http://www.whitehouse.gov/the_press_office/ObamaAnnouncesKeyAdditionstotheOfficeoftheWhiteHouseCounsel) [hereinafter *Obama White House Counsel*]. Every single head of OLC during its existence either attended a top-five law school, clerked on the lower courts or Supreme Court, or was a law professor.

<sup>49</sup> Dahlia Lithwick, *It's Not Me. It's Yoo*, SLATE (Mar. 19, 2010), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/03/its\\_not\\_me\\_its\\_yoo.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/03/its_not_me_its_yoo.html).

OLC and WHC deserve to be protagonists. The problem is that civil service lawyers do as well, and they are different lawyers with different incentives than those in OLC and WHC.

## II. POLITICAL LAWYERS

We can roughly place the lawyers in the executive branch along a continuum based on what factors led them to being hired and accepting their executive branch legal position, with “political lawyers” on one end of the continuum. These lawyers are hired because the law permits partisan political considerations by making the position a presidential appointment (directly by the President or by one of his surrogates), and/or because the norms of the position otherwise encourage or even facilitate partisan political considerations.<sup>50</sup> Given these hiring dynamics, certain kinds of lawyers select into these positions, and then these lawyers face certain incentives.

On the other end of the continuum, we have “civil service lawyers.” These lawyers are neither political appointees nor do they otherwise obtain their positions because of considerations arising out of partisan politics. Given these selection effects, these lawyers face their own, distinctive incentives. And the much less frequent presence of these lawyers in OLC and WHC suggests that these offices will operate quite differently than other executive branch legal offices dominated by civil service lawyers.

### A. *Who Are Political Lawyers?*

Ackerman and Morrison are keenly aware of the personnel dynamics of political lawyers, because these lawyers are far more common in offices like OLC and WHC (and so only brief attention will be paid to these lawyers). It is still worth sketching out some of the personnel dynamics Ackerman and Morrison highlight, and some they do not, to see how these political lawyers are different than civil service lawyers.

There are, by law, as many as eight thousand positions in the executive branch to be filled by the President or someone nominated by the President.<sup>51</sup> Many of these political appointments are legal positions. But looking just at the formal status of the position, as Ackerman, Morrison and the literature tend to do, understates the total number of lawyers in the executive branch hired due directly or indi-

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<sup>50</sup> The notion that all lawyers in the executive branch are not identical is not new. *See, e.g.,* Merrill, *supra* note 10, at 83 (“Government lawyers can be broadly categorized as either political or civil service appointees.”). My goal is to expand the considerations that permit us to classify a lawyer in one way or another (it is more than just formal legal job security). Given these considerations, my goal is also to indicate where different lawyers are located in the executive branch, and then to highlight a fuller range of incentives these lawyers face.

<sup>51</sup> *See* WILLIAM S. DIETRICH, IN THE SHADOW OF THE RISING SUN 185 (1991).

rectly to partisan politics or the legal qualifications associated with partisan politics.

This is particularly true for lawyers hired for positions immediately below political appointees, and therefore often hired by political appointees. A change in presidential administration will often make a civil service lawyer in ideological disagreement with the new administration want to leave the federal government or switch positions, as happened for liberal lawyers in the Department of Justice's Civil Rights Division during the Reagan Administration.<sup>52</sup> The Republican political appointee trying to fill what is formally a civil service position, then, might be much more impressed if the applicant had a reference from John Ashcroft than the Obama appointee would be. The job applicant might be more likely to hear of the job opening or be prepared to answer the questions to be asked during the interview if he or she has relationships with the political appointees or their surrogates. And homophily is just as powerful in legal networks as in other social networks, so the applicant is more likely to hear of the job or the interview questions if they are from the conservative political-legal network applying for the position in a Republican Administration or the liberal political-legal network applying during a Democratic Administration. The press has documented evidence of such political lawyer hiring existing even for positions not formally classified as politically appointed, under both Republican<sup>53</sup> and Democratic administrations.<sup>54</sup>

Additionally, political lawyers are different not just because the individuals doing the hiring are different, but also because those lawyers wanting to be hired for these positions are different. These lawyers select *in* to these positions as well as being selected *for* these positions. Michael Spence won a Nobel Prize in economics for writing about labor markets that screen for dedication.<sup>55</sup> These labor markets, for instance, might require that the job candidate have completed an intensive training program in order to apply for a job. This might not be necessary to ensure that the candidate has the technical skills to perform his or her job responsibilities (which he or she might already have), but more ensures that the job candidate will have the intense dedication needed or preferred for the job.

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<sup>52</sup> See MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? 97 (2000).

<sup>53</sup> See Carrie Johnson, *Report Cites Political Bias at Justice*, WASH. POST, Jan. 14, 2009, at A8 (detailing hiring practices under the Bush Administration).

<sup>54</sup> See Charlie Savage, *In Shift, Justice Department Is Hiring Lawyers with Civil Rights Backgrounds*, N.Y. TIMES (May 31, 2011), [www.nytimes.com/2011/06/01/us/politics/01rights.html](http://www.nytimes.com/2011/06/01/us/politics/01rights.html) (summarizing differences in lawyer hiring under Bush and Obama Administrations).

<sup>55</sup> See Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355 (1973).

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The labor market for political lawyers has many of these dynamics. To get to the point of being considered, legal qualifications are not enough. The lawyer must have been willing to become a regular on the dinner-party or fundraising circuit in Washington to make politically connected contacts. The lawyer must be willing to reap the benefits and endure the costs of the polarizing stamp of a political position in a presidential administration on his or her job resume in perpetuity. They must be willing to see their name attacked and slandered in the media. And they need to be willing to work long hours for low pay. Lawyers might be more ambitious and driven than the average American, but political lawyer positions select for a particular breed of motivated lawyer.

*B. The Incentives for Political Lawyers*

The result of the job hiring and job acceptance dynamics highlighted above is that a particular type of person — and lawyer — occupies these positions in the federal government. Given these preferences, once in his or her executive branch legal position, the political lawyer faces a series of incentives that differ in time and substance as compared to those of civil service lawyers. These are just incentives, and as Morrison argues it is helpful to “engage . . . work on the merits.”<sup>56</sup> But highlighting the different incentives is not meant to predict specific performance as much as predict differences in performance between political and civil service lawyers.

First, the time horizons of political lawyers tend to be shorter, as Thomas Merrill has observed.<sup>57</sup> The exit options can be quite desirable for all those hired for political positions in the federal government, not just political lawyers (and exit options are one of the best predictors of federal government tenure<sup>58</sup>). This is in part because these individuals are hired due to their partisan bona fides, and they accepted the position for that reason and so have ambitions outside of the federal government. For the political lawyer as compared to the civil service lawyer, it might be quite desirable to leave the federal government to work in a high-ranking position at the American Civil Liberties Union or the Republican National Committee. Not only is there a pull, but also a push: political lawyer positions are emotionally and physi-

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<sup>56</sup> Morrison, *Alarmism*, *supra* note 2, at 1708.

<sup>57</sup> See Merrill, *supra* note 10, at 93 (highlighting the shorter-term perspectives of political lawyers).

<sup>58</sup> See Anthony M. Bertelli & David E. Lewis, *Policy Influence, Agency-Specific Expertise, and Exit in the Federal Service*, J. PUB. ADMIN. RES. & THEORY, Oct. 2012.

cally grueling.<sup>59</sup> These are all reasons why political appointees in particular usually stay less than two years.<sup>60</sup>

These dynamics are even more dramatic for political lawyers. The exit options for a political lawyer can be quite lucrative in a financial, not just psychic or emotional, sense. Many of the monetary rewards to be reaped from being a political lawyer accrue only upon leaving the executive legal position — only then might they be hired for the political practice at Patton Boggs or the legislative arm of Microsoft, or as an investment banker at Goldman Sachs. The tenure of department general counsels is therefore, depending on which numbers you examine, either identical to or even slightly lower than the tenure of other political appointees.<sup>61</sup>

Part of the reason their time horizons are shorter is that political lawyers do not stay long in their *first* positions, but part of it is that their next position is likely to be out of the federal government altogether. Exit options outside of the federal government are attractive. The exhaustion created by a political position would not necessarily be relieved in another political position. And a civil service position might be perceived or felt as a career step backward. It should be no surprise, then, that one study found that less than ten percent of all political appointees stayed in the federal government in a civil service capacity after leaving their positions.<sup>62</sup> Because these political lawyers were selected for their positions and selected their positions partly based on political considerations, their positions once leaving government tend to be more political in nature (perhaps working for a partisan-affiliated advocacy group, for instance).

Second, the substantive concerns of political lawyers tend to be more focused on the legal agenda of the party coalitions they have served before and hope to serve again after leaving their position. Political lawyers are more likely to be selected because of their general agreement with the legal-political agenda of the political coalition selecting them, and they want the position for that reason as well. This

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<sup>59</sup> See Dom Bonafede, *Presidential Appointees: The Human Dimension*, in *THE IN-AND-OUTERS* 120, 138 tbl.6.3. (G. Calvin Mackenzie ed., 1987) (highlighting the tolls the political appointee positions take on those taking the jobs).

<sup>60</sup> See U.S. GEN. ACCOUNTING OFFICE, FACT SHEET NO. GGD-94-115FS, *POLITICAL APPOINTEES: TURNOVER RATES IN EXECUTIVE SCHEDULE POSITIONS REQUIRING SENATE CONFIRMATION* 2–3 (1994).

<sup>61</sup> See Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989–2009*, 39 *PRESIDENTIAL STUD. Q.* 432, 437 fig. 1 (2009).

<sup>62</sup> See Linda L. Fisher, *Fifty Years of Presidential Appointments*, in *THE IN-AND-OUTERS*, *supra* note 59, at 1, 27; see also Carl Brauer, *Tenure, Turnover, and Postgovernment Employment Trends of Presidential Appointees*, in *THE IN-AND-OUTERS*, *supra* note 59, at 174, 182 (“[T]he general rule among presidential appointees is ‘in and out and never in again.’”).

means that political lawyers are also likely to want to keep the party sufficiently happy with them so that they can transition to an even better legal-political position outside of the federal government (here the incentives might be longer term, since once a lawyer has left the federal government political lawyers are likely to desire several decades of a legal career meeting with the party's favor ahead of them).

It is important to note, too, that these substantive concerns might be partly political, but are also partly — if not mostly — legal as well. These lawyers are lawyers for this party coalition as opposed to demographers or economists because they support the *legal* agenda of the party. This means their substantive incentives might be to support a broad interpretation of substantive due process rights for social rights in the case of lawyers in a Democratic Administration, and a broad interpretation of economic rights in a Republican Administration, for instance. This is why they are labeled political but also lawyers — their concerns involve both.

Ackerman argues that, as a result of these time and substance incentives, lawyers like these do not have institutional considerations at heart,<sup>63</sup> and Professor Thomas Merrill makes a similar argument.<sup>64</sup> This might be overstating the case. Shorter-term incentives might align with institutional incentives. It might be that, at one point in time (although not always perhaps), it is strategically helpful for political lawyers to neglect short-term interests to appear neutral and reap longer-term benefits. It might be that longer-term institutional concerns are key parts of the specific legal agenda of the political coalition appointing the political lawyer. Think of a lawyer in the Bush Administration aware of the conservative movement's interest at the time in the unitary executive and a robust presidency.<sup>65</sup>

### *C. The Distribution of Political Lawyers: The Special Cases of OLC and WHC*

Given that political lawyers are a different breed and face a different series of incentives, their relative distribution in executive branch legal offices will affect the operation of those offices. First, this is be-

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<sup>63</sup> Ackerman puts this most dramatically for the WHC, even though the institutional pressures are the same for OLC. Ackerman argues that WHC lawyers are “superloyalists.” ACKERMAN, *DECLINE*, *supra* note 2, at 12. There is an incentive to tell the President he can do as he wishes, institutional principles be damned. *See id.* at 176.

<sup>64</sup> *See* Merrill, *supra* note 10, at 94 (“[T]he 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.”).

<sup>65</sup> *See* Stephen Skowronek, Essay, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2092–2100 (2009) (discussing how the Bush Administration pressed executive power arguments because of strategic political goals).

cause of so-called “peer effects,” when members of an organization affect other members. It is a basic tenet of organizational behavior that one “does not live for months or years in a particular position in an organization, exposed to some streams of communication, shielded from others, without the most profound effects upon what he knows, believes, attends to, hopes, wishes, emphasizes, fears, and proposes.”<sup>66</sup> A consistent finding in the literature about public sector employees is that these “employees adapt their behavior consistent with the norms and expectations of people around them.”<sup>67</sup>

Second, this is because principal-agent dynamics will be different with more rather than fewer political lawyers. Preferences of civil service lawyers might not be changed but might be better monitored by political lawyers if there are more political lawyers. Political lawyers are the bosses, or the principals, in their relationships with civil service lawyers.<sup>68</sup> A principal must have proper and sufficient information to evaluate its agent.<sup>69</sup> If there are more political lawyers relative to civil service lawyers, it will be cheaper for political lawyers to obtain information, monitor, and thereby influence the civil service lawyers, minimizing agency problems.<sup>70</sup> This is even more pronounced for political lawyers because agency problems are reduced when the agent is producing a work product that is easier to evaluate,<sup>71</sup> and civil service lawyers are often producing written products that political lawyers can monitor. For instance, in OLC the greater ease with which political lawyers monitor civil service lawyers is demonstrated by the internal review process: an OLC written opinion can be easily evaluated, and every opinion drafted by a civil service lawyer is reviewed by at least three political appointees (two deputies and the head of the office).<sup>72</sup>

It is for these reasons that we can expect that, for better or for worse, OLC and WHC will be different from other executive branch legal offices (a similar story can be told for the Office of Legal Policy (OLP)). The President appoints all WHC lawyers.<sup>73</sup> If there are degrees of political lawyers, the past and future careers of these lawyers

<sup>66</sup> See HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* xvi (3d ed. 1976).

<sup>67</sup> Donald P. Moynihan & Sanjay K. Pandey, *The Ties that Bind: Social Networks, Person-Organization Value Fit, and Turnover Intention*, 18 J. PUB. ADMIN. RES. & THEORY 205, 210 (2007).

<sup>68</sup> See B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 802 (1991).

<sup>69</sup> See Arthur Lupia & Mathew D. McCubbins, *Representation or Abdication? How Citizens Use Institutions to Help Delegation Succeed*, 37 EUR. J. POL. RES. 291, 298–99 (2000).

<sup>70</sup> See DAVID M. KREPS, *A COURSE IN MICROECONOMIC THEORY* 577–624 (1990).

<sup>71</sup> See Eric A. Posner, *Agency Models in Law and Economics*, in CHICAGO LECTURES IN LAW AND ECONOMICS 225, 230 (Eric A. Posner ed., 2000).

<sup>72</sup> See Pillard, *supra* note 8, at 716.

<sup>73</sup> See Ackerman, *Lost*, *supra* note 2, at 34 (“Recall that each Administration sweeps out the entire WHC staff and brings in its own team of super-competent super-loyalists.”).

tell us that WHC lawyers might be uber-political lawyers. Past heads of the office include individuals with substantial experiences before and after in partisan politics, like Alberto Gonzales and Gregory Craig. The other lawyers in the office also have long-standing ties to one another — and at the higher levels, to the President — through partisan politics.<sup>74</sup> OLC is composed of a “presidentially nominated and Senate-confirmed Assistant Attorney General, [and] several Attorney General-appointed Deputies.”<sup>75</sup> The head of OLC is sometimes a less partisan figure (the current head of OLC, Virginia Seitz, never worked in partisan politics before OLC<sup>76</sup> although she had contributed money to campaigns<sup>77</sup>), but has also been someone more known for their partisan activities. For instance, Theodore Olson was the head of OLC before he argued *Bush v. Gore*<sup>78</sup> or became Solicitor General for President George W. Bush<sup>79</sup> and after he had worked for Ronald Reagan before Reagan was President.<sup>80</sup> The clear majority of lawyers stay for shorter terms, with most leaving every two or three years.<sup>81</sup>

In other words, we might expect that offices with more rather than fewer political lawyers will be different from offices with fewer rather than more political lawyers. And WHC and OLC have many lawyers with political backgrounds and future political career trajectories.

### III. CIVIL SERVICE LAWYERS

#### A. *Who Are Civil Service Lawyers?*

The American executive branch has a long tradition of political lawyers, but also of civil service lawyers,<sup>82</sup> and the Hatch Act<sup>83</sup> applies to civil service lawyers just as it does to other civil servants.<sup>84</sup> Lawyers in the Senior Executive Service, such as several lawyers in the So-

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<sup>74</sup> See Borrelli, Hult & Kassop, *supra* note 8, at 576.

<sup>75</sup> Morrison, *Alarmism*, *supra* note 2, at 1710.

<sup>76</sup> See Press Release, Sidley Austin LLP, Litigation Partner Joins Sidley & Austin’s Washington, D.C. Office (Feb. 4, 1998), available at <http://www.sidley.com/newsresources/newsandpress/Detail.aspx?news=5989065c-09b2-45f4-9ea3-37cd9052d485>.

<sup>77</sup> See Virginia A. Seitz *Political Campaign Contributions 2008 Election Cycle*, CAMPAIGNMONEY.COM, <http://www.campaignmoney.com/political/contributions/virginia-seitz.asp?cycle=08> (last updated July 2, 2012).

<sup>78</sup> 531 U.S. 98 (2000).

<sup>79</sup> See Theodore B. Olson, GIBSON DUNN, <http://www.gibsondunn.com/lawyers/tolson> (last visited Oct. 22, 2012).

<sup>80</sup> See Adam Wahlberg, *Ted Olson’s Memories of Ronald Reagan*, SUPER LAW. BLOG (Feb. 16, 2012), <http://blog.superlawyers.com/2012/02/memories-of-ronald-reagan-from-ted-olson.shtml> (“I was very, very fortunate to work . . . on Ronald Reagan’s legal matters [before he became President].”).

<sup>81</sup> See Lipton, *supra* note 14, at 255; Pillard, *supra* note 8, at 708 n.95.

<sup>82</sup> Civil Service Rules, 5 C.F.R. §§ 1.1–10.3 (2012).

<sup>83</sup> 5 U.S.C. §§ 7321–7326 (2006).

<sup>84</sup> See *id.*

licitor General's Office, tend to be those civil service lawyers working right below and most immediately with political lawyers.<sup>85</sup>

Just like political lawyers working in the executive branch are not a random collection of lawyers, neither are civil service lawyers. There are selection effects driving who is hired and who accepts these jobs. This creates a cadre of lawyers with preferences that results in them facing certain incentives once these lawyers assume their executive branch legal positions. The result is that these lawyers are different from the political lawyers of OLC and WHC, but also are not the neutral technocrats that so much of legal scholarship assumes is the only alternative to the political lawyer.

When hiring, executive branch agencies or departments look for merit, but also look for devotion to the cause — it would be difficult for the EPA to justify hiring a lawyer who has worked for organizations that do not believe in climate change or believe that the entire administrative state is unconstitutional. Relevant ideological signals might be used to communicate this. The EPA hiring process might favor those who have worked for the Sierra Club, while the Defense Department hiring process might be indifferent or even antagonistic to an earlier Sierra Club stint. A reference from Robert F. Kennedy, Jr., might be helpful for an EPA legal position, and a reference from William Perry might be for a Defense Department legal position.

On the job applicant side, too, there are selection effects at work. The older accounts of ideological selection effects for civil servants argued that civil servants tend to be more liberal than the population in general and often even than the President they serve.<sup>86</sup> But the story is more heterogeneous than that. Lawyers able to obtain civil service positions in the federal government are likely to have other options, perhaps even in the private sector offering higher monetary compensation. So there can often be strong ideological or solidarity motivations driving acceptance of civil service legal positions, and again ideological motivations related to the particular legal positions they accept.<sup>87</sup> For instance, one study found that of seventeen lawyers surveyed in the

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<sup>85</sup> Membership of the Senior Executive Service Standing Performance Review Boards, 77 Fed. Reg. 59,004 (Sept. 25, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-09-25/pdf/12012-23591.pdf>.

<sup>86</sup> The classic citations for this are: Joel D. Aberbach & Bert A. Rockman, *Clashing Beliefs Within the Executive Branch: The Nixon Administration Bureaucracy*, 70 AM. POL. SCI. REV. 456 (1976); Joel D. Aberbach & Bert A. Rockman, *The Political Views of U.S. Senior Federal Executives, 1970–1992*, 57 J. POL. 838 (1995); Robert Maranto & Karen Marie Hult, *Right Turn? Political Ideology in the Higher Civil Service, 1987–1994*, 34 AM. REV. PUB. ADMIN. 199 (2004); Robert Maranto, *Still Clashing After All These Years: Ideological Conflict in the Reagan Executive*, 37 AM. J. POL. SCI. 681 (1993).

<sup>87</sup> See GOLDEN, *supra* note 52, at 97.

Civil Rights Division of the Justice Department, twelve identified as liberal and none identified as conservative.<sup>88</sup>

To be sure, on both the hiring and applicant side, there might be legal offices that hire and attract those more committed to rule-of-law values or otherwise less committed to any set of priors. This might be true in particular of the many offices within the Justice Department that have dockets less tied to current, controversial legal and political debates — for instance, the Department of Justice Civil Division's Aviation and Admiralty Section.<sup>89</sup> These offices might be more numerous not just than OLC and WHC, but also than civil service offices hiring and attracting those with a nontechnical, even ideological (if not partisan) agenda.

### *B. The Incentives Civil Service Lawyers Face*

With this personnel structure, civil service lawyers are likely to have certain preferences, which in turn generate incentives for their behavior once in office. These incentives differ in *time* and *substance* from political lawyers.

First of all, civil service lawyers have incentives across a longer period of time than do political lawyers, as Merrill has noted.<sup>90</sup> Civil service legal positions are legally structured to provide stable and desirable packages of benefits that manifest more over the longer term than the shorter term (rare is the civil service lawyer receiving a yearly bonus in six figures, but civil service lawyers receive the equivalent of tenure after a few years of employment<sup>91</sup>). The law of civil service compensation strongly protects the employment benefits and tenure of civil servants.<sup>92</sup> The ideological selection by employer and employee suggests that the devotion to the cause of the executive branch legal office by the civil service lawyer can be broad and deep. This kind of devotion does not fade in less than two years and can often only be satisfied by decades of legal exertion.

The result is that civil service lawyers stay in their positions for long periods of time. Political lawyers leave after two years, sometimes of their own choice, sometimes because they are forced out or a new election brings in a new administration. By contrast, one report found that the average civil service employee, many of whom are lawyers, has a 0.03% chance of being fired in a given year.<sup>93</sup> This is not to say

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<sup>88</sup> See *id.* at 103.

<sup>89</sup> *Torts Branch: Aviation and Admiralty Section*, U.S. DEP'T JUST., <http://www.justice.gov/civil/torts/aa/t-aa.html> (last visited Oct. 22, 2012).

<sup>90</sup> See Merrill, *supra* note 10, at 86.

<sup>91</sup> See 5 C.F.R. § 315.201 (2012).

<sup>92</sup> See *Arnett v. Kennedy*, 416 U.S. 134, 140–46 (1974) (plurality opinion).

<sup>93</sup> See ROBERT M. O'NEIL, *THE RIGHTS OF PUBLIC EMPLOYEES* 122 (2d ed. 1993).

that civil service lawyers stay in the same jobs their whole lives. But when these lawyers leave, they leave to go to another part of the federal government, and thus their constituencies can be very internal to the government — perhaps even internal just to the executive branch.

What incentives does this create for civil service lawyers as opposed to political lawyers? Civil service lawyers are motivated and strategic just like political lawyers are, even if their preferences might be different.<sup>94</sup> The longer time horizons they face encourages them to develop a series of asset-specific investments<sup>95</sup> geared toward their standing in the executive branch legal community.

One asset-specific investment is a reputation as occupying the ideological middle. Civil service lawyers are repeat players within the executive branch. If civil service lawyers are seen as hopelessly ideologically biased, these lawyers might not be terminated, but they will be marginalized. Given the relatively regular rotation of powers between the political parties in the executive branch in the United States, this means that the civil service lawyers planning to last in the Office of the General Counsel at the Department of Defense have to contemplate a world in which they will be supervised by Republican and Democratic defense secretaries and general counsels.<sup>96</sup>

This moderation can also be of assistance as civil service lawyers contemplate a present and future dealing with other lawyers in the executive branch. If civil service lawyers desire to move to another executive branch legal office, and to be effective there, they might need the support of a cross-section of executive branch lawyers.

It should not be surprising, then, that bureaucracies move to the right or to the left depending on the administration in charge. There is “substantial evidence of bureaucracies changing their implementation

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<sup>94</sup> See Merrill, *supra* note 10, at 86 (“[T]he traditional functional justification for the civil service, which I will call the impartiality argument[,] . . . posits that tenured employees are preferred to political or patronage employees because they will discharge their duties free of favoritism or partisan bias. . . . I will argue that in our post-Legal Realist Age it is not a very powerful one . . . . The idea that tenured lawyers are more impartial in their discernment of the requirements of the law therefore provides a rationale that is . . . weak.”).

<sup>95</sup> See Peter Alexis Gourevitch, *The Governance Problem in International Relations*, in STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 137, 144 (David A. Lake & Robert Powell eds., 1999) (“Political actors develop investments, ‘specific assets,’ in . . . relationships, expectations, privileges, knowledge of procedures, all tied to the institutions at work.”).

<sup>96</sup> In another article, Ackerman argues that civil servants must balance competing political coalitions at all times, given the separation of powers in a presidential system. Ackerman, *supra* note 30, at 699 (“With the presidency separated from congress, high-level bureaucrats must learn to survive in a force-field dominated by rival political leaders.”). This might not be as true during times of unified government, when pleasing the President of one party might be quite similar to pleasing the legislature of the same party. My argument is that, even during periods of unified government, the civil service lawyer has incentives to be moderate, not to accommodate Congress and the President at the same time so much as to maintain credibility in anticipation of a partisan change in power at some undefined future point.

of policy”<sup>97</sup> in response to political superiors.<sup>98</sup> Accommodating these political changes ensures that civil service lawyers can maintain power in their current job across administrations and can move to other executive branch legal positions.

Political lawyers, by contrast, can be more ideological. There is no chance, save burrowing,<sup>99</sup> that they will remain in position and have to work for an administration of the opposing party with different legal principles. They might risk alienating the civil servants and the legal profession enough to do short-term or long-term damage. But at the same time, this might yield healthy legal-political positions once they leave their executive branch legal position in a few short months or years. The two or three careerists at OLC might not like John Yoo, but he has not worked at OLC for nearly ten years.

Still, there is an incentive to couple this investment in a moderate reputation with some substantive ideological commitment (even if somewhat muted for the sake of moderation) that drew them to their executive branch legal office and made them attractive candidates. Lawyers at the Department of Housing and Urban Development (HUD) might be systematically biased toward affordable housing. Lawyers at the Department of Homeland Security (DHS) might be biased toward domestic security measures. In both cases, to obtain the approval of their colleagues in those offices, this systematic bias might need to be pursued, even if it somewhat undermines the kind of purely middle-level approach that might keep the civil service lawyer relevant across presidential administrations. This means that civil service lawyers will move in response to their political superiors, but only incompletely.

These ideological incentives complicate the incentives attributed to civil service lawyers in more recent studies of these lawyers. Merrill has argued that civil service lawyers — whom he calls “tenured” lawyers — have an incentive to be “loyal to the presidency.”<sup>100</sup> But an

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<sup>97</sup> George C. Edwards III, *Why Not The Best? The Loyalty-Competence Trade-Off in Presidential Appointments* (unpublished manuscript), available at [http://www-polisci.tamu.edu/upload\\_images/0/4/Why%20Not%20the%20Best%20RecentPapers.pdf](http://www-polisci.tamu.edu/upload_images/0/4/Why%20Not%20the%20Best%20RecentPapers.pdf).

<sup>98</sup> See, e.g., B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMICS* 29–31 (1994); Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197 (1982).

<sup>99</sup> See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 561 (2003) (defining burrowing as selecting a “particular . . . person . . . [and] mak[ing] [them] relatively durable . . . in anticipation of a presidential transition”).

<sup>100</sup> Merrill, *supra* note 10, at 94 (“[T]he 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.”).

ideological incentive in an executive branch legal position does not guarantee that the civil service lawyer will be loyal to the presidency more generally. The civil service lawyer might have been hired and have accepted an executive branch legal position because of a skepticism about presidential power (a privacy officer in DHS or a lawyer in the Inspector General's Office at the Department of Justice, for instance).

More often, though, being "loyal to the presidency" can be hard to define when different parts of the executive branch disagree on legal positions. The Office of the Legal Adviser in the Department of State serves as a "defender of international law."<sup>101</sup> A lawyer in this office might support a broad interpretation of the Alien Tort Statute (ATS),<sup>102</sup> even though the Department of Justice might support an alternative ATS interpretation to minimize lawsuits in federal courts against the United States. Being loyal to the presidency means something different if it means being loyal to the Department of State or being loyal to the Department of Justice.

Merrill might see civil service lawyers as strategically pursuing longer-term institutional goals tied to the executive branch in its entirety, but there are still many who see the government lawyer as essentially neutral and technocratic.<sup>103</sup> Ackerman and Morrison might disagree about how much OLC's and WHC's commitment to legal principle has been compromised, but both seem to imagine a world that either does or could exist where those lawyers would be free of politics and therefore committed to legal principle. Being exactly neutral is difficult for the civil service lawyers when there are incentives towards threading the needle between the different parties and also supporting the basic legal agenda of their executive branch legal office.

*C. The Distribution of Civil Service Lawyers in the Executive Branch: How Most Offices Differ from OLC and WHC*

The dynamics between political lawyers and civil service lawyers — and thus the kind of executive branch legal office that results — will vary, as argued before, based on the proportion of political lawyers to civil service lawyers. The fewer the political lawyers, the

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<sup>101</sup> Harold Hongju Koh, *The State Department Legal Adviser's Office: Eight Decades in Peace and War*, 100 GEO. L.J. 1747, 1751 (2012).

<sup>102</sup> 28 U.S.C. § 1350 (2006).

<sup>103</sup> See H.W. Perry, Jr., *United States Attorneys — Whom Shall They Serve?*, LAW & CONTEMP. PROBS., Winter 1998, at 129, 131 ("Although arguments for a truly 'independent' Justice Department peaked after Watergate, the concept of the apolitical government lawyer remains an often expressed ideal."); Pillard, *supra* note 8, at 703 (describing career lawyers as having "foster[ed] within their own legal cultures a distinction between politics and law").

less able they are to influence and control civil service lawyers. And since political lawyers face different incentives than civil service lawyers, we can surmise that the office will be quite different as a result of different proportions.

The overwhelming majority of executive branch legal offices have a quite different proportion of political lawyers than OLC and WHC. The Office of the Solicitor General (SG), for instance, is quite different than OLC. The SG's Office for most of its history had just one political appointee and now has two.<sup>104</sup> As Ackerman notes, this is quite different from OLC and WHC.<sup>105</sup>

The Office of the Legal Adviser at the State Department, perhaps an equally prestigious executive branch legal office, has one presidential appointment out of approximately 175 lawyers, and usually around one special assistant.<sup>106</sup> That political appointee is usually not someone with the kind of political profile of the White House Counsel or the Assistant Attorney General in charge of OLC.<sup>107</sup> The conflict during the Bush Administration about the torture memorandum featured figures like David Addington and John Yoo disagreeing with relatively moderate, establishment lawyers like William H. Taft,<sup>108</sup> the head of the Legal Adviser's Office during President Bush's first term. In the earlier and middle twentieth century, Green Hackworth served as Legal Adviser during one Republican Administration and two Democratic Administrations.<sup>109</sup>

With so many civil service lawyers in the office, "[t]he heart and soul of the office has never been the politically appointed lawyers who have served at the Secretary of State's right hand."<sup>110</sup> The other lawyers in the office stay for very long durations. While most lawyers at OLC do not stay for more than a few years,<sup>111</sup> as of last year, all of the deputies in the Legal Adviser's Office had been in the office for longer than fifteen years.<sup>112</sup> When civil service lawyers from the Legal Adviser's Office do leave, they often tend to go to less political positions like ambassadorial positions.<sup>113</sup>

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<sup>104</sup> See Merrill, *supra* note 10, at 90–91.

<sup>105</sup> Ackerman, *Lost*, *supra* note 2, at 16 (“There was a time, not so long ago, when the OLC resembled today’s Solicitor General’s office in its personnel.”).

<sup>106</sup> See STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 110TH CONG., POLICY AND SUPPORTING POSITIONS 110 (Comm. Print 2008).

<sup>107</sup> See David Fontana, *A New Kind of Adviser*, NEW REPUBLIC (May 6, 2009, 12:00 AM), <http://www.npr.com/article/politics/new-kind-adviser>.

<sup>108</sup> See R. Jeffrey Smith, *Lawyer for State Dept. Disputed Detainee Memo*, WASH. POST, June 24, 2004, at A7.

<sup>109</sup> See Koh, *supra* note 101, at 1749.

<sup>110</sup> *Id.*

<sup>111</sup> See Ackerman, *Lost*, *supra* note 2, at 16.

<sup>112</sup> See Koh, *supra* note 101, at 1749.

<sup>113</sup> See *id.* at 1749 n.4, 1759 n.40.

The situation in other legal offices in the executive branch is much more like that in the State Department than at OLC or WHC. The Treasury Department has recently had several important legal tasks, including drafting key terms of the bailout of the banks and the stimulus package. The General Counsel's Office in Treasury has approximately 400 lawyers, and the General Counsel supervises a total team of nearly 2,000 lawyers.<sup>114</sup> That office has fewer political appointees than WHC or OLC, and even the politically appointed General Counsel has traditionally been a relatively nonpolitical figure. The current General Counsel, George Madison, does not have a very political background, and is not a major contributor to recent political campaigns.<sup>115</sup> Other lawyers in the General Counsel's Office share this biography.<sup>116</sup>

Other counsel offices have similar dynamics. Morrison writes that these other offices are "orders of magnitude" larger than offices like OLC and WHC.<sup>117</sup> The Department of Health and Human Services (HHS) has "over 400 attorneys."<sup>118</sup> The Defense Department employs about 10,000 part-time or full-time lawyers.<sup>119</sup> Both departments have a personnel situation more similar to Treasury than to OLC or WHC.

#### IV. HOW CIVIL SERVICE LAWYERS MATTER

Civil service lawyers face a different series of incentives than the political lawyers that Ackerman and Morrison foreground, but Ackerman and Morrison might be right to ignore or minimize civil service lawyers if these lawyers are as inconsequential as their accounts make these lawyers seem. After all, political lawyers are the bosses of civil service lawyers.<sup>120</sup> With the greater "layering" of political appointees on top of civil servants as a means of presidential control over bureaucracy, this has become even truer over the past generation.<sup>121</sup>

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<sup>114</sup> *General Counsel*, U.S. DEP'T TREASURY, <http://www.treasury.gov/about/organizational-structure/offices/Pages/General-Counsel.aspx> (last updated Oct. 24, 2011).

<sup>115</sup> See *George W. Madison*, WASH. POST, [http://www.washingtonpost.com/politics/george-w-madison/gIQA5mkQMP\\_topic.html](http://www.washingtonpost.com/politics/george-w-madison/gIQA5mkQMP_topic.html) (last visited Oct. 22, 2012).

<sup>116</sup> See *Lawyers in the General Counsel's Office at the Department of Treasury* (on file with the Harvard Law School Library).

<sup>117</sup> Morrison, *Libva, supra* note 2, at 71 n.23.

<sup>118</sup> *Office of the General Counsel (OGC)*, U.S. DEP'T HEALTH & HUM. SERVICES, <http://www.hhs.gov/ogc> (last visited Oct. 22, 2012).

<sup>119</sup> *Office of the Secretary of Defense Honors Legal Internship Program*, U.S. DEP'T DEF. OFF. GEN. COUNS., <http://www.dod.gov/dodgc/contact.html> (last visited Oct. 22, 2012).

<sup>120</sup> See Wood & Waterman, *supra* note 68, at 802 ("[T]he relationship between elected leaders and nonelective bureaucrats is hierarchical. Bureaucratic agents are bound by contract to serve democratic principals.")

<sup>121</sup> See PAUL C. LIGHT, THICKENING GOVERNMENT (1995) (highlighting the "thickening" of the federal government with more political appointees).

There are at least two reasons why civil service lawyers are not just different from political lawyers, but why they matter as well and therefore deserve something like the kind of attention that OLC and WHC receive. First, the vast array of legal — even constitutional — issues that the executive branch must handle are far more numerous than the political lawyers can handle, and so on many issues, civil service lawyers are functionally and/or formally the final actor in the executive branch. Second, even when a legal issue does reach the political lawyers, it usually arrives on their desk after civil service lawyers have already framed the issue in important ways, and it is difficult to diverge from these civil service framings.

*A. The Finality of Civil Service Legalism*

Civil service lawyers have the final word on executive branch law in a large number of situations. As Morrison notes, there are very few legal issues that *must* be decided by OLC.<sup>122</sup> The President does not have the kind of direct interest in many executive branch legal issues warranting the involvement of WHC.

Civil service lawyers have the final word partly because they simply outnumber political lawyers. The offices with more political lawyers (like OLC, WHC, and OLP) combined have around one hundred total lawyers in those offices. There are several thousand political appointees in the entire executive branch, surely only some of whom (outside OLC, WHC, and OLP) are politically appointed lawyers. There are between 20,000 and 30,000 total lawyers in the executive branch. The 100 plus political lawyers cannot match the volume of output that these tens of thousands of other lawyers produce, even if political lawyers are reviewing civil service actions briefly as a final matter.

To be sure, much if not most of what civil service lawyers do on a daily basis might be prosaic and trivial, and much if not most of what political lawyers do on a daily basis might be stimulating and consequential. But neither of these rules is unalterable and permanent. There are more stimulating and consequential matters in the executive branch than one hundred plus lawyers can handle, and so inevitably — even if unintentionally — sometimes these matters will fall down to the level of the civil service lawyers.

In addition to numbers, part of the reason why civil service lawyers will be dealing with consequential issues is that political lawyers might

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<sup>122</sup> Morrison, *supra* note 10, at 1460 (“With a few exceptions, there is no formal requirement that legal questions within the Executive Branch be submitted to OLC.”); Morrison, *Libya*, *supra* note 2, at 67 (“OLC does not address every legal question arising within the executive branch, nor could it. Modern government is vast and diverse. Agencies . . . have their own general counsel’s offices capable of answering many of the issues that arise . . .”).

not even be aware that such consequential issues exist. In this regard, we can think of political lawyers supervising civil service lawyers as using a “fire alarm” system.<sup>123</sup> OLC formally learns of important legal issues when these issues are referred to them, and WHC more informally. Sometimes these issues will be spotted even before executive branch legal work begins on them (how to close Guantanamo Bay, for instance, was an issue with which WHC was involved from the beginning).<sup>124</sup> But sometimes there will be issues that WHC and OLC neither know in advance to be important nor hear a fire alarm sounded to alert them of the importance.

These are potential imperfections of the system, but civil service lawyers handle important legal issues in some areas by design rather than accident, and often rather than rarely. It is the case that “[m]any other executive branch lawyers . . . routinely engage in thoughtful constitutional analyses [and] . . . [are] staffed largely with career lawyers whose principal credentials are their legal skills.”<sup>125</sup>

The SG’s office is one of the “principal constitutional interpreters for the executive branch”<sup>126</sup> because the SG’s office represents the government before the Supreme Court and also supervises all appeals in lower federal courts.<sup>127</sup> In the litigation context, in the past year the executive branch lawyers representing the President before the Supreme Court were more often civil service lawyers than political lawyers.<sup>128</sup> The Civil Appellate Office in the Justice Department, which includes the primary lawyers representing the federal government in civil appeals,<sup>129</sup> has only a single political lawyer running this office, and several dozen civil service lawyers. At the lower court level, it can even be the case that the Justice Department does not handle the litigation, and other agencies — with their greater number of civil service lawyers — handle the litigation.<sup>130</sup>

Ackerman’s concern about institutional conditions making OLC and WHC lawless is a “multi-dimensional argument.”<sup>131</sup> But this ar-

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<sup>123</sup> See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166–67 (1984) (describing “fire alarm” oversight as involving irregular reporting of problems rather than perpetual monitoring).

<sup>124</sup> See Anne E. Kornblut & Dafna Linzer, *White House Regroups on Guantanamo*, WASH. POST, Sept. 25, 2009, at A1.

<sup>125</sup> Pillard, *supra* note 8, at 703.

<sup>126</sup> *Id.* at 682.

<sup>127</sup> 28 C.F.R. § 0.20 (2011).

<sup>128</sup> *Oral Arguments Advocates Stat Pack*, SCOTUSBLOG (May 31, 2012), [http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB\\_advocates\\_053112.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_advocates_053112.pdf).

<sup>129</sup> See *Appellate Staff*, U.S. DEP’T JUST. [http://www.justice.gov/civil/appellate/appellate\\_home.html](http://www.justice.gov/civil/appellate/appellate_home.html) (last visited Oct. 22, 2012).

<sup>130</sup> See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 488 (2008).

<sup>131</sup> Ackerman, *Lost*, *supra* note 2, at 14.

gument still assumes that civil service employees — presumably including lawyers — are either political or subject to the dictates of those who are political. These are civil service lawyers who are different, and who have final authority in some number of executive branch legal disputes.

### B. *The Framing of Civil Service Legalism*

Civil service lawyers also matter because even when an issue reaches the political lawyers, the work that the civil service lawyer has done on the issue will frame — and therefore affect — the way that the political lawyer handles the issue. In many instances, too, there will be a political or even legal cost to be paid for departing from this framing.

The notion of “framing” — that the way that an issue is presented to people can affect how they resolve the issue — is a generally accepted psychological phenomenon.<sup>132</sup> It has also been proven consequential in many legal situations.<sup>133</sup> Political lawyers would be subject to framing effects whenever they receive an issue first framed by civil service lawyers, but executive branch legal offices — and OLC and WHC in particular — are designed in a way that accentuates this civil service framing effect. OLC generally intervenes only at the request of other parts of the executive branch already discussing — and thereby framing — the legal issue.<sup>134</sup> This request usually comes in writing,<sup>135</sup> with legal opinions presented in the best light possible by the requesting party.<sup>136</sup> Because this facilitates persuasive advocacy on the issue before OLC, the framing effects can be more substantial.<sup>137</sup> Likewise, most of the time WHC becomes involved only after an issue trickles its way through the executive branch up to WHC (except for the occasional large issue that it will study preemptively).<sup>138</sup>

Also, on some occasions, these de facto “appeals” to the political lawyers will be reviewed deferentially, with the political lawyers defer-

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<sup>132</sup> See, e.g., Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981).

<sup>133</sup> See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 782–83 & nn. 26–27 (2001).

<sup>134</sup> See Pillard, *supra* note 8, at 737.

<sup>135</sup> See Morrison, *Alarmism*, *supra* note 2, at 1710.

<sup>136</sup> See Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 514 (1993) (“OLC refrains from rendering opinions regarding matters in litigation or to requesting agencies that have not themselves first provided legal opinions setting forth their own positions on contested interagency matters.”).

<sup>137</sup> See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2339 (2006).

<sup>138</sup> See Borrelli, Hult & Kassop, *supra* note 8, at 562 (“[T]he most essential task a counsel can perform for a president is to act as an early warning system for potential legal trouble spots before they erupt.”).

ring to the civil service lawyers. If there is one agency or department's counsel's office that regularly deals with an issue, even the political lawyers in another counsel's office often defer to the civil service lawyer's expertise in the first office.<sup>139</sup> Courts might also defer to the part of the executive branch perceived to be more expert.<sup>140</sup> There is evidence that this deference exists even when the political lawyers have very different positions than the civil service lawyers, if only because the civil service lawyers can creatively argue an issue to convince the political lawyer.<sup>141</sup> This *Chevron*-style deference not only exists when a political lawyer views the work of a civil service lawyer, but also sometimes results when an external actor views the work of the civil service lawyer. There is a large literature highlighting how the Supreme Court trusts and is influenced by the SG's Office, for instance.<sup>142</sup>

This deference, whether informal or formal, can often exist because of the political price the political lawyer pays for ignoring the advice of the civil servant. Ackerman and Morrison both see OLC approval as providing legitimization,<sup>143</sup> but the same is often true of civil service lawyer decisions. This was a part of the criticism of how President Obama started military activities in Libya — that he had circumvented the normal executive branch channels and listened too much to WHC.<sup>144</sup> Morrison sees OLC as distinctively having the legitimacy created by long-standing tradition, but other legal offices in the executive branch do as well, and avoiding them might come with its own legitimacy cost. The Legal Adviser's Office has been in existence for over eighty years.<sup>145</sup> The Solicitor's Office in the Department of Labor writes opinions that are similar to OLC opinions.<sup>146</sup> Avoiding them might have legitimacy costs as well.

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<sup>139</sup> See Marty Lederman, *Understanding the OLC Torture Memos (Part I)*, BALKANIZATION (Jan. 7, 2005, 9:15 AM), <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.html>.

<sup>140</sup> See Katyal, *supra* note 137, at 2340.

<sup>141</sup> See GOLDEN, *supra* note 52, at 52 (calling this “voice by argumentation” and providing examples of its existence in the Civil Rights Division of the Reagan Justice Department).

<sup>142</sup> For a good empirical overview, see Ryan C. Black & Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the U.S. Supreme Court*, 64 POL. RES. Q. 765 (2011). See also Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 473 n.79 (1993) (“The office of the Solicitor General is widely believed to be an extremely effective advocate that possesses a substantial reservoir of credibility in the Supreme Court.”).

<sup>143</sup> See Morrison, *Libya*, *supra* note 2, at 63.

<sup>144</sup> See Michael Isikoff, *On Libya, President Obama Evaded Rules on Legal Disputes*, *Scholars Say*, NBC NEWS (June 21, 2011, 6:09 A.M.), [http://www.msnbc.msn.com/id/43474045/ns/politicswhite\\_house/t/libya-president-obama-evaded-rules-legal-disputes-scholars-say](http://www.msnbc.msn.com/id/43474045/ns/politicswhite_house/t/libya-president-obama-evaded-rules-legal-disputes-scholars-say).

<sup>145</sup> See Koh, *supra* note 101, at 1748.

<sup>146</sup> See *Solicitor's Opinions*, U.S. DEP'T INTERIOR, <http://www.doi.gov/solicitor/opinions.html> (last visited Oct. 22, 2012).

## V. THE IMPLICATIONS OF CIVIL SERVICE LEGALISM

A. *Separation of Parties, Powers, and Permanent People:  
Civil Service Lawyers as Constraints*

Professors Daryl Levinson and Richard Pildes have argued that Madisonian notions of separation of powers do not translate to our current constitutional system, because political actors have loyalty to their party more than to their branch of government.<sup>147</sup> Levinson and Pildes argue, for instance, that members of Congress do not guard the interests of Congress so much as guard the interests of the political party they represent in Congress.<sup>148</sup> This particularly causes problems during periods of unified government.<sup>149</sup> During periods of divided government, the branches will constrain one another, not out of a sense of institutional loyalty but out of partisan interest.<sup>150</sup> During unified government, though, partisan interest drives collusion between the branches, thus undermining the separation of powers and “ambition counteracting ambition.”<sup>151</sup>

Civil service legalism complicates this account of separation of parties. Levinson and Pildes recognize that civil service employees could constrain partisan actors even when these partisan actors control all branches of government. The problem, according to Levinson and Pildes, is that these bureaucrats are not “politically independent”<sup>152</sup> and so cannot exercise the kind of technical judgment that might be warranted.<sup>153</sup> With more independence — such as bureaucratic life tenure — more constraint would be possible.<sup>154</sup>

Civil service legalism suggests two problems with this analysis. First and foremost is that the analysis might overstate the pitfalls of unified government and its differences from divided government. Levinson and Pildes argue that “the degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party.”<sup>155</sup> Civil service legalism suggests that there might be constraints via civil service law-

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<sup>147</sup> See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

<sup>148</sup> See *id.* at 2321–23.

<sup>149</sup> See *id.* at 2330–32.

<sup>150</sup> See *id.*

<sup>151</sup> THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

<sup>152</sup> Levinson & Pildes, *supra* note 147, at 2378.

<sup>153</sup> See *id.* at 2379 (“Politicization of the bureaucracy in the post-World War II era . . . has gradually eroded the capacity of bureaucratic institutions to check and balance unified party government.”).

<sup>154</sup> See *id.* at 2378.

<sup>155</sup> *Id.* at 2315.

yers even during unified government. Civil service lawyers have an incentive to play it down the middle, and this moderating influence might constrain a more liberal or more conservative administration by pushing them toward the center.

Ideology as well as independence are parts of the constraint. Civil service lawyers have certain ideological reasons leading to their selection for and acceptance of legal positions in the executive branch. Even given the incentives to play it down the middle, these ideological preferences can manifest themselves in a way that constrains political actors. For instance, during a Republican Administration, the civil service lawyers in the EPA might resist a rollback of environmental protection initiatives. During a Democratic Administration, the civil service lawyers in the Defense Department might resist reducing the jurisdiction of military tribunals.

The separation of parties does affect civil service legalism in part because political actors are less likely to delegate power to actors whom they consider to be ideologically dissimilar, whether these actors are a whole other branch or a part of a branch of government.<sup>156</sup> If the party in power in Congress distrusts a particular group of civil service lawyers, it might be less inclined to delegate to them. For instance, perhaps a conservative Congress would not want to delegate to the liberal civil service lawyers in the Civil Rights Division of the Justice Department. Delegation, though, does not map perfectly onto unified versus divided government. If there is a unified government controlled by the Democratic Party, it might delegate quite a bit more to the Civil Rights Division.

Second, the separation of parties critique sees a bureaucratic constraint as a “politically independent” one, when in fact civil service lawyers have their own political agendas and preferences. This notion of the civil service as a neutral constraint persists in our system,<sup>157</sup> and Ackerman and Morrison also seem to be debating whether OLC and WHC are “independent.”<sup>158</sup> But, as indicated before, civil service lawyers do not seek solely the brooding omnipresence of the law. They have other incentives as well.

### B. Strategic Legal Delegations

Another subject of much discussion about the executive branch is the decision about when and to whom to delegate power within the executive branch. Delegation within the executive branch is usually

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<sup>156</sup> See DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS* 121–62 (1999).

<sup>157</sup> See Perry, *supra* note 103, at 131.

<sup>158</sup> Morrison faults the separation of parties argument for failing to consider that Congress stands up for itself, see Morrison, *Alarmism*, *supra* note 2, at 1716 n.108, but Morrison does not discuss that civil servants stand up for themselves as well.

framed as a loyalty (political appointee) versus competence (civil service appointee) trade-off, because political appointees are assumed to “reduce overall bureaucratic performance.”<sup>159</sup> But civil service legalism complicates this story as well.

On the one hand, the decision to delegate to a political lawyer might produce as much loyalty as the decision to delegate to a civil service lawyer. Perhaps if the President’s best friend is the White House Counsel, then the President can count on the agreement of the White House Counsel with the President’s preferred legal position. But because of ideological selection effects, the same result might come from an agency or department where the civil service lawyers are already prone to agree with the President’s position on the issue. Maybe, for instance, the White House Counsel will agree that the President may engage in diplomatic negotiations with Iran before implementing punitive and provocative congressional sanctions against Iran; but maybe the State Department lawyers are inclined to agree as well.

The loyalty purchased by a delegation to a political lawyer can also come at a cost: the perception of bias. Consider, for instance, the negative response Attorney General Eric Holder received in Congress for asking two United States Attorneys that President Obama had appointed to their positions to lead the investigation into national security leaks.<sup>160</sup> Look at the reaction that followed President Obama’s historically greater reliance on his White House Counsel to decide whether he violated the War Powers Resolution in the Libya conflict.<sup>161</sup> These delegations to political lawyers might have purchased loyalty, but might have come at the cost of a damaging perception of bias.

On the other hand, the decision to delegate to civil service lawyers does not necessarily ensure competence. A President who wants aggressively to push an issue that might antagonize civil service lawyers ideologically biased in one office might be viewed with skepticism. A President who wants aggressively to push an issue that antagonizes the civil service lawyers in one department might then find his orders ignored more if he delegates to that department than if he delegates to another agency or department legal office.

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<sup>159</sup> David E. Lewis, *Testing Pendleton’s Premise: Do Political Appointees Make Worse Bureaucrats?*, 69 J. POL. 1073, 1074, 1084–86 (2007). For further empirical validation of this statement, see Patrick J. Wolf, *A Case Survey of Bureaucratic Effectiveness in U.S. Cabinet Agencies: Preliminary Results*, 3 J. PUB. ADMIN. RES. & THEORY 161 (1993).

<sup>160</sup> See Sari Horwitz & David Nakamura, *Attorney General Holder Names Attorneys to Investigate Leaks*, WASH. POST (June 8, 2012), [http://www.washingtonpost.com/politics/attorney-general-eric-holder-names-attorneys-to-investigate-leaks/2012/06/08/gJQANhGiOV\\_story.html](http://www.washingtonpost.com/politics/attorney-general-eric-holder-names-attorneys-to-investigate-leaks/2012/06/08/gJQANhGiOV_story.html).

<sup>161</sup> See Morrison, *Libya*, *supra* note 2, at 74.

Presidential delegations to civil service lawyers as opposed to political lawyers might also be seen as attempts to signal credibility.<sup>162</sup> Just like a President can achieve this by delegating to the opposing party, or to an independent commission, a presidential delegation to civil service lawyers might signal the same intentions. But the picture of civil service lawyers painted earlier suggests that whether this is an accurate perception of the signal depends on which civil service lawyers or which legal office benefits from the delegation. Is a delegation by President Obama to the Civil Rights Division to be viewed the same way as a delegation by President Obama to the Defense Department's Office of General Counsel? The ideological motivations of civil service lawyers in these offices are different. So too, the number of political lawyers relative to civil service lawyers might help evaluate the credibility of the signal — if there are a lot of political appointees, we know that the President has already invested more political resources in bending that office to his political will.<sup>163</sup>

#### CONCLUSION

The executive branch of the federal government of the United States is a massive institution. And the news stories we read every day related to the executive branch involve the people we voted for and the names we know. It is their actions, their misdeeds, and their successes that fuel the political — and even the legal — debate. This drives the discussion between Ackerman and Morrison: to understand law in the executive branch, we need to know the actions of and incentives facing Jay Bybee or Walter Dellinger.

The lawyers in the headlines matter, but so do the thousands and thousands of lawyers who do not make the headlines as often. In order to understand a massive institution, it is important to understand the massive numbers of individuals who work for it. OLC and WHC, then, provide a partial and important, but incomplete, picture of executive branch legalism. Civil service lawyers are crucial to understanding executive legalism. It is their preferences, their incentives, and their behavior that will shape executive branch legalism in the future just as much as the several dozen lawyers working in OLC and WHC.

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<sup>162</sup> See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865 (2007) (analyzing and cataloging the strategies a President can use to signal credibility).

<sup>163</sup> See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* chs. 3–5 (2008).