DEPARTMENT OF JUSTICE LITIGATION: EXTERNALIZING COSTS AND SEARCHING FOR SUBSIDIES

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I

INTRODUCTION

Department of Justice ("DOJ") control over executive branch litigation is often debated in the context of broad themes in administrative law.[1] Although important and illuminating, the central inquiry—to what extent is centralization of litigation an essential aspect of presidential control over executive branch policymaking—ignores the core aspect of the employment relationship between DOJ and its attorneys. It turns out that seemingly mundane aspects of the employment, such as wages, job responsibility, and recruitment of DOJ attorneys, raise intriguing and difficult questions of professional responsibility and institutional design.[2]

This essay explores these ignored questions of DOJ compensation, recruiting, and staffing. The analysis starts with an obvious but largely unexplored question: Why do bright new attorneys forgo the salary offered by private law firms and instead choose to work for DOJ? I conclude that young attorneys choose DOJ because of the significant responsibility government practice provides. This explanation, however, prompts the more difficult question taken up in the second part of the paper: Why do the United States and its officers and agencies entrust complex, difficult, and profoundly important litigation to neophyte attorneys? A private client with substantial resources and important stakes in litigation would not choose to have a brief primarily drafted by or crucial oral argument conducted by a third-year associate, no matter how capable that associate is at that stage of his or her career.

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1. *See* CORNELL W. CLAYTON, GOVERNMENT LAWYERS 8-10 (1995); Neal Devins, *Tempest in an Envelope: Reflections on the Bush White House's Failed Takeover of the U.S. Postal Service*, 41 UCLA L. REV. 1035 (1994); Neal Devins, *Unitariness and Independence: Solicitor General Control of Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994) [herinafter Devins, *Unitariness*].

2. Some of the ethical issues are discussed in Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

Without in any way suggesting that the government spends too little on legal fees,[3] Part II points out that the government clearly conducts its business in a manner entirely different from clients with similar resources and important monetary consequences and matters of great principle at stake. Analyzing the government's purchase of legal services provides new insights on the near-monopoly DOJ maintains over litigation. Although conventional wisdom describes the monopoly as a rational way of managing government policy,[4] the artificial monopoly may instead be a mechanism for masking the resource shortfall that is the hallmark of government litigation. Finally, viewing litigation from the perspective of the government as a purchaser of legal services puts a different spin on conventional administrative law doctrines that operate with much potency and great frequency in litigation with the United States. These doctrines can be understood as a hidden subsidy for government underpurchasing of legal services.

Part II of this essay also explores DOJ recruiting and concludes that DOJ must structure its litigation to draw top law school graduates for substantially lower wages. Part III explores how DOJ compensates in litigation for its use of neophyte attorneys and understaffing of cases, and discusses the market alternatives to DOJ's virtual monopoly over litigation. Part IV concludes that the market alternative has shortcomings not only for the agency, but for another institution with a strong interest in maintaining the DOJ monopoly, the federal judiciary.

II

THE DOJ RECRUITMENT CONTRACT: TRADING WAGES AND WORKING AMENITIES FOR CONSUMPTION OF OTHER GOODS

Before examining why the government spends less on legal services than a private client, it is important to understand the nature of the employment "contract" entered into by the government and its lawyers.[5] In short, how does the government recruit attorneys to work for DOJ when the attorneys could make substantially more money in private practice? Competition for jobs in

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3. For fiscal year 1998, DOJ requested $19 billion, a 4.9% increase over the prior year. *See DOJ Increases Reflected in Judiciary Workload*, 29 THE THIRD BRANCH 5 (April 1997). However, only a fraction of these resources are devoted to litigation. *See id.*

4. On the standard arguments for the DOJ monopoly and persuasive critiques see CLAYTON, *supra* note 1; Devins, *Unitariness*, *supra* note 1.

5. My primary focus is the hiring of attorneys through DOJ's Honors Program which applies only to those directly out of clerkships or law school. Although some of my arguments might apply to lateral hires DOJ makes, the lateral market is sufficiently different to be excluded from my analysis. For example, lateral hires may choose DOJ over a private firm for more explicit tradeoffs between money, leisure, and family. *See generally* GARY S. BECKER, A TREATISE ON THE FAMILY (1991). For the first practice job out of law school these qualities may not be as central to career choice. Nor can DOJ rely solely on those factors for its new hires to make a long-term career choice of DOJ. Reflecting the fact that entry hires typically move on to other jobs, DOJ explicitly demands Honors hires to make a three-year commitment. *See* UNITED STATES DEPARTMENT OF JUSTICE LEGAL ACTIVITIES 1997-98, at 2 [hereinafter DOJ LEGAL ACTIVITIES].

DOJ is quite intense,[6] and the academic credentials DOJ lawyers possess are comparable to those of lawyers who work for the most elite firms in the nation.[7] Some scholars hypothesize that DOJ is successful in recruiting these attorneys at least in part because the attorneys trade-off present salary for invaluable career experience that will pay dividends in the future.[8] A better explanation is instead that the young attorney trades money for job responsibility and career satisfaction.

A. Choosing DOJ: Consumption Not Investment

DOJ attorneys enter at a pay level of $38,330, a GS-11 grade. If, as is common, the attorney has done a judicial clerkship, the entry-level pay is typically $45,939.[9] This salary is considerably below associate salaries at law firms throughout the country. Starting with firms in Washington, D.C. with more than 100 lawyers—the obvious point of comparison for attorneys who choose DOJ—the mean 1997 salary for new associates was approximately $75,000.[10] Some may also receive a clerkship bonus, which for Supreme Court clerks can be $75,000. Other cities show comparable disparities between DOJ and private law firms.[11] The approximate difference of $35,000 is in no sense insignificant and demands an explanation.

One of the most common explanations offered is that young attorneys choose DOJ because of the excellent litigation experience they receive.[12] This

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6. *See id.* at 11 (noting that hiring for the Attorney General's Honors Program is "highly competitive").

7. *See* DONALD L. HOROWITZ, THE JUROCRACY: GOVERNMENT LAWYERS, AGENCY PROGRAMS, AND JUDICIAL DECISIONS 27-34 (1977); Michael Herz, *The Attorney Particular: Governmental Role of the Agency General Counsel*, *in* CLAYTON, *supra* note 1, at 160. Based on data collected over the last 10 years, of the 1,600 attorneys hired through the Honors Program, 40% had judicial clerkships, 65% were on law review, and 80% were in the top third of their law school class. *See* Telephone Interview by Janet Hirt with Paula Vickers, DOJ employee (Aug. 20, 1998). For a more general discussion of early efforts to recruit high quality young law graduates into government service, see ROBERT G. GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW 70-73 (1985).

8. *See* HOROWITZ, *supra* note 7, at 27 (noting that new attorneys use DOJ for experience and then move on to other jobs). Two other possible explanations for the choice of DOJ over the private law firm are not as compelling. First, some may choose DOJ as a stepping stone to non-firm jobs such as law teaching; the Office of Legal Counsel, the Office of the Solicitor General, and Appellate Staffs of litigating divisions, have served as excellent stepping stones. But those offices are far too small (particularly given the number of attorneys who choose to work elsewhere in DOJ) to provide a strong basis for the "stepping stone" theory. A second theory is that some attorneys choose DOJ for the shorter hours and leisure time. This theory is far better at explaining why attorneys enter DOJ as laterals or remain at DOJ for their entire career. But for entering attorneys DOJ proves to be quite demanding. The responsibility for one's own cases and enjoyment of the work is likely to make the hours long.

9. These figures are for 1997. *See* DOJ LEGAL ACTIVITIES, *supra* note 5, at 12. Federal law authorizes a small locality adjustment to compensate attorneys who reside in cities with higher costs of living.

10. *See* NATIONAL ASSOCIATION FOR LAW PLACEMENT, CLASS OF 1997 EMPLOYMENT REPORT & SALARY SURVEY 58 (1998) [hereinafter 1997 NALP REPORT].

11. New York associate salaries now exceed $100,000, and Chicago is near $90,000. *See* Frances A. McMorris, *Rookie Lawyers See Pay Soar Above $100,000*, WALL ST. J., Apr. 29, 1998, at B1.

12. *See* HOROWITZ, *supra* note 7, at 27, 29-30.

experience then can be capitalized on later when the attorney enters private practice. Viewed in this way, the pay cut that attorneys take by going to DOJ is simply an additional educational investment made by the young attorney—tantamount to an additional "tuition" payment made for post-law school training.[13]

No doubt DOJ attorneys do acquire valuable experience from government practice. Yet the argument that they trade-off the higher salaries at private firms for this experience is not without problems. First, it fails to integrate the relatively short tenure track of many DOJ attorneys.[14] The DOJ Honors Program requires recruits to make three-year commitments to DOJ, a rule that is broken but rarely enforced. This explicit norm suggests that many young DOJ attorneys would otherwise leave in less than three years. But is that really sufficient time to gain the valuable "experience" that compensates for the income losses? Probably not. To be sure, in many areas of DOJ litigation, cases move very quickly, often being resolved without discovery on a motion for injunction. But for matters that go to trial—many civil fraud cases, tort cases, and discrimination cases—a tenure short of three years hardly seems sufficient to gain extensive litigation experience. Moreover, while even new DOJ attorneys are given interesting cases, the highest profile and most significant cases are assigned to attorneys who have been at DOJ for more than two years. In short, the learning curve—while perhaps steep for DOJ attorneys—cannot provide a sound basis for the salary/experience argument.

The second problem with the experience argument is that it suggests that young attorneys can get better litigation training at DOJ than at a private firm and that their firms will later compensate them for this training. This is a somewhat curious argument. First, DOJ's on-the-job training bears little resemblance to what occurs in private firms. At large, private firms' lawyers are slowly given major responsibility;[15] and while competitive forces have perhaps led to some changes in the delivery of legal services, they apparently have not produced dramatic results.[16] To be sure, the economics of large firm practice

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13. *See* GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION (1964); WALTER W. MCMAHON, INVESTMENT IN HIGHER EDUCATION (1974). Some have made a similar claim in the context of evaluating associate salaries. Leibowitz and Tollison argue that associate salaries are relatively low and that after receiving firm-specific training associates recoup income upon entry to the partnership. *See* Arleen Leibowitz & Robert Tollison, *Learning and Earning in Law Firms*, 7 J. LEGAL STUD. 65 (1978).

14. *See* HOROWITZ, *supra* note 7, at 27-32 (discussing rapid DOJ turnover among younger attorneys). Recent developments may have dated Horowitz's findings and altered the hiring landscape at DOJ. *See also* DOJ LEGAL ACTIVITIES, *supra* note 5, at 2 (discussing the three-year commitment). Both dissatisfaction in private practice and the increasing selectivity of partnership decisions have led to active efforts by DOJ to make lateral hires. Even here, however, and perhaps to a greater extent, the salary differences between DOJ and private practice are significant. The top salary for a career DOJ attorney is less than $100,000. *See id.* at v, 8.

15. *See* ROBERT L. NELSON, PARTNERS WITH POWER 180 (1988) ("Whichever field they practice in, associates less frequently perform the 'more responsible' tasks of law practice.").

16. *See* Paul M. Barrett, *Companies Make Little Headway Curbing Lawyers' Billable Hours*, WALL ST. J., Dec. 2, 1996, at B11; Milo Geylin, *Going First Class—Soaring Legal Expense: Motorola*

are quite different from government practice and drive how large law firms staff cases. Moreover, the private law firm and the client it represents have compelling reasons to invest substantial resources in important litigation. In other words, both the law firm and the client must directly internalize the cost of litigation errors—certainly more than DOJ and its clients. These differences suggest that the DOJ method of "training" is less than optimal. Indeed, if we were to require DOJ to internalize these costs there might well be a change in how it staffs its cases.

Finally, the DOJ experience argument is faulty because it never answers the central question: Does the DOJ lawyer get a return of the salary differential in later firm compensation?[17] For a number of reasons the answer seems to be no. First, insofar as the DOJ attorney enters as an associate with a lockstep compensation system, her pay will be identical to attorneys who joined the firm immediately after law school or after serving as judicial law clerks.[18] Second, DOJ recruits do not seem to earn more as partners to make up for the pay differential.[19] The associates who entered private practice right after law school, instead of going first to DOJ, are likely to have made contacts with important clients and done work for influential partners during their extra years at their firms. Moreover, the finding that seniority is a key determinant of income in a large law firm further undermines any theory of income recapture.[20] Thus, it seems quite likely that the DOJ attorney forever gives up the pay differential.[21]

Bemoans It but Runs a Big Tab, WALL ST. J., Oct. 5, 1994, at A1; *Testing Task-Based Billing*, CORP. COUNS. MAG. 100 (1997).

17. One argument may be that young attorneys use DOJ experience to get hired by an elite firm that would not have hired them on the basis of their law school academic record. This argument is undercut by the fact that DOJ hires from the same pool of elite law graduates as do the top private firms. Although beyond the scope of this essay, such a hypothesis may have more validity applied to a lawyer employed by a federal agency who seeks to move into private practice. *See* Herz, *supra* note 7, at 160 (contrasting backgrounds and prestige levels of DOJ and agency lawyers).

18. On the general debate over seniority versus productivity-based compensation, see Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985); Bruce D. Heintz, *New Trends in Partner Profit Distribution*, LEGAL ECON., Nov./Dec. 1981, at 9; *see also* NELSON, *supra* note 15, at 193 (noting that differences between associates' salaries are "relatively insignificant"). For an interesting discussion of non-seniority based compensation, see Ward Bower, *Can a Partner's Value Be Measured?* (visited Sept. 14, 1998) <http://www.altmanweil.com/publications/articles>.

19. Nelson's data on partner income refutes the claim that partners' income "can be explained by differences in skills that lawyers accumulate over the course of their careers in firms." NELSON, *supra* note 15, at 201. Nelson's data is of course a bit dated, and certainly competitive pressures have prompted law firms to rethink how partners are compensated. Nonetheless, more recent studies show that "there remains a strong correlation between years of experience and compensation that is driven is part by economics (higher billing rates and greater efficiency of experienced fee producers)." COMPENSATION PLANS FOR LAW FIRMS 11 (James D. Cotterman ed., 2d ed. 1995); *see also id.* at 65 (noting that first few years of associate compensation are lockstep); *id.* at 73-74 (noting difficulty in administering a compensation system tied to individual performance). The recent data may reflect the winnowing of senior unproductive lawyers from the partnership.

20. *See id.* at 11.

21. Another argument may be that DOJ lawyers who switch to private firms get more responsibility when they join the firm, especially on in-court litigation. This argument depends upon those who worked at the firm throughout conceding that their training leaves them less capable than DOJ laterals to handle certain litigation matters. Obviously there are cognitive barriers to this group of lawyers

Therefore, to understand the income loss by the person who chooses to work for DOJ instead of entering private practice, we should view it not as an investment but as non-pecuniary compensation, or what some may view as consumption. People forego income for many reasons, including more leisure time or simply choosing to get non-pecuniary value out of the time. In other words, just as one can spend $20,000 on a new car or invest the same money in the stock market, a person choosing a job may decide to take a job that is lower paying but provides them other benefits.[22] This is the more likely explanation for choosing to work for DOJ; this is at the heart of the bargain that DOJ strikes with its young attorneys. Consumption, not investment, is the motivation.

B. Trading Money for Responsibility, Intellectual Stimulation, and Autonomy

The attorney trades off many things by choosing DOJ over private practice. Apart from the financial tradeoff, the DOJ attorney is giving up amenities, staff, and secretarial support. However, the offsets are many and obvious. First is the major responsibility DOJ gives to young attorneys. The case load and shortage of attorneys mandates that young attorneys be given major responsibility for significant litigation.[23] While my experience was limited to appellate work, it is not atypical. Within four years, I had argued twenty-one cases (two *en banc*), including six in the D.C. Circuit.

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adopting such a view. *See* Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853 (1995). One exception may be the relatively recent movement of people from the Office of the Solicitor General into private firms to form Supreme Court practice groups. It may be that private firms recognize (as they no doubt do with Supreme Court clerks) the value of this experience and market this as a specialized practice to present and prospective clients. Of course, insofar as these Solicitor General lawyers have entered as partners they have more status in the firm than the DOJ lawyers I am focusing on who typically join a firm as an associate.

22. For an extended analysis of this approach to appellate judging, see RICHARD A. POSNER, OVERCOMING LAW 135-44 (1995). The substitution of income for non-pecuniary job characteristics is discussed in B.K. Atrostic, *The Demand for Leisure and Nonpecuniary Job Characteristics*, 72 AMER. ECON. REV. 428 (1982).

23. DOJ clearly markets this aspect of the job. *See* DOJ LEGAL ACTIVITIES, *supra* note 5, at 10 ("The [DOJ] offers an attorney experience that cannot be duplicated anywhere else. . . . [E]ven new attorneys play significant roles in our litigation effort almost from the moment they walk in the door."); *id.* at 11 ("Honors Program attorneys typically are entrusted with an extraordinarily high level of responsibility very early in their careers."); *id.* at 37 ("The Civil Division's demanding caseload provides new attorneys with immediate opportunities to handle significant litigation. Unlike his or her counterpart in the private sector, the Civil Division attorney receives substantial responsibilities for cases from the start."). Similar claims are made by other litigating divisions. *See id.* at 41 (Civil Rights Division); *id.* at 58-59 (Tax Division); *id.* at 54 (Environmental Division).

This must be contrasted with reports that one of the major complaints of junior associates at private firms is the lack of responsibility for important matters. *See* NALP FOUNDATION FOR RESEARCH & EDUCATION, KEEPING THE KEEPERS: STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION 14, 34 (1998) (tying job satisfaction to substantial responsibility and noting that associates complain about lack of challenging and important assignments and client contact); *cf.* Mark L. Byers, *Career Choice and Satisfaction in the Legal Profession*, 12 CAREER PLANNING & ADULT DEV. J. 6 (1996) (highlighting importance of control over work in measuring job satisfaction).

Second, the issues DOJ attorneys litigate are of great intellectual interest.[24] For example, in many civil cases litigated by DOJ the issues are purely legal and involve no discovery. Much of DOJ civil litigation involves the defense of agency action, which under well-established doctrine is reviewed on the agency record, not on a record developed in district court.[25] Indeed, many agency decisions are reviewed in the courts of appeals; therefore factual disputes are quite rare.[26]

The issues DOJ litigates are also intellectually challenging because they arise out of the exercise of governmental and political power. When the President, an agency, or Congress acts on a policy initiative, the actions are often at the outer perimeter of constitutional and legal authority. As commentators have long recognized, political and social issues are almost immediately transformed into legal issues.[27] With the dominant role played by the government in all reaches of economic, social, and political life, the United States will be a litigant in these controversies. It is not often that a young attorney can work consistently on such challenging intellectual issues.[28]

The third trade-off for income, autonomy for young lawyers, arises because DOJ offers independence from both extensive hierarchy within the Department and from outside client control. New attorneys in law firms tend to work within a well-defined hierarchy of senior associates, junior partners, and senior partners, with responsibility and control parceled out within the hierarchy.[29] The hierarchy at DOJ, while also appearing well-defined and extensive, actually does little to impinge on the young attorney's autonomy. Most cases are staffed with one senior "reviewer" who signs off on all major written filings. It is extraordinarily rare for review to occur above that level, and it is almost unheard of for extensive review to be conducted by an assistant attorney general or one of her deputies.

Perhaps more important is the independence from clients characteristic of DOJ. DOJ has a virtual monopoly over litigation; it is impossible for most

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24. Intellectual challenge and stimulation are, according to one study, the most commonly cited reason for choosing a legal career. *See* Byers, *supra* note 23.

25. *See* Camp v. Pitts, 411 U.S. 138 (1973).

26. *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994); Reno v. Catholic Soc. Servs., 509 U.S. 630 (1993).

27. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (J.P. Mayer ed., 1969) (1835).

28. Again, DOJ exploits this in its materials. *See* DOJ LEGAL ACTIVITIES, *supra* note 5, at 10. ("[T]he important nature of the Department's work in all organizations ensures that its lawyers frequently handle cases of national significance, often forging new areas of the law."). I am assuming (fairly, I think) that the market in DOJ job-related information is efficient, thus constraining claims made in recruiting materials. This intellectual challenge must be considered against the backdrop of the academic records compiled by DOJ attorneys and their cohorts in private law firms. Typically they have outstanding academic records from both undergraduate education and law school. *See* HOROWITZ, *supra* note 7, at 29-30. It should thus not be surprising that they would put a premium on intellectual challenge and stimulation. *Cf.* Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 833 (1995) (noting that public employment and those with high law school grades are correlated).

29. *See* NELSON, *supra* note 15, at 188.

agencies to fire their lawyers or shop around for a new "law firm."[30] Although DOJ attorneys certainly owe basic duties of professionalism and civility to clients,[31] the monopoly changes the relationship in important and subtle ways. At the most elementary level, the DOJ attorney need not worry as much about pleasing or cultivating clients. More profoundly, the DOJ attorney has a fundamentally different duty of loyalty to her client. Particularly as one moves up through the federal court system, the legal positions of government agencies represented by DOJ are carefully reviewed, scrutinized, criticized, and often outright rejected.[32] Thus, the relationship between DOJ attorneys and their client agencies is often adversarial, even on occasion empowering the DOJ attorneys to act in a quasi-adjudicative role.[33] This effect is most apparent at the appeal, rehearing *en banc*, and *certiorari* stages of litigation. Generally, an agency may not appeal or seek rehearing or *certiorari* without the permission of the Solicitor General,[34] who relies extensively on memoranda generated by both his staff and the appellate staffs of the DOJ litigating divisions. Oftentimes, these DOJ attorneys write memoranda highly critical of the agency's actions and its legal arguments, and recommend that the Solicitor General simply put an end to the matter or tell the agency its position is indefensible.[35] The experience is not only a heady one for DOJ attorneys, but it fulfills a core aspect of professional fulfillment and prestige—independence from client pressures.

DOJ's control over its client agencies and the clients' control over private attorneys should not be overstated. Certainly there are instances of the Solicitor General acquiescing in the agency's litigation wishes (particularly when the loss will affect only that agency), of outright capitulation by the Solicitor General, or of agencies using political power to overwhelm DOJ.[36] And surely in the private sector good lawyers sometimes tell their clients that "enough is enough." Yet even if the DOJ and private models of client control are not at opposite poles of a spectrum, they are clearly found far apart.

Interestingly, what is not traded-off by the DOJ lawyer is prestige.[37] Indeed, the qualities that compensate the DOJ attorney for loss of income are

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30. The DOJ monopoly is extensively analyzed in Devins, *Unitariness*, *supra* note 1, at 182-84. The statutory source of DOJ litigation authority is 28 U.S.C. § 516 (1994).

31. It is true that DOJ faces no potential malpractice liability for any errors it might make on behalf of its client agencies. Yet this is unlikely to affect how DOJ handles cases. Other large institutional clients tend not to use malpractice actions as a means of controlling their lawyers. *See* David B. Wilkins, *Who Should Regulate Lawyers*, 105 HARV. L. REV. 801, 832 (1992).

32. *See* HOROWITZ, *supra* note 7, at 45; Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 WASH. U. L.Q. 337, 341 (1981). Lincoln Caplan's muckraking account of the Solicitor General's Office documents the role in a number of high-profile cases. *See* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987). The scrutiny occurs routinely in less controversial cases.

33. *See* HOROWITZ, *supra* note 7, at 47.

34. *See* 28 C.F.R. § 0.20 (1997). For a discussion of how agencies with independent litigation authority exercise their power, see Devins, *Unitariness*, *supra* note 1.

35. *See* CAPLAN, *supra* note 32, at 18, 62-64.

36. *See id.*

37. *See* HOROWITZ, *supra* note 7, at 22; Herz, *supra* note 7, at 160.

usually the same qualities that are considered in measuring job prestige. In their pioneering work on the legal profession, John Heinz and Edward Laumann attempt to identify the determinants of status and prestige in the different jobs lawyers hold.[38] They conclude that the nature of the client—corporate versus individual—is a key variable in measuring job prestige. Although the United States does not fall squarely into the Heinz and Laumann two hemisphere model, it bears attributes similar to the large corporate clients upon which Heinz and Laumann focus. Indeed, in its ability to exercise significant power over the economy, the government exceeds the key indicator that Heinz and Laumann use in explaining the link between the prestige of the bar and the corporate client.[39] On other factors that Heinz and Laumann explore in their analysis of job prestige—intellectual challenge and job autonomy[40]—presumably DOJ lawyers would surpass even the elite corporate bar.

This aspect of the DOJ contract with its young attorneys is not without its downside risks, and these risks pose the question explored in the remainder of this essay: Why does the government entrust young attorneys with complex, important, and difficult cases—cases that would be heavily staffed if they were to arise in a private law firm? No doubt part of the answer comes from the recruitment policy outlined above. But that is only a partial explanation. It explains the terms of employment that DOJ must offer to recruit talented young lawyers. Left unanswered is who bears any of the costs of this staffing and recruitment policy, and whether there are hidden subsidies that offset the disadvantages that arise in litigation from the DOJ contract with its lawyers.

III

EXPLANATIONS FOR GOVERNMENT PURCHASING OF LEGAL SERVICES FROM THE DEPARTMENT OF JUSTICE

Although DOJ may suffer a disadvantage in litigation, it manages to overcome it in a number of ways. These offsets take a number of different forms, sometimes operating almost as a direct subsidy; other times in a far more subtle fashion. In either case, however, the effect is the same: to compensate for DOJ's employment of neophyte attorneys.

A. Offsetting the Disadvantages to the Government

Although the private market may not allocate both an optimal price and staffing level for legal services, the prevalence of different practices—even after years of corporate retrenchment in legal fees—suggests that the government's way of litigating puts it at a disadvantage.[41] Some explanations are offered be-

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38. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 330-74 (1982).

39. *See id.* at 330-31.

40. *See id.* at 102-03.

41. Most government civil cases are handled by one staff attorney and one supervisor. The supervisors tend to be either DOJ career attorneys or those with more than 10 years at DOJ. While these

low for how the government and the legal system offset this disadvantage through indirect subsidies.

1. A Case Selection Hypothesis. A lawyer may be able to offset a disadvantage in litigation by selecting cases with the strongest arguments. Even if a party's litigation resources (including experience and staffing) are disproportionate, there is a point at which the resource advantage is of marginal or no benefit because of the merits of the case. Even the best lawyer with the most resources cannot turn a group of weak cases into winners. The under-resourced attorney can develop a strong portfolio only if a certain condition is met: He or she must have a monopoly over the clients' ability to get access to the courts. Only in that way can the lawyer make sure that the weaker cases are not pursued.[42]

This monopoly condition approximates the situation DOJ has established with most government agencies.[43] The DOJ monopoly allows its attorneys to focus on cases that have a higher chance of prevailing and, accordingly, diminishes the significance of the resource and experience disparity it faces in litigation.[44] Particularly at the court of appeals and *certiorari* stage, the DOJ success rates are quite high, far higher than other litigants.[45] It may be that if DOJ acted more like a private law firm, and had to behave as if its client-agencies could hire different counsel to press their cases, the resource and experience disadvantages DOJ works under would be more evident.

It nonetheless may be uncertain whether removal of the monopoly would affect the success rate of DOJ litigators. As suggested above, the rate should decline because DOJ would have to acquiesce in more questionable client litigation decisions if it faced the loss of the client. DOJ attorneys and the extant literature also suggest another reason for this decline. DOJ's careful selection

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supervisors can be compared to firm partners, in fact they function quite differently. They tend not to be stratified themselves, and it is highly unusual to have more than one working on a case. Also, their workload precludes intensive review and rewriting of briefs, and they cannot rely upon a junior partner or senior associate to perform those functions.

42. This is subject to the caveat that "win" rates not be propped up only by taking the easiest and least significant cases. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 566-68 (3d ed. 1986) (discussing agency case selection).

43. *See* HOROWITZ, *supra* note 7, at 5.

44. On litigation expenditures, see Robert Cooter & Daniel Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989); Avery Katz, *Judicial Decisionmaking and Litigation Expenditure*, 8 INT'L REV. L. & ECON. 127 (1988).

45. *See* CAPLAN, *supra* note 32, at 4 (discussing success rates before the Supreme Court). Unfortunately, it has proven quite difficult to obtain reversal rates for the government in court of appeals litigation. For 1997, the overall reversal rate in the court of appeals for non-prisoner civil cases involving the United States was 12.1%, meaning of course, that 87.9% were affirmed. *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS, tbl. B-5 (visited May 14, 1998) <http://www.uscourts.gov/judicial_business/contents.html>. There has been a dramatic drop in the overall reversal rate from 1960 to 1995. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 70-71 (1996) (noting a rate of 9.6% in 1995). Extrapolating from data provided to me, the reversal rate of the Appellate Staff of the Civil Division for 1997 was 62%. *See* U.S. DEPARTMENT OF JUSTICE, APPELLATE BRANCH RESULTS AND DISPOSITIONS IN 1997, at 1-2 (on file with author).

of cases and monitoring of legal arguments creates goodwill with the courts.[46] Courts know that if DOJ is pursuing the matter (particularly on appeal or *certiorari*), the stakes must be high and the legal arguments generally sound. If the DOJ monopoly were removed, the agencies would no longer be subject to the same constraints and would press weak arguments, in perhaps insignificant cases, leading to a system-wide loss in credibility.[47] This in turn would lead to a reduction in success because agencies would deplete the pool of goodwill generated by the DOJ monopoly.

Viewed in this light, the goodwill created by DOJ is a kind of public good that is subject to a fairly typical tragedy of the commons.[48] Once the goodwill is created, all agencies will have an incentive to use it, and it will be hard to charge the agencies that do use it. Without means to exclude or charge, the goodwill will soon be over-consumed. The solution to the tragedy is obvious: install DOJ as the gatekeeper to the commons.

Notice that the tragedy of the commons story told by DOJ attorneys—most frequently by the Solicitor General's Office[49]—along with its companion strategy of careful case screening, support the high DOJ success rate. DOJ attorneys go to court with cases rigorously screened at least at the appellate stage and subject to review at the trial level as well. The artificial scarcity of DOJ filings also creates goodwill with the courts, making the courts more receptive to the seriousness of the policy consequences advanced by DOJ and predisposed to take the legal arguments seriously.[50]

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46. This is most evident in the Supreme Court. *See* CAPLAN, *supra* note 32, at 18. Although Caplan's focus is almost primarily the Supreme Court, the Solicitor General performs an equally important function screening cases the United States appeals to the courts of appeals. *See id.* at 6.

47. *See id.* at 19-24, 76 (discussing link between goodwill and litigating success of the Solicitor General before the Supreme Court). In *United States v. Mendoza*, 464 U.S. 154 (1984), the Supreme Court explicitly relied upon this screening function in both the Courts of Appeals and the Supreme Court—and its system-wide benefits—as a basis for holding that the government is not subject to nonmutual collateral estoppel. The Court cited the government's brief which highlighted the benefits provided by screening. *See* Brief for the United States, United States v. Mendoza, 464 U.S. 154 (1984) (No. 82-849) ("The government's practice of selective pursuit of appellate review benefits the public interest and facilitates sound judicial management."). The Court has reiterated the importance of this screening function by the Solicitor General, rebuking him when he cedes some of his authority. *See* Federal Election Comm'n v. NRA Political Victory Fund, 513 U.S. 88, 93, 98-99 (1994); United States v. Providence Journal Co., 485 U.S. 693, 701 (1988).

Even in those cases where the Solicitor General has the least discretion—where he is duty bound to defend the constitutionality of congressional enactments, see Pub. L. No. 96-132, § 21 (codified at 28 U.S.C. § 519 (1994)), *discussed in* CAPLAN, *supra* note 32, at 132—his ability to offer a narrowing interpretation of the law confers upon him substantial ability to retain his reputation for forthrightness with the Court. *See* United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (offering narrow reading of statute regulating sexually explicit material to withstand First Amendment challenge).

48. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

49. *See* CAPLAN, *supra* note 32, at 21-24, 76.

50. Some of my colleagues expressed shock and disbelief at the implication that courts were "biased" in favor of the government. My claim is not one of bias, but instead an increase in credibility that is given a litigant who undertakes certain functions that serve the institutional interests of the court in allocation of judicial resources. In this respect goodwill is a good dispensed by courts to all (including private lawyers or law firms) with certain professional standards. The DOJ monopoly simply allows the government to earn more than private firms.

2. Negative Externalities Generated by the DOJ Monopoly. If the DOJ monopoly does indeed opperate as described above, why do agencies tolerate the resulting disadvantage? Two negative externalities generated by the DOJ monopoly must be distinguished: the negative externalities that might be generated in cases the DOJ loses because of using bright but inexperienced attorneys, and the negative externalities the agency suffers when DOJ refuses to press an argument or pursue litigation to the extent the agency desires. Presumably, the latter externalities include cases the agency otherwise values and might have chosen to litigate.

The first category of losses is probably not large; as noted above, DOJ has relatively high success rates in litigation. Even if they are large, particularly when coupled with the second type of losses, the political system is unlikely to be able to devise solutions to force DOJ to internalize those costs. First, the obvious solution—to allow agencies the power and funds to hire private counsel or independent litigation authority—is unrealistic. Because of congressional control over salaries for government attorneys, it is unlikely agencies will be authorized to hire more experienced or better credentialed attorneys. In short, the agencies may simply be substituting one group of inexperienced attorneys for another less talented group. It is also unlikely that Congress would appropriate large funding increases for agencies to hire more attorneys to staff cases. Indeed, both the level of salaries for federal attorneys and the low number of attorneys (given the amount of the legal work handled in the federal government), suggest that these problems may reflect strong legislative preferences concerning the level of law enforcement desired by Congress. Add to this the power of the President—with DOJ's assistance—to oppose decentralization of litigation authority, and the political problems for the agency become almost insurmountable.[51]

Although DOJ authority over litigation arguably may impede presidential initiatives taken by agencies, recent experience suggests that the opposite is

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This goodwill takes many forms, which manifest themselves in procedural advantages for the government. One of the least noticed but important is the ability of the government to bring matters outside the record to the court's attention. Caplan discusses this process of "lodging" of materials with the Supreme Court. *See* CAPLAN, *supra* note 32, at 21-24. Less noticed is the same process that occurs in the courts of appeals. This lodging practice has substantive effect in at least two ways. First, in cases involving review of agency action the government may choose to bring to the court's attention agency past practices or interpretations that argue strongly in favor of deferring to the agency's position. *See, e.g.*, Reply Brief for the Appellant at 11, Azurin v. Von Raab, 803 F.2d 993 (9th Cir. 1986) (No. 86-2154) (citing Excerpts of Record for Customs Service); Brief for the Appellants at 12, Edwards v. Bowen, 785 F.2d 1440 (9th Cir. 1986) (No. 85-2060); Brief for Secretary of Health & Human Services at 15 n.7, Hogan v. Heckler, 769 F.2d 886 (1st Cir. 1985) (No. 85-1149). Second, most judges (even if they are not honest about admitting it) are concerned about the effects or consequences of their rulings. Lodging allows the government to put before the court material that alerts the court to the adverse fiscal or programmatic consequences that may attach to a defeat for the government. In some instances the government may simply inform the court of facts, without even putting matters into the record. *See* Petition for Reh'g & Suggestion for Reh'g En Banc of the United States at 13, West v. United States, 744 F.2d 1317 (7th Cir. 1984) (en banc) (No. 83-1482).

51. The battle over independent litigation authority and presidential control are canvassed in HOROWITZ, *supra* note 7, and Devins, *Unitariness*, *supra* note 1.

likely to be the case. Where agencies take an initiative that has either the implicit or explicit support of the White House, DOJ opposition is highly unlikely.[52]

3. Government Free-Riding in Cases and the Bipolar Alignment of Litigation. A hidden subsidy for DOJ may arise from the nature of the litigation in which DOJ is involved, as well as the differing resources of the parties. Not all DOJ cases involve disputes with parties who have significant resources to hire private counsel. Indeed, the large percentage of litigation with the federal government are cases at the other extreme, including cases involving Social Security benefits, other social programs, and prisoner litigation.[53] In this category of cases, DOJ generally has the significant resource advantage over the *pro se* litigants, legal services attorneys, and solo practitioners.[54]

In the other category of cases, however, DOJ is litigating against both a large, elite law firm and a corporate client or trade association with significant resources for funding litigation. Many major regulatory disputes fall into this category, including environmental regulation, regulation of financial institutions, and workplace and auto safety. Such cases are likely to pit DOJ against a larger and more experienced legal staff. How is DOJ subsidized in these cases?

At least part of the answer comes from the politics of regulation. Delegation of power to administrative agencies can occur in many different ways, with Congress holding broad powers to design agencies. Not infrequently, Congress will delegate power to an agency when powerful well-resourced interest groups are in conflict on a policy issue.[55] The Occupational Safety and Health Administration ("OSHA"), the National Labor Relations Board, and the National Traffic Safety Administration fall in this category. In other situations, Congress may delegate power to multiple agencies, with each agency having jurisdiction over a particular interest group. The Comptroller of the Currency (national banks), the National Credit Union Administration (federal credit unions), and the Securities and Exchange Commission (securities industry) fall within this description. In either regulatory category, however, agency actions that trigger litigation are likely to produce powerful winners and losers. If OSHA adopts a benzene standard for the workplace, both unions and the industry affected will be likely litigants.[56] If the Comptroller of the Currency lets

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52. *See* CAPLAN, *supra* note 32, at 39-48 (discussing White House intervention in drafting of brief in *Bakke* case); *id*. at 56-57 (discussing White House intervention in *Bob Jones* litigation).

53. *See* DATA USER SERVS. DIV., U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 216 (1997) (listing number of district court filings).

54. *See generally* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 98-103, 108-10 (1974) (describing the resource advantages of "repeat players" in the justice system).

55. *See* MICHAEL HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS 108 (1974); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 22-24 (1998).

56. *See* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980).

banks sell annuities, the insurance industry is a likely litigant.[57] If the Environmental Protection Agency adopts a rule insulating secured creditors from liability for environmental cleanup on property, the generous exemptions may prompt litigation by the Chemical Manufacturers Association.[58]

The resulting configuration of litigation usually includes well-financed parties that intervene on the side of DOJ. These parties, represented by law firms comparable to the firms challenging the government's action, can pick up for some of the deficiencies in the government's presentation, particularly in the parts of a case that might include significant devotion of work hours—such as combing through legislative history, reviewing large administrative records, or analyzing technical data. The incentives of the agency and the private intervenors may not always be perfectly aligned, but the intervenors, who often stand to benefit significantly from the agencies' action, are likely to devote substantial resources to marshalling strong legal arguments in the government's favor.[59]

Thus, it is a mistake to look at DOJ litigation resources without looking at the broader regulatory and legal context in which these cases arise. Sometimes it is the DOJ attorney—relatively inexperienced and alone on a case—who has the resource advantage over her adversary. Oftentimes, DOJ litigation is simply another stage in the conflict between powerful interest groups. In such cases, DOJ attorneys play a significant role, but often litigate with the support of the interest groups who stand to lose or gain by the outcome of the litigation. It is not uncommon for agencies, because of funding shortfalls that may often be intentional, to depend upon the resources of private interest groups to carry out a regulatory mission. There is no reason that this pattern should abruptly end when the matter is handed over to DOJ for litigation.

4. Understanding Administrative Law Doctrines as a Form of Legal Subsidy. A cursory glance at many doctrines in administrative law reveals what appears to be a tilt in favor of the government. The government has available a range of jurisdictional defenses that lead to dismissal without any consideration of the merits. The doctrines of exhaustion of administrative remedies, finality, ripeness, and standing frequently are barriers to challenging government

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57. *See* NationsBank v. Variable Annuity Life Ins., 513 U.S. 251 (1995); *see also* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 118 S. Ct. 927 (1998) (invalidating, at behest of banking industry, agency interpretation of statute authorizing broad geographical expansion by federal credit unions).

58. *See* Kelley v. Environmental Protection Agency, 15 F.3d 1100 (D.C. Cir. 1994), *cert. den. sub nom.* American Bankers Ass'n v. Kelley, 513 U.S. 1110 (1995).

59. Along with an attorney in the Office of the Solicitor General, I prepared the brief for the Comptroller of the Currency in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987). The major issue in the case was whether bank discount brokerage offices are "branches" subject to the then-existing ban on interstate branching found in the McFadden Act. In our brief we made strong arguments from the text of the statute and its legislative history. What we failed to develop in our brief was a reference in the legislative history to the long-established practice of bank off-site use of safety deposit boxes, which supported the notion that not all bank offices are branches. The private law firm representing the intervenor on our side (Security Pacific National Bank) discussed this in its brief. The Court's opinion expressly relies upon this passage in the legislative history. *See id.* at 406.

actions. These doctrines not only delay litigation, but force the private litigant to expend resources to challenge decisions in the administrative process.[60] Additionally, although the standards of review in administrative law differ, they all allow for giving deference to the agency's action.[61] For example, despite the Administrative Procedure Act's authorization of *de novo* review, it is virtually never applied in practice.[62] Coupling these deferential standards with the bar against expansion of the administrative record[63] makes it even more difficult to challenge the agency's decision.

The government's jurisdictional defenses operate with powerful anti-waiver doctrines. As an interpretive matter, the Supreme Court has repeatedly held that waivers of sovereign immunity are to be strictly construed.[64] Moreover, insofar as a legal defense of the government can be tied to sovereign immunity, it is considered jurisdictional in nature and not waivable by counsel.[65] The non-waiver rules that benefit the government appear particularly odd when compared to the strict waiver rules applicable to private parties who challenge agency action.[66]

No doubt these administrative law doctrines and waiver rules can be persuasively justified on sound constitutional and policy grounds. Indeed, administrative law scholarship is dominated by a discussion of these sorts of issues in a separation of powers context. What is suggested here is that these rules operate as a kind of subsidy. Consider the *Chevron* doctrine.[67] As formulated, *Chevron* requires the reviewing court to ask: first, whether the intent of Congress is clear and thus binding on the agency; second, if the statute is ambiguous, whether the agency's interpretation is reasonable.[68] The debate over the normative and positive aspects of the *Chevron* doctrine have been voluminous, with most of the former devoted to debating the separation of powers implications of *Chevron*. My interest in *Chevron* is quite different. *Chevron*—and the

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60. *See* FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980) (holding that the expense of litigation is part of the "social burden" and that there was no irreparable harm in a litigant defending itself in administrative proceedings).

61. *See* 5 U.S.C. § 706(2) (1994).

62. *See id.* § 706(2)(F); PETER STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW 939 (1995) (noting that *Overton Park* "limits de novo review under the [Administrative Procedure Act] to very unusual circumstances"). Indeed, even when the administrative record is compiled by the agency in an *ex parte* proceeding, review is confined to that record. *See* Franklin Savings Ass'n v. Office of Thrift Supervision, 934 F.2d 1127 (10th Cir. 1991).

63. *See* Camp v. Pitts, 411 U.S. 138 (1973).

64. *See* Lane v. Pena, 518 U.S. 187 (1996); Smith v. United States, 507 U.S. 197 (1993); *see also* Massieu v. Reno, 91 F.3d 416, 419-20 (3d Cir. 1996) (stating that the finality requirement for seeking review of agency action is jurisdictional and not subject to waiver).

65. *See* Henderson v. United States, 517 U.S. 654 (1996).

66. *See* Jones v. Board of Governors, 79 F.3d 1168 (D.C. Cir. 1996) (stating that a party who does not participate in agency proceeding may not seek judicial review of agency action); Northwest Airlines, Inc. v. Federal Aviation Admin., 14 F.3d 64, 73 (D.C. Cir. 1994) (holding that argument not raised before agency may not be basis for challenge on judicial review).

67. *See* Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 842-43 (1984). For a recent application, see *Atlantic Mut. Ins. Co. v. Commissioner*, 118 S. Ct. 1413 (1998).

68. *See Chevron*, 467 U.S. at 841-42.

general concept of deference to the agency[69]—significantly decreases the government's litigation burden. The party challenging the agency's decision can prevail if and only if it is shown that the statute clearly addresses the issue adversely to the government.[70] The DOJ—and the agency—usually can prevail if they can show that the statute is ambiguous.[71] The different burdens are clear and could have an offsetting effect on DOJ's chances of prevailing and on the amount of work that needs to be devoted to the case. Plainly, for the party challenging the agency, the added burden requires a greater commitment of resources to overcome DOJ's inherent advantage at litigating questions of law.[72]

B. Decentralizing Litigation Authority: Informational and Institutional Challenges

The DOJ's firm control of what litigation will be pursued and what arguments will be raised is a mechanism for offsetting the experience and staffing disadvantages under which DOJ operates. Plainly, if one sifts through cases to select those with stronger arguments and higher stakes, better litigation results can be expected. DOJ's selectivity also creates a pool of goodwill and credibility with courts that enhances the prospects for favorable litigation outcomes. Although the agencies are forced to incur the costs of this litigation arrangement, most commentators suggest that agencies either are ambivalent about the arrangement or outright supportive of it because they may at times gain important victories by drawing on the pool of goodwill DOJ creates.[73] "Overgrazing" of this commons can be prevented only by delegating to DOJ the gatekeeper role.

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69. I am aware of an argument that the application of *Chevron* may in fact lead to more aggressive review of agency decisions. This is particularly the case where step one of *Chevron* is merged with a textually determinate theory of statutory interpretation. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term, Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27, 73 (1994); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994); Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractability, and the Proper Incentives*, 1995 DUKE L.J. 1133, 1143. This debate is irrelevant for present purposes because I am using *Chevron* as shorthand for giving the agency great deference in interpreting statutes. *See* Smiley v. Citibank, N.A., 116 S. Ct. 1730 (1996).

70. A party may still prevail if it shows that the agency acted unreasonably under step two of *Chevron*. *See* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997). However, like step one, this standard of review typically tilts in favor of the government.

71. *See Atlantic Mut. Ins. Co.*, 118 S. Ct. at 1418 ("Since the term 'reserve strengthening' is ambiguous, the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one."). *Chevron* cases raise interesting strategic decisions for DOJ and agency lawyers. An agency may well prefer to win cases at *Chevron* step two because if it wins at step one it cannot alter its decision in the future, a course of action not unusual for agencies. Thus, in briefs DOJ attorneys ultimately may argue that, while the statute clearly supports the agency, it is sufficient to resolve the case to hold simply that the statute is ambiguous, and the agency's reading reasonable.

72. *Cf.* POSNER, *supra* note 45, at 176 (noting that *Chevron* doctrine lowers decision costs for judges reviewing agency interpretations).

73. *See* HOROWITZ, *supra* note 7, at 45; Herz, *supra* note 7, at 160.

Even if we accept part of this argument—that a pool of goodwill is created—is it possible that under an alternative litigating structure goodwill could also be created? Suppose Congress entirely decentralized litigation authority among government agencies; presumably, some agencies would see an advantage in mimicking DOJ litigation structures, thereby creating their own agency-specific goodwill. Agencies could (and some with independent litigation authority have) set up litigation structures that include trial, appellate, and Supreme Court experts. Just as DOJ strictly controls which cases are pressed and which arguments are raised, the agency lawyers would play gatekeeper at each stage of the case.

There are several reasons why this decentralized system may not work to produce pools of goodwill, and why some institutional actors may prefer the DOJ monopoly. First, individual members of Congress might skew the system. In a decentralized Congress, independent litigation authority may give individual members with a strong interest in pending matters an incentive to distort the agency's litigation decisions, thus impeding the effort to create agency-specific goodwill with the courts.[74] In a battle with a powerful committee chair, an agency general counsel's plea that a matter might undermine the agency's credibility with the court is not likely to be considered seriously. Particularly for a member of Congress on a two-year election cycle, an agency's long-term relationship with the courts is not likely to count for much.[75] An additional factor is the agency's inability to stand with the full support of the Attorney General and the President. When the Attorney General or one of her subordinates speaks to a powerful member of Congress, each side knows that ultimately the President can be enlisted (or already has been) to support the litigation decision. The member knows that a fight with the President is a far different matter than a dispute with an agency general counsel cut off from the DOJ/presidential power structure.[76]

Opposition to the decentralized litigation system is likely to come from a more important institution, the federal judiciary. Since federal judges are both the dispensers and one of the benefactors of litigation goodwill, their opposition would be pivotal. The DOJ monopoly and screening produces important benefits for the judiciary: It reduces caseload, ensures a constant stream of intellectually challenging and important cases, and warrants that issues were vet-

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74. *See* CLAYTON, *supra* note 1, at 9 (discussing Congress's preference for independent litigation authority as a means of enhancing legislative power). The Supreme Court has explicitly stated its skepticism that agencies would forbear from "unnecessary" litigation. *See* Federal Election Comm'n v. NRA Political Victory Fund, 513 U.S. 88, 96 (1994) (noting that, absent Solicitor General control, agencies would press a "more parochial view"); United States v. Providence Journal Co., 485 U.S. 693, 701 (1988) (commenting on "parochial interests of a particular agency").

75. *See* Herz, *supra* note 7, at 143 (discussing multiple constituencies of agency general counsel and need for working relationship with congressional committees); *cf.* Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966) (vacating agency order on grounds that Senate subcommittee deprived Pillsbury of procedural due process and remanding case to the FTC).

76. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 590-94 (1984).

ted and that only important and serious arguments are pressed, thus allowing the court to conserve precious resources. In short, DOJ's signature on a brief constitutes important information upon which the court relies. In exchange, of course, the court gives DOJ goodwill. Indeed, at the Supreme Court, this trade is explicitly acknowledged, and when the Solicitor General reneges, the Court has not hesitated to rebuke the Solicitor General and remind him of his obligations.[77]

When we decentralize litigation authority, the judicial branch bears extra costs. Most importantly, the courts would have to undertake an agency-specific calculation of whether DOJ-type screening is being done, at what level, and in turn what goodwill if any to give the agency. Given the number of federal agencies, this search, evaluation, and assessment can be time consuming and costly for the courts.[78] Of course, each agency would try to project to the courts that they are engaged in DOJ-type screening processes. If, because of the costs of assessment and valuation, the judiciary was unable to detect which agencies were truly undertaking the screening, a "lemons" problem would arise.[79] The courts, as "purchasers" of screening, could not detect which agencies were screening and therefore would simply stop "paying" out goodwill. Agencies would also respond rationally; because courts were not offering goodwill, there would be no point to competing with the other agencies to earn goodwill. Ultimately, therefore, the entire system would bear more costs, with higher caseloads, more careful scrutiny of government arguments by the courts, and potentially greater resources devoted to government lawyering to make up for the loss of goodwill.

Even if the result is not the inability to detect which agencies are selling "lemons," the courts are unlikely to embrace the decentralized litigation plan. The judiciary, as does DOJ, gains enormous benefit from DOJ's screening of cases and arguments. More time is made available to devote to opinion quality, oral argument preparation, judicial administration, or even leisure time for judges interested in using their time otherwise.[80] For judges as much as DOJ lawyers, the challenge and intellectual stimulation of the cases that arise from the centralized plan contributes not only to job satisfaction, but to prestige as

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77. On two recent occasions, the Solicitor General supported arguments making inroads into his control over Supreme Court litigation, and in both cases the Court rejected the arguments. *See NRA*, 513 U.S. at 99; *Providence Journal Co.*, 485 U.S. at 701. The Court explicitly chastized the Solicitor General's ceding of power, "find[ing] such a proposition somewhat startling, particularly when supported by the office whose authority would be substantially diminished by its adoption. . . ." *Providence Journal Co.*, 485 U.S. at 701.

78. DOJ represents over 100 federal agencies. *See* DOJ LEGAL ACTIVITIES, *supra* note 5, at 37. In this respect, the problems associated with all government agencies "owning" litigation rights may be analogized to a tragedy of the "anticommons." *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

79. *See* George A. Akerlof, *The Market for "Lemons": Quality, Uncertainty, and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

80. *See* POSNER, *supra* note 45, at 117-44 (offering model of judicial utility function).

well.[81] Federal judges, many of whom have DOJ experience, continue to be direct beneficiaries of DOJ's monopoly.

The difficulty of generating agency-specific goodwill is further underscored by the fact that not all government agencies regularly litigate before the Supreme Court and courts of appeals. The earning of a reputation, however, requires that the game between court and litigator be a repeated one.[82] If the agency knows that it is an infrequent litigant it may have no incentive to earn goodwill, or if it does it may fear that its showing of restraint will go unrewarded, since the court will rationally conclude that it will be unable to reward or penalize. Centralization of litigation overcomes this problem and allows all agencies to share in the potential for goodwill created by DOJ.[83]

IV

CONCLUSION

This essay offers a preliminary analysis of an aspect of DOJ representation that has largely been ignored. The narrow problem of DOJ staffing of cases

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81. *See* Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 918 (1983); Carolyn Dineen King, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 959 (1991). For an extended discussion of the problem of the growing federal caseload, see RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985), and the more muted concerns in POSNER, *supra* note 45.

82. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 16 (1984). This explains how certain agencies with independent litigation authority manage to become repeat litigants (particularly before the D.C. Circuit) and attempt to develop goodwill. For example, the SEC and FCC frequently appear with their own counsel in the D.C. Circuit and the judges on that court may obtain sufficient information, along with the possibility of a repeated game, to establish levels of goodwill. Notice, however, while one can speculate that these agencies with independent litigation authority can effectively mimic the DOJ litigation model and develop similar reputations, anecdotal evidence suggests the contrary. The Office of Thrift Supervision ("OTS"), which regulates savings and loans, has established a horrible litigation reputation in the D.C. Circuit. *See* Kaplan v. OTS, 104 F.3d 417, 424 (D.C. Cir. 1997) ("OTS' position in this case comes perilously close to treating those who serve on the boards of both savings and loans and their parents as absolutely liable. . . . This will not do as a matter of administrative law."); Johnson v. OTS, 81 F.3d 195, 203 (D.C. Cir. 1996) (characterizing agency position as "nonsensical . . . it proves almost nothing"); Wachtel v. OTS, 982 F.2d 581, 585 (D.C. Cir. 1993) (refusing to defer to agency position that is "almost frivolous"); *see also* Checkosky v. SEC, 139 F.3d 221 (D.C. Cir. 1998) (castigating agency position as "fail[ing] to adopt an intelligible negligence standard," violating "elementary administrative norms of fair notice and reasoned decisionmaking," and finding agency opinion "almost deliberately obscurantist"). Perhaps even more startling, some agencies with independent litigation authority have, on occasion, explicitly disclaimed any special relationship between government counsel and the judiciary. *See* Freeport-McMoRan Oil & Gas Co. v. Federal Energy Regulatory Comm'n, 962 F.2d 45, 46 (D.C. Cir. 1992) ("We . . . pause to address FERC counsel's remarkable assertion at oral argument that government attorneys ought not be held to higher standards. . ."). However, the court has reminded government counsel of their higher obligation. *See id.* at 48 ("We find it astonishing that an attorney for a federal administrative agency could so unblushingly deny that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission.").

83. Consider the recent case of National Credit Union Admin. v. First Nat'l Bank & Trust Co., 118 S. Ct. 927 (1998). There, the Solicitor General represented the National Credit Union Administration ("NCUA") on an important question of banking law. The NCUA rarely litigates in any court—especially the Supreme Court—and thus had little opportunity to develop a litigation reputation. Even though the NCUA was unsuccessful in this case, by being represented by the Solicitor General the agency was able to draw on the goodwill.

and hiring of attorneys raises complex and difficult questions of administrative regulation, professional responsibility, and economics. The story told here is subject to a number of important caveats, which, I hope, do not unduly detract from the argument pressed. More empirical data is needed on numerous aspects of the problem, including tenure for DOJ attorneys, work assignments for DOJ and private lawyers, and actual control of DOJ litigation. Additionally, the argument is necessarily incomplete because it largely ignores separation of powers issues and questions of bureaucratic governance. The discussion has also glossed over a number of important distinctions among agency lawyers and litigating offices within DOJ. Given my interest in setting forth a general problem and a broad theoretical framework, it would not be surprising that other areas of government litigation would fall far outside the discussion.

Despite this essay's limitations, it is clear that DOJ recruiting, staffing of cases, and work assignments warrant further attention. Scholars who have contributed significantly to the debates over the role DOJ plays in separation of powers battles or disputes over regulatory reform should not be surprised to discover that there are important aspects of the government lawyering process that remain unexplored. Indeed, with DOJ playing such a pivotal role in the administrative state, it would be surprising if we were to learn otherwise.