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# The Role of Civil Service Attorneys and Political Appointees in Making Policy in the Civil Rights Division of the U.S. Department of Justice\*

*Brian K. Landsberg\*\**

In 1957, Attorney General William P. Rogers created the Civil Rights Division of the United States Department of Justice.<sup>1</sup> He did so in response to the enactment of the Civil Rights Act of 1957, the first federal civil rights law since Reconstruction. During the next three-and-a-half decades, Congress enacted numerous additional laws forbidding discrimination and conferred on the Department of Justice authority to bring enforcement actions in federal court.<sup>2</sup> Although the Constitution and the laws of the United States are clear in forbidding various forms of discrimination, numerous issues of legal interpretation have been left, in the first instance, to the courts. This has thrust the Civil Rights Division into the policy arena—not only setting priorities, but also selecting legal positions on a variety of unsettled issues. These issues have ranged from the development of remedies for violations of voting rights to busing and affirmative action in employment.

During my twenty-two years as a civil servant in the Civil Rights Division, I observed the process of policy making from a variety of vantage points—as a trial attorney, member of a planning unit, head of the Education Section and head of the Appellate Section. While the Civil Rights Division's responsibilities differ from those of other litigating divisions, I believe that common issues affect policy making in all the divisions. This essay focuses on the Civil Rights Division, the fount of many of the policy decisions that have faced the Justice Department over the past

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\* This essay expands on some ideas which appeared in Brian K. Landsberg, *Civil Rights, After Meese*, Nat'l L.J., Sept. 12, 1988, at 13; Brian K. Landsberg, *Book Review*, 6 *Const. Commentary* 165 (1989) (reviewing Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (1987)).

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<sup>1</sup> Department of Justice Order No. 155-57, 22 Fed. Reg. 10310 (1957).

<sup>2</sup> A very helpful, albeit somewhat dated, summary of the Department's authority appears in John Oakley, *The United States as Participant in Public Interest Litigation: Recent Developments*, 13 *U.C. Davis L. Rev.* 247, 249-59 (1980).

thirty-five years and the Division most familiar to me.

My theses are simple. Both civil service attorneys and political appointees influence policy. Wise policy requires cooperation between the two groups. When one group shuts itself out from influence by the other, the Department's policy suffers. In this essay, I attempt to begin consideration of these issues and some corollary points, as well as raise questions for further study.

First, I would like to present some basic descriptive information about the two groups in order to set the foundation for understanding their relative roles. Two obvious distinguishing features are their method of selection and their tenure. The Attorney General, Solicitor General and Assistant Attorney General for Civil Rights are appointed by the President with the advice and consent of the Senate. They may select a small number of non-career assistants. In contrast, the members of the civil service are selected through a facially non-political process. While attorneys do not take a civil service examination, the law requires that they be hired based solely on merit, without regard for political affiliation.<sup>3</sup> The tenure of most political appointees will be no longer than that of the President who appointed them; typically it is shorter. Since the creation of the Civil Rights Division of the Justice Department in 1957, eight persons have served as President of the United States and fifteen have served as Attorney General.<sup>4</sup> In contrast to this high turnover of political appointees, civil service lawyers serve as a source of stability. Although hundreds of civil service lawyers have passed through the Division during the past thirty-five years, careers of twenty or thirty years are not uncommon among this cadre.

Many have written about the Civil Rights Division and its political leadership. However, most studies of policy making in civil rights law enforcement have paid scant attention to the civil service lawyer. Some mention of the civil servant accompanies commentaries on the occasional cause celebre, such as the delay of desegregation in Mississippi in 1969<sup>5</sup> or the volte-face in the *Bob Jones University* case in 1981.<sup>6</sup> Also, it is not uncommon for political

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<sup>3</sup> 5 U.S.C.A. §§ 2301(b)(1)-(2), 2302(b)(E) (West Supp. 1992).

<sup>4</sup> See Justice Management Division, U.S. Dept. of Justice, 200th Anniversary of the Office of the Attorney General ii (1990) (The fifteen Attorneys General include those listed therein, from William Rogers to Dick Thornburgh, plus President Bush's Attorney General, William Barr, who is not listed.).

<sup>5</sup> See Gary Orfield, *Must We Bus?* 326 (1978).

<sup>6</sup> See Philip Heymann & Lance Liebman, *The Social Responsibilities of Lawyers* 136 (1988); see also Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* 51-60 (1987).

appointees to aim generalized barbs or praise at civil servants.<sup>7</sup> I believe, however, that students of policy making in the Department of Justice should conduct a more focused and thorough examination of the role and influence of civil servants. This essay suggests a few areas of inquiry for further study.

My description of civil service lawyers is not based on an examination of the records of the Division, although such an examination might be revealing. Rather, I rely on personal impressions formed during my twenty-two years there. It is sometimes said that familiarity breeds contempt. In my case, however, familiarity with the Civil Rights Division lawyers has bred respect.<sup>8</sup> The typical lawyer in the Division was a high achiever in law school, and most were hired under the Attorney General's Honors Program or from judicial clerkships. Most were attracted to the Division because of their commitment to the laws which it enforces and because of the Division's general reputation as a good place to gain experience in complex litigation. Many leave after a few years, generally moving on to attractive jobs as litigators with law firms or as United States Attorneys. One can count among the alumni of the Civil Rights Division several federal judges, numerous law professors and many leaders of the bar. But another large group makes the Civil Rights Division their career. They do so not because they lack mobility, but because a variety of factors make their jobs desirable. Chief among those factors is the feeling that their work promotes justice.<sup>9</sup>

The Civil Rights Division's type of work—litigation in federal court—also tends to mold those who do it. Early in the Division's

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<sup>7</sup> An egregious example of such a barb appears in Charles Fried's account of his tenure as Solicitor General, where he states that the career lawyers in the Civil Rights Division "sabotaged [Assistant Attorney General William Bradford Reynolds'] rightful claim to leadership in every way they could." Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 41 (1991). To his credit, Professor Fried has since expressed regret, acknowledging that he "saw little with [his] own eyes that would [justify his remark]." Letter from Charles Fried to Brian Landsberg (Aug. 3, 1991) (letter on file with author).

<sup>8</sup> Inevitably, in a group of 180 or so lawyers (the size of the Civil Rights Division in recent years), one may find an occasional drone or ideologue, but they are the rare exception in the Division and their influence has been negligible.

<sup>9</sup> Jonathan Yardley describes my former colleague, the late Walter W. Barnett, thus:

Walter was that genuine and invaluable rarity, a true public servant. He entered government not to enrich his contacts and then spin through the revolving door into lucrative private practice, but to work for a cause in which he believed and for people whom he felt had been deprived. [Walter was] a wholly serious man, devoted to his work and convinced of its importance. . . .

history it became apparent that success in civil rights litigation in the deep South required extraordinary lawyering. Because many trial court judges were unsympathetic, every case had to be tried with the goal of providing compelling grounds for reversal by a more balanced appellate court.<sup>10</sup> Further, Assistant Attorney General John Doar stressed that Division attorneys must be the epitome of rectangular rectitude; turning around the famous Holmes phrase,<sup>11</sup> he required that government attorneys always turn square corners. From these circumstances grew a tradition of thoroughness and care that persists to the present day.<sup>12</sup> That tradition disfavors knee-jerk responses to issues. Arthur Schlesinger, Jr. once described the difference between lawyers in the Civil Rights Commission and those in the Civil Rights Division: "One was an agency of recommendation and the other of action."<sup>13</sup> Lawyers who began with similar backgrounds diverged in their attitudes, depending on whether their role was gadfly or litigator. In short, the Division has attracted employees looking for more than just another job, people committed to equality under the law and to litigation as the engine of securing that right.

This configuration of the Division's enforcement staff does not present the image of a runaway bureaucracy, totally out of touch with reality. Nonetheless, some problems are inherent. First, the job of the law enforcer is to find violations of the law and correct them. Zeal to uncover wrongdoing may lead to a lack of rigor in critically evaluating cases and positions. Second, the civil service staff is hired by and serves under political appointees, each of whom may seek to mold that staff into the image most compatible with the policy views of the President. This may lead to a real or

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<sup>10</sup> "The Division was not prepared to take the terrible risk of losing a single case because of lack of proof. We faced tough judges. We wanted the proof to be so overwhelming so as to lock up the trial judge . . . and to convince the country as well." Arthur Schlesinger, Jr., Robert Kennedy and His Times 301 (1978) (quoting John Doar & Dorothy Landsberg, *The Performance of the FBI 905-06* (1971)).

<sup>11</sup> See *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920) ("Men must turn square corners when they deal with the Government."); see also John M. Maguire & Philip Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 Harv. L. Rev. 1281, 1299 (1935) ("[I]t is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.").

<sup>12</sup> Most recently, President Bush recognized this tradition in his executive order concerning civil justice reform:

[T]he United States sets an example for private litigation by adhering to higher standards than those required by the rules of procedure in the conduct of Government litigation in Federal court, and can continue to do so without impairing the effectiveness of its litigation efforts.

Executive Order 12,778, 56 Fed. Reg. 55,195 (1991).

<sup>13</sup> Victor S. Navasky, *Kennedy Justice* 109 (1971).

perceived lack of responsiveness to new leadership when administrations change. Third, some civil service staff may develop a degree of expertise and a commitment to particular law enforcement policies that can overwhelm a new leader. Fourth, civil service staff may form alliances with outside groups concerned with the laws that the staff enforces.<sup>14</sup> Fifth, "there are significant pressures to place decisions beyond the control—even beyond the consideration—of policy-making officials by identifying policy questions as questions of law and therefore as peculiarly within the province of the courts."<sup>15</sup> Finally, we know that, over time, bureaucracies tend to ossify, lose their sense of purpose, look more to the past than to the future, and reject new ideas because they differ from what they have always done.

These characteristics are important because civil service lawyers influence policy. Policy in the Department of Justice primarily refers to litigation decisions. These include decisions to sue or not sue, defend or capitulate, settle and appeal. The litigator must also decide *how* to litigate: what facts to stress, what theories to pursue and what relief to seek. These are discretionary decisions.<sup>16</sup> The Civil Rights Division is a party or amicus in over one

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<sup>14</sup> Former Deputy Attorney General Tyler believes that:

[S]ome offices and divisions within the Department of Justice have informally affiliated with public pressure groups in our society. They feel that it is incumbent upon them in their official capacity to be in cheek-to-jowl with these groups, even to the extent of bringing them in to put on a "dog and pony show"—as it is called in Washington—on the fifth or fourth floor of the Department of Justice and sometimes even in the White House. This has happened within the civil rights sphere, the antitrust sphere, and in other offices.

Daniel J. Meador, *The President, the Attorney General, and the Department of Justice* 108 (1980). Mr. Tyler seems to have drawn this conclusion from the pattern of advocacy groups seeking an opportunity to convince him, the Attorney General or the Solicitor General of the correctness of their position. Because that position sometimes corresponded to the position of a litigating division, he assumes the advocacy group and the divisions must have been acting in concert. On the other hand, when Mr. Tyler met with other advocacy groups, whose positions conflicted with those of a litigation division, he presumably saw no such cabal. To equate similarity of position with conspiracy is illogical; to characterize advocacy group efforts to influence policy as improper "dog and pony shows," while simultaneously giving audiences to other groups with whom one is more in tune is simply improper. Mr. Tyler's position seems at odds with those of his former boss, Attorney General Edward H. Levi, who believed strongly in "government by discussion." See *Government by Discussion*, *infra* pp. 283-286.

<sup>15</sup> Ronald G. Carr, Mr. Levi at Justice, 52 U. Chi. L. Rev. 300, 307 (1985). For example, Professor Selig characterizes the Reagan administration's decision to dismiss the appeal of a school desegregation case as "inconsistent with a commitment to the rule of law." Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong?*, 1985 U. Ill. L. Rev. 785, 807.

<sup>16</sup> See Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276, 1312 (1984) ("Discretion appears within the bureaucracy as a supplement to its essentially objective functioning; discretion is added to the operation of bureaucracy in order to

thousand ongoing suits.<sup>17</sup> It brings between one hundred and two hundred new suits each year,<sup>18</sup> filing numerous briefs, motions and pleadings. This work is done primarily by the roughly one hundred eighty civil service lawyers. These lawyers are not fungible, and absent some controls litigation decisions could turn on which lawyer is assigned to the matter. The basic control is or at least should be the law itself. For example, Congress did not grant the Department of Justice carte blanche power to initiate civil rights litigation. It withheld from the Department the right to bring a civil suit seeking injunctive relief against patterns of police brutality by a police department.<sup>19</sup> It defeated a proposal to allow the Department to bring civil actions to remedy racial discrimination in jury selection.<sup>20</sup> Even where such suits are authorized, Congress has attached limiting conditions.<sup>21</sup> Finally, the civil service lawyer must follow the substantive provisions of the law as construed by the courts. Even with all these restraints, however, the Division retains tremendous flexibility, both as to its priorities and as to unsettled areas of the law.<sup>22</sup>

Non-government lawyers typically labor under the most basic restraint of all: the wishes of the client. But who is the client of the government lawyer? As a District of Columbia Bar Committee has pointed out, some argue that the government lawyer's responsibility is to the "public interest" and the client is "the people as a whole," while others argue that the client is "the entire government."<sup>23</sup> The Committee concluded, however, that "the employing agency should in normal circumstances be considered the client of the government lawyer." If the employing agency is the client, then ordinarily the lawyer will learn the client's wishes from the political appointee (here, the Attorney General and Assistant Attorney General for Civil Rights).<sup>24</sup> This shift of dis-

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make its objectivity possible. To be objective, the bureaucracy has to carry out the wishes of its constituents, but to do so it must refer to their general intentions ('maximize profits') or their specific commands ('fix prices'). Either reference requires the bureaucratic actors to use their discretion.").

<sup>17</sup> Civil Rights Division, U.S. Dept. of Justice, Case Management System Statistics Report (Oct. 16, 1992).

<sup>18</sup> *Id.*

<sup>19</sup> See *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980).

<sup>20</sup> See H.R. 14765, 89th Cong., 2d Sess. (1966).

<sup>21</sup> For example, the Department of Justice must first receive a citizen complaint before initiating a school desegregation action, 42 U.S.C. § 2000c-6(a) (1989), and the Attorney General must sign the complaint, 42 U.S.C. §§ 2000a-5(a), 2000b(a), 2000e-6(a) (1989).

<sup>22</sup> See Meador, *supra* note 14, at 28-29.

<sup>23</sup> Report by the District of Columbia Bar Special Committee on Government Lawyers and The Model Rules of Professional Conduct, 3 Wash. Law. 53, 54 (1988).

<sup>24</sup> I use the term "political appointee" in a non-pejorative sense to refer to officials nomi-

cretion from one person (the civil service lawyer) to another (the political appointee) allows democratic processes, rather than mandarins, to determine what litigation decisions promote the public interest.

Thus, we the people are the clients of the Department of Justice,<sup>25</sup> and we entrust to the Attorney General and the political appointees who serve under him control of the civil service attorneys. The political appointee must ensure that the civil service lawyers enforce the law and that they do so in a manner consistent with administration policies, to the extent possible.<sup>26</sup> Placing the responsibility here does not end the problem which a former general counsel of the Office of Management and Budget calls

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nated by the President and confirmed by the Senate. Some come from the world of politics. For example, two Assistant Attorneys General for Civil Rights came from positions as state senators (Jerris Leonard from Wisconsin and John Dunne from New York), some were lawyers in private practice who had supported the electoral winner (Harold Tyler, Burke Marshall and J. Stanley Pottinger), and some were promoted from positions as deputy assistant attorney general (John Doar, Stephen Pollak and David L. Norman). In the Division's early years, the Eisenhower, Kennedy and Johnson administrations thought the Division should maintain a neutral, disinterested, almost quasi-judicial image. None of the men chosen to head the Civil Rights Division were identified with civil rights aims before taking office. See John T. Elliff, *The United States Department of Justice and Individual Rights: 1937-62*, 546-50 (1987). Indeed, Attorney General Robert Kennedy's Director of Public Information, Ed Guthman, believes that Kennedy decided "that someone who had been in the forefront of any rights or racial cause might be handicapped by ideology or past associations in civil rights enforcement." That led to the choice of Burke Marshall, an "enlightened [Burkean] conservative, brilliant Yale lawyer," as Kennedy's Assistant Attorney General for Civil Rights. Navasky, *supra* note 13, at 162.

<sup>25</sup> Former Solicitor General Griswold states: "[M]y client was the United States. I did not regard the President of the United States as my client, though he was my ultimate boss, and my tenure was at his will." Erwin Griswold, *Ould Fields*, *New Yorker* 327 (1992). Other federal agencies are sometimes referred to as clients, but ultimate control over their litigating positions lies with the Attorney General, not the "client agency." See 28 U.S.C. § 516 (1989). Professor Selig argues that "[t]he Department's client is the law and the public interest." Selig, *supra* note 15, at 793. Both the open-ended nature of the law and the public interest, as well as their disembodied nature, argue against such a characterization.

<sup>26</sup> As Professor Burke Marshall, a former Assistant Attorney General for Civil Rights, told Congress:

[L]aw enforcement in this area [civil rights] demands policy direction. It affects the lives of millions of people and the emotions and passions of millions of others. It seems right, not wrong, to me that an administration give policy direction on such matters as busing, employment quotas, school district consolidations, and private discrimination in places of public accommodations, as much as I disagree with the policy established by the present administration in most of these areas.

Removing Politics from the Administration of Justice, 1975: Hearings on S.2803 and S.2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. 114 (1974) (statement of Burke Marshall, Deputy Dean of the Yale Law School). See also *id.* at 204 (statement of Archibald Cox, Williston Professor of Law, Harvard University, and former Special Prosecutor in the Department of Justice). But see Selig, *supra* note 14, at 793 ("Every enforcement decision the Department makes should depend solely on the relevant law and facts, and not on extraneous political or ideological considerations.").



"clientless lawyering."<sup>27</sup> Where lawyering is clientless the reins which tether most lawyers are absent—the lawyer is both the maker of policy and its advocate. Ideally, this should engender a more serious sense of care and responsibility in the law enforcement officer, but the political appointee is subject to countervailing pressures having little to do with the law.<sup>28</sup> Yet the Department of Justice must provide even-handed enforcement of the Constitution and the laws that its lawyers are sworn to uphold. Abraham Lincoln's Attorney General, Edward Bates, put it well: "[I]t is my duty, above all other ministers of State, to uphold the Law and to resist all encroachments, from whatever quarter, of mere will and power."<sup>29</sup> Although our understanding of them may evolve, the meaning of the Constitution and federal laws cannot transmogrify every four or eight years with each new President. If individual rights depended on presidential election returns, we would become a nation of men and not laws.

From the above, it is clear that both the civil service employee and the political appointee bring disadvantages to clientless lawyering. The former has no claim to represent the wishes of "we the people"; the latter may take a narrow, partisan view of those wishes. The former may be tied to the positions of the past; the latter may not be aware of the lessons of the past. One answer to this dilemma is joint decisionmaking, building on the strengths of each and on the responsibility that falls on each to execute faithfully the laws of the United States.<sup>30</sup> Other answers—raw ex-

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<sup>27</sup> Review & Outlook: The Apostate Lawyer, *Wall St. J.*, Feb. 20, 1986, at 24 (editorial) (quoting Michael Horowitz, former general counsel to the Office of Management and Budget).

<sup>28</sup> I recall a meeting in the office of President Reagan's Solicitor General, Rex Lee, early in the Administration. We were discussing the position to be taken in the government's brief in a case pending before the Supreme Court. The political appointees of another Department were arguing that our brief should reverse the position taken in the lower courts by the Carter Administration. Mr. Lee listened patiently, but seemed unpersuaded. Finally, the proponents for a changed position pulled out their trump card: "But Mr. Solicitor General, you must remember that we won the election." Fortunately, the law and the facts trumped politics, and the government's brief in that case did not reverse our prior position.

<sup>29</sup> Homer Cummings & Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* 499 (1937).

<sup>30</sup> Cf. Code of Ethics for Government Service, H. Con. Res. 175, 85th Cong., 2d Sess., 72 Stat. B12 (1958) (reprinted in 5 U.S.C.A. § 7301, note), which states:

- Any person in Government service should:
1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government Department.
  2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.

The Code also appears as an appendix to the Department of Justice's Standards of

ercise of political power or the creation of a completely apolitical Department of Justice—would magnify one or the other prong of the dilemma.

I believe that an empirical study would reveal that joint decisionmaking has been the norm in the Civil Rights Division. Of course, the Attorney General, Solicitor General and Assistant Attorney General for Civil Rights must have the final word, but normally they have done so only after consulting with civil service attorneys. By and large, the two components of the Division have recognized that both public interest and self interest dictate cooperation. The political appointee's impact on policy will be minimal unless she can enlist the aid of the career staff. Sheer volume of work, the need for expertise, and the maintenance of credibility with the courts and Congress all lead in the direction of joint decisionmaking. Moreover, even if there are disagreements about specific policies, both groups share a commitment to enforcement of the civil rights laws. The civil servant has other incentives to cooperate. Not only does the political appointee hold the upper hand on matters such as promotions and assignments, but the civil service attorney needs approval of the political appointee to file cases or briefs.

Other forces, however, lead to tension between the political leader and the civil service follower. An understanding of this relationship between political and civil service attorneys might fruitfully be advanced by examining various models of law enforcement management. In this essay, I briefly describe two polar models, fleshed out with reference to a few case histories (drawn primarily from published accounts) that demonstrate how each group responds to the tension between them. The case histories span several administrations and different phases in the development of civil rights enforcement. No administration has followed one model exclusively; the differences have been in emphasis. Other models might be considered as well.<sup>31</sup> Certainly a great deal more study and thought should be devoted to these models if we are to define the optimal relationship.<sup>32</sup>

**Government by Discussion.** Attorney General Edward H. Levi, who served under President Gerald Ford, espoused what he

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Conduct, 28 C.F.R. Part 45.

<sup>31</sup> One could contrast centralized and decentralized control; hands-on versus delegated leadership; and ad hoc versus programmed litigation decisions. One could also study the variety of organizational structures which the Division has employed over the years and their impact on policy setting.

<sup>32</sup> I hold a strong bias in favor of the first model, government by discussion.

called a "government by discussion."<sup>33</sup> In 1975, Solicitor General Robert Bork wished to file a brief with the Supreme Court urging the grant of certiorari in the Boston school desegregation case,<sup>34</sup> because he felt the busing order in that case went too far. The case was a cause celebre. Proponents and opponents of the lower court decision vigorously lobbied the Department of Justice. Bork sought the view of Assistant Attorney General Pottinger, who headed the Civil Rights Division. Pottinger opposed the filing. The Attorney General discussed the case with the President, presumably because the proposal related to the President's general policy opposing school busing. The President wanted the Department to make its own determination,<sup>35</sup> and there ensued a period of intense deliberation within the Department. This was not a case of civil servant versus political appointee; indeed, the Attorney General simply sought the advice of the Solicitor General, Assistant Attorney General for Civil Rights, and civil service attorneys such as Deputy Solicitor General Lawrence Wallace and myself (at the time, I was head of the Civil Rights Division's Appellate Section). I am sure he consulted with others, such as his special assistants, as well. I was impressed, first, by the freedom we had to speak our minds freely and, second, by the focus of all involved on the merits of the issue, rather than on the political controversy swirling around us. In the end, the Attorney General decided not to file the brief. However, the discussions ultimately led to further meetings to discuss a legislative approach. Attorney General Levi "led in the development of proposed legislation, under the direction of the President, designed to guide use of the busing remedy in school desegregation cases in order to achieve the purposes articulated in the courts' decisions while interfering as little as possible with other values . . . ."<sup>36</sup>

Attorney General Levi was not, of course, the only Attorney General to favor government by discussion. For example, Attorney General Robert F. Kennedy employed an open style of leadership, and he called on a variety of career and political appointee attorneys for their views.<sup>37</sup> Similarly, early in the tenure

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<sup>33</sup> See Carr, *supra* note 15, at 313.

<sup>34</sup> *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975).

<sup>35</sup> See Meador, *supra* 14, at 85. But see Bob Woodward & Scott Armstrong, *The Brethren* 427 (1979) ("[T]here were reports that the Ford administration would come out against busing. But when these reports were followed by more violence, the White House decided not to intervene.").

<sup>36</sup> Carr, *supra* 15, at 316. See also Orfield, *supra* note 5, at 353-54.

<sup>37</sup> See Navasky, *supra* note 13, at 99 (discussions regarding voter discrimination litigation), 297-322 (discussions regarding Department's position in reapportionment cases);

of Attorney General John Mitchell a free-flowing debate ensued as to the shape of federal school desegregation policy. Career attorneys Bob Owen and Dave Norman joined Assistant Attorney General Jerris Leonard and officials of the Department of Health, Education and Welfare in these discussions, which resulted in "a document that supported strong enforcement of the law."<sup>38</sup>

Government by discussion requires trust between the civil service lawyers and political appointees. Trust cannot exist without some common denominator as to basic objectives, but it does not require agreement as to subsidiary issues. Mutual trust will rarely exist at the beginning of a new administration—it must be built. Mutual trust is difficult to cultivate in Washington, D.C., where the "leak" is a way of life and the significance of the leak tends to be magnified out of all proportion to its actual importance. The building of trust requires civil service attorneys to honor confidences,<sup>39</sup> and it requires political appointees to resist pointing the finger when leaks occur. Civil service attorneys must be confident that they will not be punished for expressing their views to the political appointee, or the well-known dangers of Washington sycophancy will insulate the political appointee from the range of information and views needed to make wise choices.

No doubt such an atmosphere was easier to maintain in the 1960s, when the Division was small enough for the Assistant Attorney General to spend time in the trenches with his troops, and the common objectives of the career and political staff were clearer than today. One answer to the problems occasioned by the growth of staff and the diffusion of responsibilities and attitudes is effective use of a pyramidal organization. The Assistant Attorney General and the civil service leadership (deputy assistant attorneys general and section chiefs and their deputies) can create or destroy an atmosphere of trust. If the political and civil service leadership engage in cooperative law enforcement, the line lawyers who work in the various litigation sections are likely to follow that example.

Discussions may not always lead to the right decision, but involvement of civil service lawyers in the decision-making process lends legitimacy to those decisions and motivates the civil service lawyers to represent zealously the position of the Department.

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Schlesinger, *supra* note 10, at 239-41.

<sup>38</sup> Leon Panetta & Peter Gall, *Bring Us Together: The Nixon Team and the Civil Rights Retreat* 111-14 (1971).

<sup>39</sup> Arguably, the leaks may violate professional ethical norms as well. See, e.g., Model Rules of Professional Conduct Rule 1.6 (1983).

Moreover, government by discussion will often prevent errors.<sup>40</sup> One of the many mistakes that led to the *Bob Jones University* debacle during the Reagan administration was its failure to listen to civil service attorneys from the Tax Division, Civil Rights Division, Solicitor General's office and Department of Treasury.<sup>41</sup>

**Government by Fiat.** Government by discussion in the Boston school desegregation case during the Ford administration may have been, in part, a reaction against government by fiat,<sup>42</sup> which marked the Nixon administration's approach to busing. Busing was not a politically popular remedy and the Nixon administration was firmly opposed to it. However, the Supreme Court required busing when it was deemed necessary to overcome the effects of past racial discrimination by school systems.<sup>43</sup> Following the Court's decision in *Davis v. Board of School Commissioners*, many large Southern city school systems that were placed under busing plans challenged those plans in the higher courts. As one commentator described the situation: "The President ordered the Justice Department to actively oppose busing plans. Instead of using the Department to argue the conservative position on the unsettled issues of constitutional law, he attempted to use the Civil Rights Division as a weapon against enforcement of the settled law."<sup>44</sup> There ensued a series of hasty, ill-informed misadventures by the Division.

For example, twenty-four hours before the Nashville school desegregation case was to be argued before the United States court of appeals, the Civil Rights Division moved for leave to file an *amicus curiae* brief which argued against busing. The court granted the motion and invited the Division to present oral argument. According to the court's opinion, Deputy Assistant Attorney General K. William O'Connor, who drew the unenviable assignment, "had not had the opportunity to read the District Court record in this case and was not aware in advance of hearing that the claimed practical problems had never been presented to or adjudicated by the District Judge."<sup>45</sup> In another case, Solicitor General Griswold, ordered to support a stay of a busing order,

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<sup>40</sup> See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>41</sup> See Brian K. Landsberg, Book Review, 6 Const. Commentary 165, 177-79 (1989) (reviewing Caplan, *supra* note 6, at 51-56).

<sup>42</sup> I describe two techniques of government by fiat: government by unilateral command from the political appointee to the civil service lawyer and government by end run.

<sup>43</sup> *Davis v. Bd. of School Comm'rs*, 402 U.S. 33, 37 (1971).

<sup>44</sup> Orfield, *supra* note 5, at 336.

<sup>45</sup> *Kelley v. Metro. County Bd. of Educ.*, 463 F.2d 732, 746 (6th Cir.), cert. denied, 409 U.S. 1001 (1972).

could find no legal argument for a stay; Attorney General Kleindienst alone signed the government's amicus brief urging a stay.<sup>46</sup> These shenanigans did not harm the law, but they did undermine judicial confidence in the Department of Justice. They also were very demoralizing to civil service attorneys in the Department, who reacted by refusing to sign some briefs, sending letters to newspapers, signing a statement of opposition and resigning.<sup>47</sup>

Another technique of government by fiat is the end run, in which normal procedures are breached in order to avoid discussion of proposed courses of action. Early in the Reagan administration, the Assistant Attorney General for Civil Rights stated his opposition to employment quotas, goals and timetables.<sup>48</sup> Apparently dissatisfied with the civil service staff's responsiveness to his announcement, Assistant Attorney General William Bradford Reynolds hired non-civil service attorneys and authorized them to act independent of the normal Department structure. Thus, for example, the Department took the unusual, though not unheard of, step of intervening in a fair employment suit in the court of appeals in order to seek an en banc rehearing of the panel decision. The panel had reversed a district court order refusing to enter an affirmative action consent decree. The Department's filing was a secret operation handled by two non-civil service attorneys who did not consult with the Division personnel normally responsible for employment cases and appeals until the eve of filing.<sup>49</sup> Unlike the Department's brief in the Nashville school desegregation case,<sup>50</sup> the Department filed

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<sup>46</sup> Griswold, *supra* note 25, at 319 (1992). Griswold misidentifies the case as involving Montgomery County, Md. schools; it actually involved Prince George's County, Md. schools. See Memorandum of the United States, *Vaughns v. Bd. of Educ.*, 410 U.S. 918 (1973) (denying stay); 410 U.S. 910 (1973) (denying cert. to 468 F.2d 894 (4th Cir. 1972)). Griswold notes that in another case he 'could not vigorously support the position of the United States' as to the delay of school desegregation in Mississippi and he, therefore, 'assigned the case for oral argument to the Assistant Attorney General for the Civil Rights Division, Jerris Leonard.' Griswold, *supra* note 25, at 273. Griswold was fired by President Nixon in the summer of 1973, at the conclusion of the Supreme Court's October 1972 term. *Id.* at 317.

<sup>47</sup> See Orfield, *supra* note 5, at 338-40 (Orfield refers, *inter alia*, to me: 'The head of the Civil Rights Division's education section, Brian Landsberg, found that he could not, in good conscience, sign a number of the briefs submitted in major school desegregation cases.' Memorandum from Brian Landsberg to Assistant Attorney General Pottinger (Oct. 12, 1972)).

<sup>48</sup> See Norman C. Amaker, *Civil Rights and the Reagan Administration* 124 (1988).

<sup>49</sup> The case was *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (en banc). I was one of the persons not timely consulted. The Equal Employment Opportunities Commission prepared a brief supporting entry of the consent decree, but was dissuaded by the Administration from filing it. *Id.* at 1572 n.5 (Wisdom, J., dissenting).

<sup>50</sup> *Kelly v. Metro. County Bd. of Educ.*, 463 F.2d 732 (6th Cir.), cert. denied, 409 U.S.

lawyerlike papers in this case and it partially prevailed in the court of appeals. The costs of maintaining these shadow Civil Rights Division attorneys, who were referred to by civil service lawyers as commissars, include inefficiency, lack of balanced consideration of positions and poor morale among the civil service attorneys. Such an expression of distrust breeds distrust in return.<sup>51</sup> The advantages of such a dual system include its effectiveness in developing expertise among non-civil service attorneys, its responsiveness to an administration's agenda,<sup>52</sup> and its implicit warning to civil service lawyers to conform or leave. Aside from the issue of whether the advantages are outweighed by the disadvantages, one might also ask whether, in light of the availability of other techniques of governing, government by fiat is necessary.

Although government by unilateral command is available only to the political appointee, government by end run may at times be available to the civil service lawyer as well. The political appointee is physically incapable of monitoring every court appearance and every court filing. When the goals of the political appointee and the civil service lawyers differ radically, the latter may be tempted to become a loose cannon. A well-known example is the oral argument of a civil service lawyer in the court of appeals shortly after the Mississippi school desegregation debacle, where the lawyer publicly chastised the Attorney General.<sup>53</sup> Occasional examples might be unearthed of civil service lawyers soliciting invitations from federal judges for the government to participate in litigation, where the political appointees might have resisted *sua sponte* participation by the government. Non-responsiveness to policy direction is an indirect form of the end run. For example, during the Nixon and Ford administrations one section of the Department had avoided bringing systemic cases and had concentrated on cases of individual discrimination. On taking office, Assistant Attorney General Days ordered that systemic cases

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1001 (1972).

<sup>51</sup> Sissela Bok eloquently described the costs of secrecy: "[Secrecy] can debilitate judgment, first of all, whenever it shuts out criticism and feedback, leading people to become mired down in stereotyped, unexamined, often erroneous beliefs and ways of thinking. Neither their perception of a problem nor their reasoning about it then receives the benefit of challenge and exposure." Sissela Bok, *Secrets* 25 (1982). She also points out the divisiveness of secrecy: "[W]hile secrecy may heighten a sense of equality and brotherhood among persons sharing the secret, it can fuel gross intolerance and hatred toward outsiders." *Id.* at 28.

<sup>52</sup> Sissela Bok notes that "[s]ecrecy is as indispensable to human beings as fire." *Id.* at 18. Her explanation includes the following, which is applicable to the Department of Justice: "Secrecy for plans is needed, not only to protect their formulation but also to develop them, perhaps to change them, at times to execute them, even to give them up." *Id.* at 23.

<sup>53</sup> See Panetta & Gall, *supra* note 38, at 296.

were to be given the highest priority. However, the attorneys in that section continued to produce individual cases rather than systemic ones. I remember that, in the end, Mr. Days had to disapprove a meritorious appeal of an individual case in order to enforce his policy.

Much remains to be learned about the interaction of the civil service attorney and the political appointee.<sup>54</sup> But I am satisfied that this much is true: It has long been recognized that "of all manifestations of power, restraint impresses men most."<sup>55</sup> The political appointee and the civil service attorney in the Department of Justice each possess considerable power. Each labors under the awesome responsibility of enforcing the laws of the nation. Government by discussion draws on the strengths of each group to produce proper restraint in setting of law enforcement policy. Government by fiat tends to abandon restraint, because each element of the Department ignores the legitimate concerns of the other.

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<sup>54</sup> *United States v. Lovett*, 416 F.2d 386 (8th Cir. 1969) (en banc). Some examples of unanswered questions include the following: First, who are the civil service lawyers? Are they drones? Ideologues? Eunuchs? Dedicated and able public servants? Second, what power do they possess to influence policy? Are they the de facto policymakers? Neutral tools in the hands of political appointees? Partners in policy? Another branch in the system of checks and balances? Third, what forces influence the professional conduct of civil service lawyers? Finally, how should political appointees interact with the civil service lawyers and what should the civil service lawyers do when they disagree with the political appointee?

<sup>55</sup> Attributed to Thucydides. See *The Practical Cogitator* 461 (Charles Curtis, Jr. & Ferris Greenslet eds., 3d ed. 1975).