

Transformative Bureaucracy:
Reagan's Lawyers and the Dynamics of Political Investment

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The diffuse, disjointed quality of American policymaking produced by federalism, separation of powers, and the extensive role of nonstate actors means that transforming governing arrangements requires more than success at the ballot box. Successful political movements must combine electoral power with the generation of ideas, the creation of durable organizations, and the recruitment and training of movement personnel.ⁱ This is especially the case where legal change is concerned. Previous work has argued that legal change requires a combination of electoral power and the construction of a legal “support structure” composed of intellectuals, litigators, and organizational entrepreneurs.ⁱⁱ The capacity to effect legal change is conditioned by the depth and sophistication of political and professional networks outside of government and the degree to which they are linked to critically placed actors inside government.

Officials within the executive branch have considerable resources at their disposal that can be invested in improving the quality of their affiliated support structure and speeding up its development. Some of these resources are either not available, or available in a much less efficient manner, to actors outside government. Investment in organizational capacities and networks by political appointees can, therefore, have a considerable long-term payoff for the governing coalition of which they are a part.

Political scientists typically model political actors as seeking to maximize their short-term interests subject to a set of fixed constraints. An expanding literature in public policy and American political development tradition has increased our understanding of political dynamics by providing rich accounts of how political constraints change over time, thereby altering the range of choices faced by decision makers. For the most part, however, this literature has understood this process of shifting constraints as essentially uncoordinated or accidental, rather than conscious and strategic.

In previous work I have shown that, under certain conditions, political actors consciously and strategically seek to alter the political constraints that will face their successors in the future. Conservatives in Britain, for example, pushed through ambitious pension privatization proposals because they believed they would increase public support for market-oriented solutions in the future.ⁱⁱⁱ Similarly, advocates of Social Security privatization in the United States pushed for expanded private retirement savings programs in the expectation that they would reduce opposition to transforming Social Security into a system of private accounts.^{iv} Advocates of welfare reform in the Reagan administration dramatically expanded the use of “waiver” authority in order to induce state-level experimentation that they (correctly) believed would expand the scope of politically viable welfare reform in the future.^v Finally, conservatives in philanthropic foundations invested considerable resources over more than a quarter-century in order to create the organizations, networks, and ideas that would overturn the systematic advantages of legal liberals.^{vi} In each of these cases, political actors operating in different institutional venues recognized the limitations that existing political arrangements placed on their capacity to generate change in the present. Rather than adapting their behavior to those constraints, they responded by engaging in *political investment*: devoting scarce resources to projects (policy change, idea generation and legitimation, and organizational and network development) that would shift the terrain of political competition in later periods.

We are generally not accustomed to thinking of political appointees in these far-seeing terms, given that so much of their work is, of necessity, devoted to implementing their agency’s inherited tasks (what I will call the appointee’s “administrative” function) and attempting to advance new policy objectives, either through legislation, rule making, or other tools (which I will call their “programmatic” function). In the cases where scholars have

turned their lens on the dynamic, long-term impact of political appointees, they have focused on their role as policy entrepreneurs^{vii} or as investors in the autonomy or effectiveness of their own agency.^{viii} What I will call “transformative bureaucracy” differs from these forms of bureaucratic behavior, in that it involves consciously deploying agency resources to transform the terms of political competition in the future by reshaping the agency’s *external* environment.

Political appointees have potent capacities to influence their external environment—and hence the terrain of future political competition—by investing in the political support structure composed of ideas, organizations and networks, and personnel. Where ideas are concerned, senior political appointees (especially cabinet secretaries) can devote the considerable resources of their agencies into putting meat on the bones of previously exotic ideas, diffusing them to agency personnel, and forcing them into mainstream political discourse by conferring on them the respectability of high office. Political appointees can assist the development of political organizations by providing them direct subsidy, increasing their profile (for example, by giving highly-publicized speeches to their members), and by granting them preferred access to agency decision making. Finally, political appointees can exercise considerable sway over their successor generations by appointing sympathizers to lower-level positions, grooming them for higher office, and in the process reshaping the “mobility track” for higher office.

The relationship between Reagan’s lawyers and the conservative movement is an especially promising case for gaining insight into the possibilities of transformative bureaucracy. First, the Reagan administration, especially its second-term legal cadre, was staffed by senior administrators with an unusually high level of ideological fervor and commitment to the conservative movement. Second, Reagan entered office when the

conservative movement's networks were denser at the grassroots than at elite organizational, professional, and intellectual levels. This gave key figures in the administration a special interest in fostering elite organizational mobilization and networks, in order to facilitate the development, legitimation, and implementation of their political program over the long term.

As I argue below, the Reagan Justice Department (and to a lesser degree the larger cadre of administration lawyers), especially in the second term under Edwin Meese, engaged in an impressively wide range of political investments. While Attorney General Meese plays a critical role, the “agent” in this account is best understood in collective terms: the “leadership cadre” composed of Meese and the core political appointees who shared his ideological goals and strategic orientation. The Meese Department of Justice (DOJ) put in place specific planning procedures designed to ensure that distant benefits were considered, increased the power of units disconnected from the routine work of the department, and added staff that were hired on the basis of their ability to participate in the broader intellectual work of the department, even for positions of a more functional or administrative character. Beginning under William French Smith and accelerating under Meese, the leadership of the DOJ paid close attention to hiring intelligent, highly ideologically committed young lawyers into lower-level positions, both for the short-term purpose of ensuring control over the permanent bureaucracy and in order to credentialize a generation of future senior movement lawyers. Most importantly, the Meese DOJ invested quite considerable resources to transform the broader terrain of constitutional and jurisprudential thought, and to support organizations (like the Federalist Society) that would generate and legitimate ideas, as well as create strong networks that connected the state, the Republican Party, and the legal profession.

In Section I, I set the stage by describing the strategic situation as of 1981, with conservatives ascendant electorally but frustrated at their inability to compete with the liberal legal movement at the organizational, intellectual, and professional levels. I then briefly examine the administration's failed effort to right this imbalance by crippling its foes in the public interest law movement. The balance of the paper examines the administration's more fruitful efforts to build up the ideas and personnel of the conservative legal movement. In Section II, I discuss the internal organizational changes initiated by Attorney General Meese, many of which were designed to orient the department away from an obsession with its "inbox" and toward long-term goals. In Section III, I document the very conscious effort by the administration to build up and burnish the credentials of a new generation of young conservative lawyers, both through hiring and mentoring them, as well as helping to support the nascent Federalist Society—all of whose founders were hired by the department. In Section IV, I describe the administration's ambitious effort to resuscitate the intellectual legitimacy of "originalism," and how this can be seen as an effort to remove the stigma from a controversial idea through its support by powerful government officials. In Section V, I examine the department's follow-up on the originalism speeches, paying close attention to the role of the Office of Legal Policy (OLP). I conclude by speculating on the conditions under which we might expect political investment to occur, and how the concept can help us make sense of the interaction of parties, administrative agencies, and social movements, in the law and beyond.

I. Grassroots Without Elites: The Conservative Legal Movement Circa 1980

The election of 1980 was a resounding success for legal conservatives. The Republican Party took control of the presidency and the Senate, led by a president with a long record of conflict with legal liberalism. A year before Nixon ran for president on a platform of law and

order, Reagan was already observing that, “The courts at the appellate level have narrowed the difference between liberty and license and in some areas have overbalanced the scales of justice so that the rights of society are outweighed by decisions granting new rights to individuals accused of crimes.”^{ix} Legal and judicial issues, such as capital punishment and overhauling judicial selection, were a major priority during Reagan’s time as the governor of California, and Reagan’s policies in areas as diverse as the treatment of migrant labor, welfare reform, and the environment were thwarted or delayed by public interest law firms.^x For example, Reagan’s effort to cut \$211 million from the state’s MediCal program was defeated by California Rural Legal Services, while his veto of \$1.8 million in state funding to the group a few years later was defeated when a three-judge panel declared the move “unfounded and without merit.”^{xi}

Reagan’s political appointees and supporters in California learned that even the formidable tools of the executive branch were no match for the increasingly well-organized network of liberal public interest lawyers, judges, and their supporters in the legal academy and the bar. These complaints crystallized with the creation of the Pacific Legal Foundation (PLF) in 1973, which had a direct connection to Governor Reagan. William French Smith, a long-time member of Reagan’s “kitchen cabinet,” helped to found PLF by connecting Robert Zumbrun, the deputy director for Legal Affairs of the California Department of Social Welfare, with the industrialist J. Simon Fluor, who had become increasingly frustrated by liberal public interest law firms’ success in derailing development in the West.^{xiii} Also on the board was Governor Reagan’s chief of staff Ed Meese, one of PLF’s first members and strongest supporters. A couple of years after its founding, PLF considered going national, but chose instead to support the creation of a network of regional conservative public interest law firms, coordinated by a new organization, the National Legal Center for the

Public Interest. While PLF had some successes in the 1970s (and would have even more impact in the 1980s, when its repeated attacks on the California Coastal Commission bore fruit in one of the first successful challenges to local government takings^{xiii}) its successor firms were, on the whole, not nearly as effective.^{xiv}

The lack of impact of these firms became brutally obvious to the conservative movement's patrons in the wake of a report by a then-obscure lawyer in private practice, Michael Horowitz. Horowitz's increasing hostility to liberalism reached a peak during a meeting of public interest lawyers in the early Carter years:

The critical moment came when my classmate [at Yale Law School] Charlie Halperin, who is really one of the godfathers of the liberal public interest movement, asked me to come to a conference, the tenth anniversary of the public interest law movement . . . It was one of the most eye-opening, stunning experiences, because here were all these guys—some of them were in government, some were in the public interest movement—and the latter were suing the former in profoundly collusive ways, where the government agencies would lose and the court would order expansion of government programs, in a sense mandating appropriations that Congress was refusing to give. And then I remember the head of the Legal Services Corporation at the time saying give me a little more money and HHS won't stand a chance. And I just thought the level of arrogance and antidemocratic air about people who just knew they were on God's side, whoever she was, was just stunning. Then I called up Dick Larry, who was then at the Scaife Foundation . . . I . . . made a cold phone call, and said I've just been at this conference, and [I want you] to give me a grant as if you were a new client, so I would have the time to write this report.^{xv}

While others in the conservative movement believed that the answer to the liberal public interest law movement was to somehow shut it down—a strategy that later came to be known as “defunding the left”—Horowitz sought to learn from the movement instead. “When I was at Charlie's conference, here were these general counsels of agencies saying my door is always open to the Environmental Defense Fund, and we plot and scheme . . . we work it out. You make these radical demands on me and then I can look like I'm in

the middle. So we can advance the ship that way . . . I thought that was a wonderful model.”^{xvi}

That was not, however, the model that conservative public interest law firms had adopted. While liberal public interest law firms were heavily invested in Washington, DC, conservative firms had almost no representation there. Reflecting the lessons he had learned from the left, Horowitz told the Scaife Foundation that:

Washington is “where the action is” insofar as issues of public policy are concerned. A conservative public interest law movement should of course have, as one of its prime objectives, a radical alteration of that fact. Still, in maintaining its regional orientation, the conservative public interest law movement has essentially confused wish with reality, for it is in being more effective in Washington that the conservative public interest law movement can more effectively erode the power of its agencies . . . decision-making in Washington is, as is true with all human institutions, dramatically effected by personal relationships and ease of immediate access to decision makers.^{xvii}

Conservatives were unable to play the “inside game” of public interest law, because their absence from Washington cut them out of the regulatory and professional networks through which information is transferred in the modern administrative state. Even worse, the conservative firms’ tight connections to business and their tendency to defend narrow corporate interests made it hard for them to attract idealistic young lawyers, and made it difficult for them to claim the mantle of the “public interest” from the left. Horowitz believed that legal conservatives could legitimately claim to represent the public interest, speaking for “such unrepresented parties as taxpayers, ultimate consumers and small businessmen,” as well as “poor clients such as ghetto school children affirmatively interested in the maintenance of internal school discipline” and “ghetto public housing residents,” who wished to “reestablish order in their neighborhoods.”^{xviii} Without expanding their activities beyond narrowly legalistic defenses of conservative interests, however, Horowitz thought that the movement

would “at best achieve episodic tactical victories which will be dwarfed by social change in the infinite number of areas beyond the reach of its case agendas.”^{xix} Until conservatives convinced the legal profession and the broader public that they represented ideas with real intellectual and moral heft, and were able to recruit young lawyers motivated by those ideas, they would fail in the courts.

It took a decade for conservatives to develop a new generation of public interest law firms informed by the lessons of Horowitz’s report.^{xx} But just a few months after Horowitz submitted his report to the Scaife Foundation, the election of Ronald Reagan to the presidency put Horowitz—along with William French Smith, Ed Meese, and others involved in supporting the first generation of organized conservative responses to legal liberalism—in a position to start doing something about the miserable state of the conservative legal infrastructure.

The most obvious strategy available to Reaganites for dealing with the organizational imbalance between legal liberals and conservatives was a vigorous attack on the financial foundation of liberal public interest law. Reagan’s men genuinely believed that the election of 1980 represented a sharp break in the development of American law and public policy, and that they had won a mandate to reverse the politics of the previous two decades. Rather than slowly building up conservative capacities by nurturing ideas, organizations, and personnel, therefore, the administration focused its early attention on hobbling its opponents.

This strategy came to be known as “defunding the left.” To lead this charge, the administration nominated none other than Robert Zumbrun, the founder of the PLF, to be head of the Legal Services Corporation (LSC). Zumbrun’s job was to serve as the LSC’s undertaker, fulfilling the administration’s promise to eliminate the agency. The public interest law movement and its elite allies saw the nomination for what it was—the first step

to eliminating the LSC—and the nomination produced a firestorm of attacks.^{xxi} Zumbun's nomination was eventually withdrawn.^{xxii}

Despite considerable efforts on the part of the White House, the Office of Management and Budget (OMB), the Environmental Protection Agency (EPA), and other departments, the administration was unable to utilize its electoral power to meaningfully weaken support for liberal public interest law.^{xxiii} The administration's defunding strategy failed for a number of reasons, among the most important being the well-founded belief of congressional committees that public interest lawyers could limit the damage that the administration could cause by waging "politics by other means" through the courts.^{xxiv}

Equally important, however, was the strong support that the LSC received from the organized bar. Just as establishment lawyers had prevented public interest law from being suffocated in the crib back in the Nixon years—when numerous former American Bar Association (ABA) presidents led the charge to prevent the IRS from stripping public interest law's tax-exempt status^{xxv}—the bar put pressure on moderate Republicans and served to counteract the administration's claims that taxpayers were funding legal radicalism. In a sign of the profession's commitment, the president of the ABA, William Reese Smith, led a protest march in Washington calling for the preservation of the LSC. The LSC found support from mainstream Republicans like Senator Warren Rudman (R-NH), as well as the party's remaining liberal members of Congress. The defunding the left strategy sank because the defenders of the LSC simply cared more about the issue, and had more organized troops willing to do something about it, than did the LSC's opponents in and out of the administration. Without a strong support structure outside of government, even an administration with strong electoral support did not stand a chance.

Conservatives did manage to cut the LSC's budget in 1982 as part of the larger effort to clamp down on government spending, but this barely chipped away at the larger subsidy apparatus, most of which was outside the appropriations process entirely. And the failure to eliminate the LSC entirely turned out to be fateful for conservatives, as the agency's budget grew rapidly during the George H.W. Bush administration. Finally, private support for public interest law—especially in the area of the environment—skyrocketed in the wake of conservative attacks, more than compensating for reductions in government support.^{xxvi} The Reagan administration was unable to use its formidable electoral power to cripple its opponents in public interest law. While the administration's destructive capacity proved weak, its ability to use government to help shore up its own side would prove much more effective. It is to those efforts that we now turn.

II. Reorganization for the Long Term

Under the direction of Edwin Meese, the DOJ became considerably more focused on shoring up conservative resources for competing with legal liberals in the realm of organizations, personnel, and ideas. To make sense of this shift, I begin by putting those goals in the context of the larger organizational and strategic changes created in the transition from Attorney General William French Smith to Meese, which sets the stage for the initiatives described in sections III through V.

The Smith DOJ (which lasted from 1981 to 1985) did not differ from that of his successor ideologically—both were strongly conservative. It was under Smith, for example, that the dramatic change in antitrust enforcement occurred, under the leadership of Assistant Attorney General William Baxter, one of the leading figures in law and economics.^{xxvii} Smith's Justice Department also saw a drastic shift in civil rights enforcement under Assistant Attorney General William Bradford Reynolds, whose Civil Rights Division was

perhaps the part of Reagan's first-term executive branch with the greatest ideological commitment and willingness to challenge existing policy commitments.^{xxviii} The White House did not harbor suspicions that the department was insufficiently conservative, as it did with other cabinet agencies. Kenneth Cribb, an assistant to White House Chief of Staff Meese in the first term, recalls that, "We liked the Smith Justice Department, and the policy apparatus that I was involved with at the White House, which basically all answered to Ed Meese, was in alliance with the Smith Justice Department, against other opinions in the administration."^{xxix}

Where Smith and Meese differed considerably was in their strategic orientation and the opportunities their time in office offered. In particular, Smith and Meese had very different management styles. Richard Willard, whose time as assistant attorney general for the Civil Division spanned the Smith and Meese regimes, recalls that:

Bill Smith's leadership style was more informal, whereas Meese developed more structures in support of his style. Bill Smith was a little more the hidden-hand type who got things done without making a big show of it, and would give direction very informally and confidentially. Ed was more likely to set up structures—retreats, committees, programs—as a way of advancing his agenda. Meese was more like the corporate style of management, whereas Smith was more like the law firm senior partner style of management. One good example is the way they used their dining room. Smith had lunch with his major direct reports almost every day in his dining room . . . It was generally a time for exchange of informal advice and guidance, bonding, that sort of thing. A very good informal institution of governance . . . That was a good example of his hidden-hand approach. Meese tended to organize more events. He didn't just have an informal lunch. He'd have this group or that group in, he'd have a speaker in, or something like that. It was more structured and formal as opposed to the informal team-building approach.^{xxx}

Gary McDowell, who served as Meese's chief speechwriter, recalls that Smith and Meese had very different connections to the conservative movement, as opposed to Reagan personally. "Smith was a long-time Reagan kitchen cabinet member, good guy, smart guy, but not a cutting-edge, down in the mud conservative like Meese was. Meese, Lyn Nofziger, those

were the people who understood the conservative movement, those were the people who . . . understood Reagan . . . I don't think I've ever seen Ed Meese without an Adam Smith or a Federalist Society tie on . . . That includes every day I worked with him, and every day I've seen him since.”^{xxxix} While Smith had strong connections to the conservative movement, the conservative movement was at the core of Meese's political and personal identity. In addition to his history with PLF and Reagan's battles with the liberal legal movement in California, Meese was linked to the small band of conservative legal scholars, having taught at the University of San Diego Law School for four years (the home of Bernard Siegan, one of the earliest defenders of the idea that the courts should actively protect economic liberties^{xxxix}) before entering the Reagan White House. While it would be a stretch to say that Meese was an intellectual, he took ideas seriously and surrounded himself with intellectuals. Steven Calabresi, who worked for Meese as a special assistant, recalls that, “He was unusual in that he was very interested in ideas as well as in action and accomplishing things.”^{xxxix}

The difference was not just a matter of orientation, however, but a function of timing. Eastland recalls that, “The Smith department was more oriented to what came into the ‘in-box.’ Probably rightly so.”^{xxxix} Meese recalls that, “I think in some ways Bill Smith had some of the same ideas in mind, but because he came there first, he had a much greater role to play, or burden, to get things organized, or moving in the right direction, and so a lot of his effort was pointed in that direction, and I was able to build on that. Another reason is we had recruited a lot of bright young people at the assistant and deputy assistant attorney general level, and the various appointed positions.”^{xxxix} As we explore in Section III, this difference in personnel was considerable—many of Meese's most important appointees held junior positions in Smith's DOJ.

The increasing priority that the Meese DOJ put on fighting the battle of ideas reflected the frustration felt by many inside the department—especially William Bradford Reynolds, who was unsuccessfully nominated by Meese for associate attorney general, but who played a similar role without the title—with its performance in this area during the first term. Senior leaders of DOJ recognized, even before Meese was confirmed, that they could not count on the White House to do their high-level thinking and outreach for them. At the department’s 1984 retreat, then-assistant secretary for Legal Policy Tex Lazar observed that “in civil rights, we did not have a public relations effort and we got lots of bad press; we consciously avoided confronting some of these issues. . . . We need to sell the Department to the rest of the Government and the public. DOJ does this less and less well than anyone else.”^{xxxvi} Reynolds agreed, arguing that, “We have not done a good job in educating the public. Lots of people come in and no training is given to them on how to deal with the media; nor is there a coordinated and affirmative effort made to sell our programs. So, we lose a lot of the initiative and are always reactive, not proactive. E.g., *Bob Jones, Voting Rights Act, Grove City*, comparable worth.”^{xxxvii} Lazar observed that one of the critical failings of the Office of Legal Policy (OLP) in the first term was that it was too internally focused and insufficiently directed to the broader conservative legal movement. “We need to bring in James Q. Wilson types. We need their input in forming policy and their help in selling We need to sell our policies to lawyers and legal scholars.”^{xxxviii} Meese’s belief that the DOJ needed to reshape its external environment in order to advance its program, therefore, was already accepted by many of the men who served under Smith.

Meese made a number of changes to DOJ that reflected his greater focus on the long term. Meese recalls that, “When I got into the department, I thought we needed a stronger planning effort, a stronger long-range look, so I set up several planning boards of my top

people. One was a strategic planning board—where should the country, where should the government, where should the department be, ten years from now . . . This was my own idea [hadn't been present under Smith].”^{xxxix} Meese also increased the priority given to the long-range planning retreats of the department, and they appear to have become more forward-looking, oriented toward objectives that reached beyond Reagan's term in office.^{xl}

To push forward a more intellectual, long-term orientation for the department, Meese increased the resources and upgraded the personnel of the public affairs division, a decision driven by the priority he placed on rhetorical leadership. Willard recalls of Smith that, “He was much more cautious [than Meese]. He would frequently want to water down what was being said so that it wouldn't create a headline in and of itself. It's not that he didn't agree with the ideas, but he didn't enjoy being provocative. Ed enjoyed being provocative, and so he was willing to draw more attention and that produced more publicity.” Publicity was central to Meese's strategic approach. A letter from Eastland to Pat Buchanan early in 1985 points to the increasing centrality of public outreach to the Meese regime, and its increased ambitions:

Ed Meese and I want to reorganize Public Affairs, which is now mainly a press office. Speechwriting will be under me, as will a “public liaison” effort designed to reach out to academics and laymen. I will be the department's communications strategist, mapping plans for doing battle in the war of ideas. Mr. Meese wants to emphasize federalism and separation of powers. I intend to design public initiatives in these areas, as well as in some others, including judicial restraint, victims' rights, religious freedom, and “Baby Doe.”^{xli}

Gary McDowell recalls that, “One of the big differences in the Bill Smith regime and the Ed Meese regime is that [under Smith] Terry Eastland [had been] a special assistant to the attorney general, and his sole speechwriter. When I came on we created a speechwriting unit, and I had at any given time three to four speechwriters and two research assistants

working under me. So it became a much bigger operation, a much more pronounced presence.”^{xliii} This expanded speechwriting team was designed to serve the entire department, and not just the attorney general, in an effort to get the department to speak (literally) with one voice. William Bradford Reynolds, for example, relied on the speechwriting team in public affairs especially strongly. McDowell had been a professor at Tulane University and a fellow at Harvard Law School, and studied with Herbert Storing at the University of Chicago before receiving his PhD at the University of Virginia.^{xliiii} Hiring McDowell was intended to make the public affairs division an active part of the larger intellectual debate in the department. Cribb believes that, “The public affairs division of Justice, with the appointments of Terry Eastland and Gary McDowell, had become a place where you had substantive people doing intellectual work. That was an ongoing thing. Just because the speeches had been given didn’t mean they stopped thinking.”^{xliv}

Working in the same direction as the reorientation of the Office of Public Affairs was the transformation of the Office of Legal Policy. OLP was created in 1981 to take the lead on judicial selection and to play an important role in policy development and coordination, but by the end of Smith’s term in office its proper role was still a matter of considerable internal dispute. At the department’s 1984 senior staff retreat, Lazar admitted that, “OLP has tried hard, but succeeded little. There are, however, needs in the department that OLP or someone must deal with.”^{xlv} Even after hashing out the issue at the department retreat, there continued to be great disagreement about where, precisely, “staff support for special projects, Cabinet affairs, and long-term planning—functions which are currently performed by OLP” should be housed, with some proposing that the division be eliminated and its functions transferred to the Attorney General’s office.^{xlvi}

OLP was given a much clearer role under Meese: to lead the search for judicial nominees, to coordinate department policy, and to contribute to the long-term intellectual development of conservative legal thought. To head OLP in the second term, Meese chose Stephen Markman, a committed legal conservative who had served on Senator Orrin Hatch's Judiciary Committee staff and had just become the head of the Federalist Society's Washington, DC, Lawyer's Chapter. The importance that the department leadership gave to a renovated OLP is evidenced by the fact that "we offered that job to two very substantial people. One later became the attorney general . . . Bill Barr . . . It was an inopportune time for him. We wanted Steve Markman in a senior position, and so when that didn't work out, we moved the chess pieces a bit and put Steve there."^{xlvi} As we see in Section V, Markman would raise the profile of OLP considerably, both by resuscitating its role in judicial selection, and by contributing to the department's originalism project.

Under Markman, OLP was in a strong position to take on its new, more focused tasks, because "it was . . . more susceptible to individual definition by attorneys general than most other offices, which had more rigid and traditional jurisdictions."^{xlviii} The most important gap that OLP filled was in using intellectual development to give the department greater coherence than it had attained under Smith. Cribb argues that, "We understood that we would have to have a great deal of coordination in order to get consistent arguments before the court . . . one of the problems in the past was that the government didn't speak with a consistent conservative voice in its litigation. So one thing we knew we [needed was to] institute certain coordinating mechanisms."^{xlix} While some of those coordinating mechanisms were formal and organizational, the most important coordinating mechanism was ideational—the more the department knew what it thought on key questions, and communicated it clearly both inside and outside Main Justice, the easier it would be to

ensure that everyone went in the same direction. The short-term objective of coordination and the longer-term goal of intellectual development went hand-in-hand, but the latter was the sort of function that could easily fall through the cracks in the litigating divisions of the department: “for busy policy people to do their work, there needed to be think-tank work behind it. They’re too busy to do that kind of work.”¹

The decision to raise the profile of OLP was also an instinctual part of Meese’s leadership style. Meese recalls that,

When I came in, we had a pretty direct purpose for it [OLP], which was to work on legal policy matters, to work on and be an in-house think tank, as well as to be the principal place for our work on the selection of judges. . . . Everywhere I’ve been, I’ve always tried to have a think tank. . . I had studied management and leadership a lot up to that point, and people who I admired and thought were successful usually developed some sort of think tank, as people who could look at issues, long-term planning, away from the day to day. You have all these people working on the day to day, so it was important to have a group of people who were kind of separate from specific kinds of things, who could look at long-range matters.^{li}

The shift in the role of OLP between the Smith and Meese regimes is vividly captured in the contrast between how it was described in the department’s 1984–85 and 1986–87 reports. In the 1984–85 report, OLP was described as “the principal policy staff reporting to the Attorney General and the Deputy Attorney General. Under the direction of an Assistant Attorney General, OLP plans, develops and coordinates the implementation of policy initiatives on issues that are of special concern to the Attorney General and the Administration.” The latter report describes OLP as “a strategic legal ‘think tank’ serving as the Attorney General’s principal policy development staff, the Office of Legal Policy (OLP) devotes itself to the study of issues central to the Department’s policy agenda . . . OLP’s long-term planning responsibilities require its attorneys to anticipate and to help shape the terms of national debate on forthcoming legal policy questions.”^{liii} Whereas Smith’s DOJ

report emphasized that OLP would focus on the “implementation of policy initiatives,” Meese’s OLP was explicitly oriented to “long-term planning.” As subsequent sections show, this was more than a change in rhetoric—it reflected a deep shift in the department’s culture.

III. “People Are Policy”: Recruiting and Mentoring Talent

Alongside the DOJ’s role in helping to legitimate the language of originalism (discussed in Section IV), the department’s greatest long-term impact on the development of the conservative legal network lay in the recruitment and mentoring of young conservative lawyers. A large percentage of the contemporary conservative legal establishment came out of Reagan’s DOJ, and especially for those who served in the Meese years, the experience powerfully shaped their professional development.^{liii} The legacy of the department’s investment in personnel can be found on the bench and in conservative public interest law firms that relied on Reagan DOJ veterans for valuable pro bono legal work.^{liv}

In Reagan’s first term, Kenneth Cribb and Michael Horowitz played especially important roles in recruiting and mentoring young conservative lawyers, despite being outside the DOJ. Cribb was originally hired as a deputy by Loren Smith, the chief counsel to the Reagan campaign, through their shared connection to the Intercollegiate Studies Institute (ISI).^{lv} After Reagan’s victory over Jimmy Carter, Cribb became the head of the DOJ and regulatory agencies division of the transition team. He recalls that it was exceptionally difficult to find committed conservatives for legal positions:

Quite frankly, early in the Reagan [first term] that was a weakness across the board—not just in Justice, but in Justice particularly . . . because of the fact that the analysis in the law had come along later, there weren’t as many trained conservatives in the law . . . The conservative movement was, by 1980, very mature at the level of ideas and issue work, but because people were reacting against the establishment, most of them did not have the kind of pedigree that could lead to senior appointments . . . There’s a temporal quality to the whole progression of the conservative movement . . . [it] had

not produced senior level bureaucrats, public servants . . . they had been outsiders, they did not have prior experience in government.^{lvi}

Cribb's activities were part of a larger project, with support from the president himself, to use administration appointments as investments designed to groom a generation of conservatives for positions in the federal government and beyond.^{lvii}

This process began as early as the Reagan transition. "The way the transition was originally designed, it had five or six members of each team. Well, in my section of the transition, we added what we called a senior advisor, and there could be six or eight of those. And that was our way of kind of credentialing conservatives. If nothing else, these people were members of the transition team that brought the government into being."^{lviii} In identifying conservatives for these entry-level positions, Cribb's background in the movement was essential:

That was a question of being part of a recently organized movement. We were known to each other . . . just as Loren depended on me to come in through my ISI connection . . . I happen to have done the first edition of Heritage's national policy expert guide one summer between two years of law school. At that time, there were probably only 250 or 300 [conservative] people in the country who would qualify to be considered policy experts. And I knew them all, I knew them all by first name and handshake . . . I recall putting Jim Miller on the Federal Trade Commission team, as chairman. He became the actual chairman of the commission. Then Mark Fowler supervised the FCC team and became the head of the FCC.^{lix}

Conservatives like Meese and Cribb were concerned that a large number of Reagan's senior appointments were, by political necessity, going to Republicans who did not identify with the conservative movement. Salting agencies with young movement conservatives was also a way to ensure greater control over agencies that the White House could only exercise distant supervision of.^{lx} "Our objectives were not simply to allow young people to blossom, our objectives were to adequately address and implement Reagan's agenda, which involved long-

term and permanent fixes of various kinds . . . It was basically to get a Reagan underground growing in the Reagan administration.”^{lxi}

DOJ officials in the first term recognized that hierarchy was no substitute for ideologically committed personnel. Richard Willard, the head of the Civil Division, observed during the department’s 1984 retreat that, “Mechanisms aren’t as important as people. . . . Personnel selection is critical . . . All the rest of this is important, but people are the key. The caseload is enormous, you must have eyes and ears to spot the key issues.”^{lxii} Willard now believes that the effectiveness of the Reagan DOJ was driven by a combination of careful selection of personnel and clear direction from the very top:

Ronald Reagan was a very successful president because we all knew what he believed. We didn’t have to pick up the phone and call the White House and ask, “What does the president think about this?” We knew. We could confidently execute his policies without having to have everything bucked up to the top and then sent down to us with instructions about how to do it . . . Obviously there were times when compromises had to be made, political imperatives required that something be done that was maybe not what the president would have done if he were totally free. In that kind of administration picking good people who supported the president’s political agenda and were confident was very important, more important than having weekly reports and review mechanisms and that sort of thing.^{lxiii}

Careful selection of personnel, as Willard makes clear, can be a way of grappling with the principal-agent problem at a lower level of transaction costs than “weekly reports and review mechanisms.” While the Reagan DOJ did not do away with the principal-agent problem entirely (as the resignations that accompanied the “Bechtel” investigation of Meese showed), it did succeed to a greater degree than most government agencies in creating an identity between the president and his agents.

Even though they recognized the superiority of “identity” over “supervision” as a way of controlling the department, Reagan’s lawyers found themselves (especially in the first term) constrained by the limited development of the conservative legal network. Willard

recalls that, “These were the days before the Federalist Society was really off the ground, so it was hard to find lawyers who had a conservative political outlook. At that time, the law schools and the professional associations were overwhelmingly liberal in their outlook, and so finding conservative lawyers who had the outlook, but also the professional competence, to do the job was a challenge.”^{lxiv} The problems of conservatives’ limited networks were exacerbated by the usual tensions between ideological commitment and party patronage: “It was made a little worse because you had a lot of back and forth between Justice and presidential personnel, over staffing issues, with presidential personnel trying to push political hacks off on the department, and the attorney general trying to recruit people of quality, some of whom may not have voted in the Republican primary in 1976.”^{lxv} In the absence of a well-developed network like the Federalist Society, Reagan’s lawyers relied on their preexisting, and usually quite limited, networks. The same problems the administration faced in staffing the department appeared in judicial selection. Willard recalls that, “We had a vacancy on the 8th circuit. And in my desk, I had a full-page ad . . . called ‘Law Professors and Deans for Reagan/Bush.’ It listed a number of deans and law professors who had endorsed President Reagan. . . I looked at it, and I noticed this guy from the University of Missouri, I think it was Kansas City. . . Well, I put his name in the hat and he was appointed to the 8th circuit—Pasco Bowman.”^{lxvi} The desire to move beyond these ad hoc, almost accidental connections, networks, and sources of information explains, in part, why so many senior officials in the Reagan DOJ were so supportive of the Federalist Society.

Seeding the administration with young conservatives served its short- and long-term objectives simultaneously. In the short-term, it alleviated the principal-agent problem, by putting in place more conservative “eyes and ears,” for an administration acutely concerned that it was governing an executive branch (including many of its own appointees) that was

not wholly sympathetic to its ideological objectives. In the long-run, it helped build the “farm team” for future senior appointments. Political investment, in other words, had both long- and short-term returns.

During the same first Reagan term that conservatives in the White House, and to a lesser degree DOJ, were trying to build a “Reagan underground,” Michael Horowitz was trying to do the same thing from the OMB. Having pointed out in his report for the Scaife Foundation that conservative public interest law firms did not have a powerful presence in the nation’s capital, Horowitz sought to help them build such networks from his perch as general counsel at OMB. Horowitz recalls that:

It was frustrating. When I was at OMB I would occasionally call people in and say ‘for God’s sake, I’d be happy to meet with you. Let’s have a periodic set of meetings, tell me what we’re doing wrong.’ None of them had that sort of quality, even after my report. One of the reasons was that most of them were outside Washington, so when they came, it was a trip to make a formal presentation, rather than a brown-bag lunch by people who were in constant contact with them . . . I wanted these guys holding our feet to the fire, they just didn’t get it.^{lxvii}

Conservative public interest law firms were outsiders to the regulatory and legal politics of DC, lacking the skills, presence, and prestige to make a mark on the nation’s legal elites.

Horowitz was just as unsuccessful in prodding conservative organizations inside DC to use what power they had to gain influence over the administration’s hires, especially in law. He recalls that:

At the end of the first term, I made a list of sixty, seventy people inside the administration and some outside, many, indeed most of them lawyers, with a set of suggestions as to who could be moved up to the next level. . . I went to the overall conservative movement [and said] here’s what I would do, why don’t you be as smart as Ralph Nader was when he was dealing with the Carter administration. Nader would come in, and this is an apocryphal story . . . and say . . . I don’t want to have any say as to who gets appointed as White House Counselor or even cabinet secretary. I’ll support whoever you appoint. And there would be this great sigh of relief, but he’d say I do have . .

. four people for general counsel positions, two Federal Trade Commission positions, and six assistant secretary positions. And . . . they'd say sure, do you have any more for us? . . . So I went to conservatives with this list of mine and said if you go to [Chief of Staff James] Baker and declare a truce with him and say you're not going to attack him but here's a list of these people, can't we promote them to general counsel, can't we get these guys to be deputy secretaries, or here are guys who have been deputy secretaries, let's make them secretaries, I think we can cut and deal and we'd define the administration domestically and we'd have people in there to drive the policies. But I didn't adequately succeed.^{lxviii}

Horowitz recognized that success in the executive branch depended on the existence of a political network outside government, which could support the efforts of conservatives in government and apply continuous pressure on them, to counteract the usual temptations toward moderation. Until they could build linkages between state, party, and society as durable and effective as those constructed by liberals, conservatives would continue to be beaten in the low-profile bureaucratic battles that have such a large impact on policy development.

Having failed to transform existing conservative firms into an effective tool for conservative legal politics, Horowitz turned in the same direction as Cribb: building an entirely new legal establishment from the bottom up. Horowitz recalls that:

One of the things I did a great deal of when I was in the government was work on personnel matters . . . [I acted] as a career mentor and someone who encouraged people to come into government, or not to stay too long and go back into private practice and earn a source of independent income so that they would not be government junkies all their lives . . . to approximate the model of the Clark Cliffords and Cy Vances and Califanos and the others to move from their law firms back to cabinet secretaryships back to their law firms. I wanted conservatives to be able to do that . . . I would find out who was clerking for Scalia and Bork and Silverman, and I would have those guys come to my office in Washington when I was at OMB. I'd ask them where they wanted to go, and I'd get them jobs. Or I'd encourage them to go into private practice. There's a standard interview I'd do . . . I tried to . . . get these young people to define their achievable career fantasies and then work through what sort of steps would get them there.^{lxix}

Horowitz saw his role as similar to that played by Allard Lowenstein for liberals: recruiting talented young people into political activism, helping them envision a career in public service, and acting as a bridge between generations of the movement.

This was a critical role in the early 1980s, because the clear mobility track for conservative lawyers that we take for granted today had not yet developed. Stephen Galebach, who worked in the White House during Reagan’s first term and moved to DOJ with Meese in 1985, recalls “When I was on law review [at Harvard], talking about clerkships with people like Mike Chertoff, who was a year above me, talking about the most popular judges—there were no highly regarded conservative judges. There was no clerkship path that a conservative Republican law student would look to. I just found [Judge Malcolm] Wilkey on my own . . . It was purely individual and episodic.”^{1xx} What Horowitz, and to a lesser degree Cribb, were doing was creating the connections between clerkships, lower-level positions in the executive branch, and conservative organizations outside government, that when knit together could provide a conservative legal mobility track to could compete with traditional partisan and state bar networks.

Helping the nascent Federalist Society get off the ground was central to building that mobility track. While it is difficult to imagine today, when the Society started in the early 1980s, its networks to conservative foundations and top public officials were limited. Lee Liberman Otis, one of the founders of the Society (and a special assistant to Richard Willard in the Civil Division), recalls that Horowitz:

found us after we started . . . He was really excited to find out that this thing existed. And he was full of ideas, people he knew . . . He did help us a little with foundations, but also I think he helped us with just meeting other conservative lawyer types in Washington. For example, I clerked with a fellow named John Schmitz who became Deputy Counsel to Vice-President Bush. Mike Horowitz came up with the idea that John should meet Boyden Grey who was then counsel to Vice President Bush . . . He just knew

everybody basically, and so if we were looking for speakers or things like that he would be able to help us with stuff like that.^{lxxi}

Cribb also took notice of the Society from early on, recognizing that it could play an important role in his effort to create a “Reagan underground.” He recalls that, “The first person I met was [Federalist Society President] Gene Meyer. He came up to me in a social gathering. He introduced himself, and asked if he could be useful to us in any of our work, or if we could [hire] some of their young members. I told him immediately that I approved of what they were doing and that it was important, and that I would like to talk to him about getting some of those young people into the administration.”^{lxxii} Cribb’s deep connections with the conservative movement’s nascent organizational apparatus were critical in recognizing the potential value of Society, which was then just a handful of student organizations. “They based the Society on the same principle that ISI was based on . . . So by knowing that these folks had an ISI approach, I knew a lot about the organization without being told anything.”^{lxxiii} The Federalist Society dramatically expanded the network of ideologically certified young lawyers that the administration could draw upon, broadening it beyond the smaller and more obvious group of clerks to conservative judges.

Smith’s own men recognized that the department had not gone far enough in Reagan’s first term to recruit the next generation of conservative lawyers. As a consequence, the Meese DOJ made an active decision to hire young. Cribb recalls that:

One of the lasting effects of that early work was the farm team it created. At the beginning of our transition efforts, Mr. Meese cautioned me that he valued gray hair. I came back and said Ed, there aren’t enough gray haired people who agree with us. Fortunately it was a rebuttable presumption on his part, and so many of Ed’s appointments to high office in the Department of Justice were relatively young intellectuals, and many that he recommended to the president for the lower courts were young, because that’s where the talent was, and that’s where the people were who agreed with our philosophy.^{lxxiv}

A substantial number of Meese's assistant AGs were committed conservatives who would have been considered too inexperienced for the job just a few years before, but now were in a position to be moved into much more responsible positions. Stephen Markman had done his time on the Senate Judiciary Committee staff member before being made assistant AG for Legal Policy; Chuck Cooper had been special assistant to William Bradford Reynolds in Civil Rights for four years before being nominated to the post of assistant attorney general in the Office of Legal Counsel; John Bolton had served at the Agency for International Development during Reagan's first term, before being chosen as assistant AG for Legislative Affairs. In each of these cases, the department was seeking people who had proven their ideological bona fides in earlier positions, and now had the credentials for more senior jobs. In addition, they were looking for appointees who had the ability to contribute to the larger intellectual project that the Meese regime had planned for the department. Cribb notes that, "Even in the areas of Justice where in the past you had instrumentalists of some kind, technicianswe tried to put in substantive intellectuals. A good example would be Legislative Affairs, where the appointment was John Bolton. You don't need a constitutional lawyer to do legislative affairs, except that we tried to get more out of him than just carrying messages back and forth..."^{lxxv}

Just as important in the long-term was the effort to hire young conservatives into positions as special assistants and deputy attorneys general. Meese and Cribb brought Stephen Galebach, who had worked for them in the Office of Policy Development at the White House, with them as senior special assistant at DOJ. Galebach was a very committed conservative, a graduate of Yale College who knew Liberman, McIntosh, and Calabresi through the Yale Political Union, and who played his own small role in the development of the Federalist Society.^{lxxvi} When Galebach moved over to DOJ, he looked for conservatives

like the Federalist Society founders when choosing special assistants: “The sort of people who went over to the Meese Justice Department, and the special assistants that I recruited, and those at the Deputy Assistant AG level, they were motivated by some vision of what government should and should not do and trying to apply it. That’s what it was about. It wasn’t Karl Rove-type Republican politics. It was very radically different from that.”^{lxxvii}

This sharply distinguished the Meese DOJ from many of the other departments in the Reagan administration, where conservatives had still not gained dominance. Gary McDowell remembers many of those departments as being staffed by people “who were Republicans because their daddy gave a lot of money and you had to put them to work someplace. . . . There were a lot of . . . people in the administration who were there for partisan reasons, family connections, there because they wanted to be in Washington.”^{lxxviii} Meese and Cribb helped to transform the pattern of career mobility among Republican lawyers, from relying primarily on partisan connections to more specifically ideological networks, like ISI and, eventually, the Federalist Society.

The mix of motives in the Meese DOJ was much the same as it had been for Meese and Cribb when they were at the White House—coordination and control in the short-term, personnel development in the long-term. As Cribb puts it, “One of our goals was that you could actually delegate matters and get substantive results.”^{lxxix} That said, it was also the case that, as Steve Calabresi recalls, “there was a real desire to train a generation of people—a farm team—who might go on later on in future Republican administrations to have an impact and to hold more important positions.”^{lxxx} By relying on specifically ideological mobility networks, conservatives like Cribb and Meese hoped to restructure what young lawyers thought of as rational, careerist behavior. Cribb recalls that, “What I was up to with the mentoring of these young people was to show how practical it was to start with the

world of ideas. Ideas in fact moved the world. In Washington, every lesson or reinforcement or punishment that you get is the opposite of that. ‘Do the short-term thing, or otherwise you’re not going to be confirmed, etc.’ My work with them was to show that if they were loyal to certain fundamental principles, that they would get ahead because they would be recognized as effective and loyal servants of Reagan.”^{lxxxix} Reaganites like Cribb, Meese, and Horowitz sought to break the link between moderation, pragmatism, and professional ambition, institutionalizing a pattern in which ideological commitment served as a credential rather than a disqualification.

An important component of this new mobility track was the Federalist Society. Without question, Meese’s decision to hire the Society’s founders as special assistants was critical to getting it attention, and to sending a signal that identifying as a conservative could be a career asset, rather than a liability. Cribb argues that:

I mean how many special assistants to the attorney general are there? These are very key spots. In terms of the signal it sent, yes, the Reagan administration thinks what they’ve accomplished in terms of founding the Federalist Society is important, and worthy, and we’re going to give them good jobs. . . . Young idealist oriented students saw that you could win that way, you could succeed if you acted honestly on the basis of your ideals, as opposed to maneuvering and telling people what they want to hear and playing both sides of the street.^{lxxxii}

Hiring the Society’s founders also increased their visibility among the department’s senior leadership. As McDowell recalls, “The Federalist Society was an integral part of the Meese Justice Department . . . It’s not like the Federalist Society was some sort of distant organization. The founders were on board with us on a daily basis.”^{lxxxiii} This expanded the networks that the Society’s leaders could draw upon, and increased the sense within the conservative movement that, as small as it was at the time, the organization was critical to the movement’s future. This was especially true for conservatives with a background in

academia, like McDowell, who acutely felt their alienation from the legal academic mainstream. “We all appreciated how different it was, and how important it was going to be. I had been a fellow at Harvard Law School. It was a place where there was no conservative presence . . . I think that we all knew the possibilities, we all hoped the Federalist Society would develop as it has developed.”^{lxxxiv}

Supporting the Federalist Society was not a matter of official department policy, but instead a natural response on the part of individuals to its long-term importance. Meese remembers that, “All three of the founders of the Federalist Society came to work for me in the Justice Department, so I knew what they had done just from conversation. This just naturally followed from people’s inclinations—I don’t think there was any conscious decision . . . Individual people were supportive of the society.”^{lxxxv} As Meese and McDowell argue, the most important contributions to the Society were individual in nature, mainly through the willingness of department leaders to give speeches to the Society. This was most dramatic in the case of one of Meese’s earliest and most prominent speeches on originalism, which are discussed in detail in Section V. Calabresi recalls that:

The most dramatic thing that was done to help the Society was that Mr. Meese chose to give his speech setting out originalism and his theory of constitutional interpretation at a meeting of the Washington chapter of the Federalist Society. The speech got a tremendous amount of publicity, and it was on the front pages of all the newspapers, and our name got mentioned in all the articles because the speech was to us . . . It was probably one of the two most important speeches that he gave, and the fact that he chose to give it to the Federalist Society certainly legitimated us . . . Ken Cribb and Mr. Meese . . . were products of the conservative movement before there was a Reagan administration, and they knew there would be a conservative movement for a long time after there was a Reagan administration. I think that . . . they wanted to build up the conservative movement . . . as a way of leaving an institutional legacy.^{lxxxvi}

For Meese and Cribb, the conservative movement was not an outside interest to be appeased—it was their primary organizational identity. After leaving government, both

Cribb and Meese spent the next two decades of their careers building the conservative movement's organizational infrastructure—Cribb as the head of ISI and Meese at the head of the Heritage Foundation's program in law. Cribb became a member of the Federalist Society's Board of Directors, while Meese went on to the Society's Board of Visitors. They therefore not only invested in the "institutional legacy" left by the department, but were able to reap its returns.

While Meese's originalism speech gave the Society a much higher public profile, numerous speeches given by lower department officials to budding Society chapters were just as important. Calabresi recalls that, "a bunch of department members spoke at Federalist Society events, both national and chapter events. Among the people I know who spoke at Federalist Society events were Brad Reynolds, Richard Willard, Chuck Cooper, Ken Cribb, Mr. Meese, and I'm sure there were others as well."^{lxxxvii} This was critical to the Society's growth, since the single most important tool the Society had for attracting members to new chapters was the presence of a high-profile speaker, who (in addition to the intrinsic interest of their talk) sent a signal that this was an organization with very powerful allies. Calabresi recalls that, "chapters were trying to get started, they tried to invite speakers, either through Gene Meyer or by an invitation, and some of these folks thought it was important enough to encourage the growth of the organization that they chose to spend their time doing that."^{lxxxviii}

The presence of DOJ officials at Society meetings, combined with the department's willingness to hire Society members, added immensely to the Society "brand." Just as the national reputation of a chain like Krispy Kreme guarantees customers when it opens up a new branch, the brand of the Federalist Society established by the investment of DOJ's political executives ensured the interest of potential members when the Society tried to open

new chapters. Law students had heard of the organization even before a chapter was set up, and had a sense that the organization had the official imprimatur of the state, the Republican Party, and the conservative movement. Even when the Society was relatively small, therefore, this official investment gave the impression that it was growing and that, to be a player in conservative legal circles, one needed to be involved in the organization.

Had the senior leaders of the Reagan DOJ not embraced the Society, it is likely that it would have developed chapters much more slowly, had greater difficulty raising money and networking with senior Republican lawyers, and might not have developed its monopoly organizational status. While the actions of the Society's founders were the most important factor in explaining the organization's success,^{lxxxix} the support given them by the senior members of Reagan's legal team played a critical role as well. The return on this political investment in recruiting, mentoring, and organizing young conservative lawyers has been an entirely new mobility structure for conservative lawyers, one that now rivals the older network of state parties and the bar.

IV. Legitimizing Originalism

The distinguishing feature of Attorney General Meese's management style was his emphasis on the generation and diffusion of ideas. The organizational and personnel initiatives pushed by Meese laid the groundwork for the department's most ambitious long-term project, legitimating what he called the "jurisprudence of original intent." Starting as a series of speeches, the originalism project grew into a broader set of departmental programs, with consequences that are still being felt today. The project was "transformative" in the sense that it was designed to provide a unifying language for conservative elites and to legitimate conservative ideas within the profession and the legal academy. While the originalism project was certainly designed to aid the short-term objectives of the DOJ leadership, it was equally

the case that its leaders expected it to have longer-term impacts on the strategic environment outside of government.

At the beginning of the Reagan administration conservatives were still working with a set of legal tools inherited from the Nixon era. Steve Markman recalls that early on “the stuff of debate was still kind of the old Nixonian terminology of strict constructionism and law-and-order jurisprudence.”^{xc} This was a reasonably serviceable way to describe conservative ideas when their most important task was to appeal to groups who felt displaced by the changes of the Warren Court—social conservatives, businessmen, Western ranchers and farmers, and urban working-class white ethnics. But these ideas, many of which had a distinctly Frankfurterian, New Deal, cast to them, were of limited use to a movement that now held the reins of government and that sought to legitimate its use of the courts, not simply to criticize from the outside. Eastland recalls that the originalism speeches were designed to go intellectually beyond where the department had been in the first term: “Bill Smith had given speeches arguing against judicial activism. I thought that those speeches [were fine] as far as they went, but I thought that the time had arrived to state in a more positive way what judicial interpretation was about.”^{xc} Cribb agrees that pushing conservatives to develop legal ideas that could guide action, and not just critique, was a key goal of the speeches: “the problem with the earlier analysis—judicial restraint, strict construction, especially judicial restraint—is that they had become catch phrases, they didn’t really have any analytical content. For example, if you obey the Constitution, then there are areas that conservatives in seeking to obey the Constitution would have to be very active.”^{xcii} Conservatives needed an idea that could provide intellectual legitimacy for those areas where conservatives thought that the courts should not simply defer to the elected branches of government, as well as those where it should. While conservatives were becoming

increasingly interested in, for example, putting teeth in the Fifth Amendment's Takings Clause, judicial restraint pointed in the opposite direction. Even more important, conservatives needed an idea that could be taken seriously by legal intellectuals and the profession as a whole, a task for which judicial restraint did not measure up.

Originalism, an idea that had been either created or resurrected (depending on one's point of view) in the 1970s, seemed to admirably serve both goals. Starting with Robert Bork's 1971 "Neutral Principles and Some First Amendment Problems,"^{xciii} and accelerating with Raoul Berger's *Government by Judiciary*,^{xciv} scholars critical of the Warren Court began to develop a critique of the courts that rested on an essentially historical methodology, arguing that the legitimacy of the judicial role rests on the original understanding of specific constitutional provisions.^{xcv} Until the scholarly interventions of Bork, Berger, and their successors, conservatives lacked an intellectual framework in the law that was as rigorous as those they had developed in political philosophy or economics. Cribb believes that it was this relatively late development of conservative thinking in the law that explains why it took until the 1980s for conservatives in government to effectively challenge legal liberalism, as they had liberalism in social policy and economics. "Intellectually, we wouldn't have been able to do it if we had wanted to under Nixon, because the kind of analysis that isolated the role of the judge as the key factor in this really came about in any kind of depth from Bork's writings . . . We had an advantage that the Nixon and Eisenhower people didn't have, [since] the law was the last of the great intellectual disciplines to receive a conservative analysis."^{xcvi}

This originalism project was, at its core, an appeal to professional elites rather than the mass public or the conservative grass roots. In an important recent article, Robert Post and Reva Siegel have argued that:

In scholarly debates, originalism is typically conceptualized as if it were an abstract and theoretical jurisprudence that primarily advances a particular method of constitutional construction . . . It is a grave mistake . . . to conceive the originalism espoused by Edwin Meese to be merely an abstract and theoretical jurisprudence of this kind. Since the 1980s, originalism has primarily served as an ideology that inspires political mobilization and engagement. Its success and influence is due chiefly to its uncanny capacity to facilitate passionate political participation.”^{xcvii}

In one sense, this claim has much to support it—popular movement conservatives in the last two decades have, as Post and Siegel show, used originalism as a mobilizing device. This is different, however, from what the actors involved thought they were doing at the time, which was to open up space for the conservative movement’s elite supporters in the law, not its mass base.

The Meese originalism speeches and the programming that followed them were designed primarily to generate ideas that could guide the practice of lawyers in the department and to legitimate the legal program of the administration among the elite community outside it. Cribb recalls that:

We understood that [the] project of getting the Constitution right was more than just appointing judges, and that we had to have a rhetoric that was persuasive, and an analysis that became talked about by public intellectuals. So I would say that very little of this was aimed at the general public, but we were aiming at the kind of people who talk about the law. Academics, public intellectuals, not even just lawyers . . . It was not a wedge issue or a rallying point for politics. We assumed that this was the latest and best conservative analysis. We assumed the movement knew less about it than we did . . . Ed was trying to stir up the elites to get off their commodious rear ends and begin talking about the constitution seriously.^{xcviii}

Echoing Cribb, Meese recalls that the first originalism speech was directed primarily at the legal profession’s elite, and the audience reflected that intention. “It was a matter of communicating to the profession.”^{xcix} Gary McDowell, who as the attorney general’s speechwriter had primary responsibility for drafting all of the originalism speeches, observes that it was his hope that the speeches would appeal to multiple audiences simultaneously:

The objective of the speeches was to resurrect an old, and widely regarded, until recently, view of how judges ought to undertake to reach their decisions . . . That was an important point to make to the ABA, it was important to make to the broader legal academy, where you're still getting debates on these things, and also the general public, Nixon's great silent majority who looked around and wondered what the hell was going on out there, why are these justices doing these things, and why are they illegitimate? Meese's speeches were designed to say, "this is why." It wasn't a shotgun blast, it was a rifle shot. It was a rifle shot that went through those constituencies from the same perspective.^c

The originalism speeches were designed to provide a language through which DOJ, which could easily be overwhelmed by the press of daily business, could push the debate on the administration's legal agenda to the more abstract level of constitutional propriety. This was essential for conservatives' ideas to be taken seriously, and it was especially vital given the very ambitious agenda that the Meese had planned for the department:

You had all these guys out there doing the nuts-and-bolts litigation . . . what the Justice Department under Ed Meese gave was an intellectual and philosophic rubric . . . One of the things that distinguished the department under his tenure was not making the legal debates simply over policy issues—are you for or against abortion, are you for or against *Miranda* . . . but rather to abstract and elevate that . . . to give a philosophical context for those policy disputes, to elevate the conservative legal view, to 'these are not just the policies that support the business community, but these are political and legal issues that are rooted in something more transcendent than the disputes of the moment.' . . . The speeches, the rhetorical dimension of the department, were to give context for all those other, more mechanical activities, like filing suits and joining as amicus.^{ci}

The first strategic judgment behind Meese's speeches, therefore, was that selling Reagan's legal policies at a lower level of abstraction had led to some unpleasant results in the first term, and that couching them in a broader context would increase their appeal.

The second, easily overlooked, objective of the speeches was to coordinate action inside the department through ideas, rather than through orders and a chain of command. It was widely known in the department that the arrival of Meese, who as chief of staff in the White House had been intimately involved with judicial selection, would be accompanied by

an intensified focus on both the apparatus and guiding principles for picking judges.^{cii} Steve Markman recalls that the inadequacy of older conservative ideas was a serious practical problem for those involved in judicial selection:

I remember as Counsel for the Judiciary Committee, there had been many conversations concerning how the Committee minority could best carry out its ‘advise and consent’ responsibilities. The Republicans introduced a minority questionnaire for the first time that was designed to provide us with greater perspective on a nominee’s judicial philosophy. We were always looking for means by which we could more intelligently assess judicial candidates. But the concept of “originalism” was not clearly there, and this would have been the most effective line of inquiry of all . . . No prospective judicial candidate was going to come for an interview with the Department and state . . . that, if appointed, he or she, would follow the precepts of Justice Brennan. Nor would anyone come in and proclaim that he or she would become a “judicial activist.” But something more sophisticated was required on our part to separate those candidates who would live up to the President’s and the Attorney General’s expectations, and who would contribute to their intended legacies, from those who would not. What General Meese gave the Department was an improved framework within which to assess candidates.^{ciii}

Cribb echoes the belief that the emergence of originalism was critical to the task of judicial selection: “Another early reform was improving the actual predictability of judicial selection by taking advantage of the scholarship of Robert Bork and others writing in the 1970s on the role of the judge. Before this intellectual analysis was available, all our judge-pickers had were slogans—‘judicial restraint,’ ‘would you legislate from the bench?’—those kinds of things, which of course everyone knows the answers to if you want a judgeship.”^{civ}

The decision to give the first of the originalism speeches was made against the backdrop of the *Achille Lauro* hijacking, and thus the natural topic for the attorney general to address to the ABA would have been terrorism, a significant policy priority for the administration. Giving a speech on originalism, therefore, meant missing an opportunity to address a matter of pressing current concern (both political and legal) for a much longer-term, and arguably riskier, objective. McDowell recalls that Meese:

Assembled his entire senior staff . . . into the main AG's conference room, and he went around and told them all, should we give this speech? . . . We all knew that there were going to be repercussions from the originalism speech. We knew this was not going to fall silently and be forgotten. We knew that this was going to change the debate over constitutionalism in the country . . . He went around the room and he polled each person, and said, what do you think . . . And he comes all the way around the room, and he says to me . . . what do you think? And I said, this is a topic that you can return to throughout your administration, and it's an issue that's important and one that speaks to the president's view of constitutional matters. He then turned to Brad Reynolds, and said, Brad, what do you think? And he said, Ed, that's why we came. And that was it. That was the decision to give the speech.^{cv}

The controversy that Meese's men anticipated came rapidly, in the form of an attack by Justice William Brennan. The very fact that the great liberal lion took originalism seriously enough to denounce it helped support the idea that Meese and Brennan were engaged in what the Federalist Society would trumpet as "The Great Debate."^{cv} Meese recalls that, "We were very gratified when Justice Brennan replied, and so that made it an argument, which got it more attention than if we had just put the speech out there . . . [Otherwise] It probably would have had the same effect as most speeches to the ABA have."^{cvii} The ABA speech set the stage for a series of follow-up speeches designed to add meat to the idea's bare bones, and to demonstrate both its intellectual viability and its ability to translate into real-world policy consequences.

McDowell argues that:

We carefully orchestrated a series of speeches over the next couple of years, that would take issue by issue federalism, separation of powers, and all the rest, and make speeches that would be press-released—many were published as law review articles—to continue explicating the philosophical grounds and reasons for originalism. [At] our speech planning meetings we thought, "what should we do next, where should we do it?" We gave the Dickinson College speech, I think it was on federalism, on Constitution Day. They were magnets for protest, when Meese would appear. He was capable of drawing out the other side with a vengeance.^{cviii}

The response, by Brennan and others, produced a conflict, and conflict is what defines an event as news and draws the attention of top legal scholars. The conflict played out in the law journals, providing an opportunity for liberal law professors to attack the speech, but also opening up space for conservatives to defend the idea and expand on its implications. Meese did for the idea of original intent, and for the conservative organizations who drew inspiration from it, what its scholarly adherents could not: he gave “visibility, support, and legitimacy to a lot of ideas relating to getting back to fidelity to the Constitution...a background against which some of these organizations could flourish.”^{cix}

The speeches can thus be seen as one case of a larger phenomenon, which is the capacity of senior government officials—independent of the actual content of their words—to move otherwise marginal ideas into the intellectual mainstream. Jack Balkin describes the phenomenon well:

The question of what is “off the wall” and what is “on the wall” in law is tied to a series of social conventions that include which persons in the legal profession are willing to stand up for a particular legal argument. In law, if not in other disciplines of human thought, authority, and particular institutional authority, counts for a lot. The more powerful and influential the people who are willing to make a legal argument, the more quickly it moves from the positively loony to the positively thinkable, and ultimately to something entirely consistent with “good legal craft.”^{cx}

The originalism speeches put the stamp of the attorney general—a position whose distinction in the legal profession is unparalleled—on an idea that had previously been widely regarded as “off the wall.” But the Meese-Brennan debate shows something else that Balkin did not address. The process by which ideas are converted from “on” to “off” the wall is driven as much by the actions of an idea’s opponents as its elite advocates. The worst fate for an idea is to be ignored, to be treated as so marginal that it need not be attended to. The critical moment in the legitimation of an idea is the point at which highly placed

opponents get drawn into the debate. Meese advanced the idea of original intent by acting as a lightning rod, attracting energy from his opponents and redirecting it back through his supporters in the legal academy.

These speeches also had a profound effect on conservatives themselves—especially the movement’s legal intellectuals—giving organizations like the Federalist Society a set of overarching ideas that could hold people together who otherwise disagreed profoundly. While conservatives and libertarians disagreed on, for example, how aggressively the courts should protect economic liberty, the injection of original intent gave them a source of authority that both sides could accept as a framework for debate. The fact that the attorney general was speaking out on previously marginalized issues gave conservatives cover to do so themselves, in some cases going further than Meese himself had gone. Calabresi recalls that:

Mr. Meese played a very important role in shaping the ideas that conservatives had about constitutionalism . . . Some of the ideas that he championed . . . received so much attention and publicity because of his speeches, that he pulled people together behind a common set of ideas who might not otherwise have agreed. Among the things that he talked about that were important to conservatives were first of all originalism. Second of all, the idea of departmentalism, that other branches of government than the courts play a role in constitutional interpretation. He was one of the first leading conservatives to express an interest in the unitary executive, although he meant something different and narrower by that than the current Bush administration does. He was one of the first conservatives other than Richard Epstein—who wasn’t taken seriously—to talk about constitutional protection for property rights through the Takings Clause.^{cx1}

Meese’s injection of originalism into professional and popular discourse was therefore an exceptionally supportive force for the long-term development of conservative thought.

V. Originalism: The Follow-Up

Meese’s speeches set the tone for the intellectual agenda of DOJ, and they were built upon by one of the most unusual features of the Meese DOJ, its regular departmental seminars.

Eastland recalls that these were a distinct break from the previous term: “We were certainly not doing things like that when Smith was there.”^{cxii} Willard recalls that under Meese:

There was more emphasis on legal or jurisprudential policy as such. Some of the scholarly events that happened under Meese’s leadership were really remarkable in terms of the talent. I can remember one of those events, after Meese became attorney general, during the break, chatting with Bork and Scalia, who were smoking in the hall. I said, “Guys, you better lay off this or you won’t get appointed to the Supreme Court.” Turned out it didn’t stop either of them from being nominated . . . I only think there were four or five of them under Meese. They were very good. Bill Smith did some [more broad-gauge] things that I think were very effective. Under him there was an effort to bring all the lawyers in the government together, so he had some retreats for general counsels of departments and agencies with their counterparts in Justice. This was an effort to increase Justice’s influence over other agencies. I would say that there may have been more emphasis on team-building and developing relationships under Smith, whereas under Meese there may have been more emphasis on ideas and ideology.^{cxiii}

Whereas Smith was more concerned with building connections within government, Meese sought, through activities like the department seminars, to orient his lawyers toward forces and ideas outside of government.

Under the auspices of the Office of Public Affairs, these seminars brought legal intellectuals in to speak to senior DOJ officials on issues at some remove from the department’s day-to-day workload. These seminars were a key part of the Meese DOJ’s very unusual organizational culture, helping the department’s lawyers connect the larger themes Meese was sketching out to their own work, and fleshing out and working through the implications of originalism. Cribb claims that the seminars were designed largely to prevent the department from becoming narrowly focused on the department’s “in-box”: “There’s a phrase that the urgent often overwhelms the important in Washington. I think that’s true. It was our way of taking a step back from the quotidian noise and looking at our long-term goals [and] getting better at the ideas on which those goals were based.”^{cxiv}

Stephen Galebach recalls that what was most striking about the seminars was how much they broke “from the daily dynamics of the Justice Department agenda, which is driven very much by what we have to do today, it’s driven very much by the normal business of the department, which would tend to get shaped by the long-established internal established procedures, or self-interest of various departments. Whether that was INS, FBI, you name it.”^{cxv} Breaking the tyranny of the press of business was precisely the point, for Meese. He saw this as a natural accompaniment to his personnel strategy: “we had all these bright young people there and I wanted to keep them motivated. If you have very good lawyers, in a law firm or anything else, you want to stimulate people intellectually. It’s just a part of good management.”^{cxvi} The seminars, like his speeches, were a means for working out his goals as attorney general, communicating them to his subordinates, and encouraging them to integrate them into their everyday tasks without being ordered to do so.^{cxvii} “[They were] also to develop a rich background of constitutional thinking for departmental policies. Dealing with the exclusionary rule, improving civil liberties, things like that. One of the things the seminars did was to encourage expansive thinking on a broader philosophical basis, from which they could then extrapolate . . . as they responded to particular cases or issues.”^{cxviii}

The departmental seminars and other intellectual activities, like multiday conferences, were designed to stimulate debate and argument, which was essential for a movement that was still, on important matters, figuring out precisely what its ideas were. In order to foster this debate, and in the process stretch out the department’s time horizons, Meese’s DOJ built upon templates for action that were familiar from within the conservative movement. McDowell recalls that the conferences were designed to:

Educate internally . . . people there on staff. One of the things you'll find if you spend time with lawyers is they don't read the things you and I read, and they don't think about the things you and I think about. So, you might have somebody who is inclined to originalism, or inclined to understand the Founders' view of federalism and believe they understand it. But they haven't read the Federalist Papers or the anti-Federalist Papers or Marshall's opinions or any of those things. These were in a sense sort of Liberty Fund conferences, where we had readings, people would come, we'd talk about these things. The notion was, you take these very busy lawyers, who had very productive careers outside government, but now they're in government where they don't have time to take a leak, and they don't have time to sit back and read and think about important issues. One of the things we undertook in Public Affairs was to provide time for these kind of seminar experiences, to talk about these issues. Federalism, we did a one-day thing at the Marriott on *Humphrey's Executor*,^{cxix} we did all these kinds of intellectual things. It was an exciting place to be, because there were arguments to be made, arguments between us. . . . We had fundamental disagreements and we fought them out in seminars, at brown-bag lunches, in speech-planning meetings, when we sent things around for review and they came back with asinine comments on it. . . . These were done to deepen the conservative understanding of constitutional and legal things. They were done both for the heat of the moment in the Reagan administration, and they were done for the long-term, down-the-road future of the conservative legal movement.^{cxx}

It is a commonplace observation among those in public service that bureaucrats draw down, but never replenish, whatever intellectual capital they bring to their job. The conferences and seminars in Meese's DOJ were designed to reverse this pattern, building up the intellectual capital that political appointees carried into their work after leaving the department.

While Meese's speeches, along with the work of Bork, Berger, and others, laid out the broadest contours of originalism, the internal intellectual work of DOJ was vital to working out originalism's implications and sorting through its inconsistencies. For example, in Meese's early originalism speeches, he referred to the idea as the "jurisprudence of original intent." Through the departmental seminars (in tandem with similar debates going on in the Federalist Society, whose DC chapter's speeches focused, for a time, almost exclusively on originalism), this approach was gradually dropped by conservatives and replaced with the

concept of “original meaning.” In a story that many of my sources told me, Stephen Galebach recalls:

. . . a lunch we had, maybe 25 or 30 of the political appointees in the department, with Nino Scalia. He was then on the DC Circuit, and he gave a talk against original intent. It was great. His point was, that judges are obligated to follow the original meaning of constitutional provisions and statutes. The subjective intent of the framers was irrelevant—it was the words they used as understood in light of context. He had a lot of fun doing that, because he got to see everyone’s faces with his denunciation of original intent.^{cxxi}

Cribb believes that this seminar was a critical turning point in the development of originalism: “It was so clear to me that was true. Of course, you couldn’t talk because you were in the audience. But you could just tell by osmosis that everyone agreed with that. And so I wrote, ‘stipulated,’ and tacked it up on the podium while he was talking. We used original meaning more after that.”^{cxxii}

The final contribution of the Reagan DOJ to the development of originalism was to put meat on the concept’s theoretical bones, a task given primarily to the reinvigorated Office of Legal Policy. Steve Markman recalls that, “The attorney general had given his speech on originalism, and as with any speech, it was necessarily limited in its details . . . It was clear that one of OLP’s primary functions would be to assist in developing the philosophical underpinnings of what he meant by originalism, and to attempt to put this philosophy into real-world practice through our judicial selection responsibilities.”^{cxxiii} Where the intellectual foundations of originalism were concerned, the most important project of OLP was a lengthy “sourcebook” on originalism, designed to be a guide to the concept, and to point its adherents in the direction of the most important scholarship on the subject.^{cxxiv}

More well-known were two other reports put out by OLP in 1988, *Guidelines for*

Constitutional Litigation and *The Constitution in the Year 2000*.^{cxxv} The audience for the *Guidelines* was primarily the department's own lawyers. Markman recalls that the objective of the *Guidelines* was to "educate the department itself on some of these principles, because we understood that over the course of the years some of the principles we objected to had been institutionalized within the department. We obviously did not expect to transform the legal culture overnight, either within or without the Department. However, there was substantial internal discussion about these principles within the Department and we wanted to contribute to their institutionalization in a variety of ways."^{cxxvi}

By contrast, *The Constitution in the Year 2000* was aimed primarily at an audience outside the DOJ. It was with this document that the department sought to have the impact that Post and Siegel identify—to use originalism as a tool for aggregating the various different commitments of legal conservatism, and to make those ideas a rallying point for debate on the Constitution beyond the community of legal elites. Markman recalls that:

In our monograph on *The Constitution in the Year 2000*, we tried to translate the debate for the public by defining the practical consequences in having originalist and nonoriginalist judges and justices. The establishment clause says this and the free exercise clause says that, and in terms of countless issues from school prayer to Christmas displays to expressions of reverence in public places, it will make all the difference in the world whether Justice Jones or Justice Smith is placed on the bench for the rest of his life. So these abstruse constitutional debates have real-world consequences and such consequences ought to be better understood by the people who will be defining the judicial branch of government at the same time that they are selecting the head of the executive branch of government every four years. In our speculation about *The Constitution in the Year 2000*, we intended to communicate to the American people, which was our ultimate audience, that constitutional decisions in the modern era increasingly occurred as a consequence of judicial philosophies and that different futures would occur depending upon what philosophies came to predominate on the courts. Judicial decisions do not occur serendipitously or in a vacuum. Rather, they are a direct function of the kinds of people placed on the courts and their constitutional perspectives. Obviously, abortion had been one matter in which national policy had been determined in this manner, but there were many other issues in which future public policies would be similarly determined. That is, there would be

forks in the road in such areas as criminal justice, the role of religion in public life, affirmative action, federalism, and a variety of social issues in which the country would be faced with drastically different constitutional futures, depending upon which fork in the road would be taken at constitutionally critical moments. We actually hoped that this would stimulate more discussion in the course of presidential elections concerning the impact of their judicial appointments.^{cxxvii}

The department's political investment in originalism was powerful because the idea had the potential to speak simultaneously to multiple audiences. The primary purpose of investing in originalism at the beginning of Meese's term in office was to have an influence on the legal profession and legal scholars, and it clearly succeeded on that front. Originalism turned out to be a highly fruitful line of inquiry for conservative scholars, many of whom have made successful academic careers expounding on the concept, and the idea has been sufficiently powerful that liberals have had to both engage with it and, in many cases, incorporate it in their own work.^{cxxviii} Originalism is now no longer "off the wall" in elite circles. But it is also the case, as Markman clearly suggests, that the idea is a double-edged sword, capable of cutting at both the elite and mass levels—and it was understood to be so at the time that its adherents were working on it in the Reagan administration. It simultaneously legitimated conservative ideas in elite circles and served as a tool for popular mobilization, providing a bridge between the movement's legal elites and its activists in the field. The investment in originalism proved to have returns far beyond what its supporters could have hoped at the time—returns that liberals are slowly trying to replicate.^{cxxix}

VI. Conclusion

As a single case, the experience of the Meese DOJ cannot on its own provide the foundation for an explanation of the existence of transformational bureaucracy. What political scientists should draw from the experience of Reagan's lawyers, however, is that political investment, as a distinct analytical phenomenon, exists. Political agents such as political appointees do

not always discount long-term gains, despite the pressures presented by commitments to key members of their party's coalition and the everyday business of their department. These short-term tasks do, in fact, take up the largest part of their time and resources, but political executives possess resources that can alter the agency's external environment—and hence the scope of political outcomes—in the future.

For political scientists to get traction on the conditions under which transformational bureaucracy exists, however, they will have to loosen two assumptions common in the discipline's study of American politics: myopia and individualism. Myopia is the common assumption that political actors are “hyperbolic discounters,” that they heavily weigh benefits in the present and disregard those in the future. This may be true for some political actors, embedded in particular kinds of situations (such as members of Congress early in their career), but as a more general matter we should treat time horizons as a continuous variable, and as a matter for investigation rather than as an assumption of analysis. Second, political actors do not consider only those benefits that accrue to them personally, and discount to zero those that benefit others. Some actors, especially those who are deeply embedded in larger political networks, do act rationally if we assume that the unit of analysis is the network, and not the individual. Part of what characterizes membership in a political network—what makes it much more than simple interest group attachment—is that it blurs the line between individual and collective benefits. Consequently, while the individualism and myopia assumptions may be very useful for explaining the behavior of a great many political actors, we should be careful to make a substantial exception for those possessed of a strong collective identity. These actors' behavior is still rational, but collectively so.^{cxxx}

Whether political appointees adopt an investment orientation is likely to be as much a function of the competitive position of their political coalition as their own individual

attributes. Consider, for example, the analogy between political appointees' investment in their coalition's support structure and presidents' decisions to engage in party building. Daniel Galvin has argued that presidents face a choice between investing in the long-run capacities of their party, or using the party for near-term objectives such as re-election and legislative success, which he calls "predation."^{xxxxi} The most powerful variable in explaining presidents' choice of investment or predation is the overall state of party competition: presidents whose parties are dominant tend to be predators, and those whose party is less competitive tend to be investors. That is, the weaker their party is, the longer the president's time horizon tends to be. There is a useful analogy to be drawn here with political competition outside the electoral sphere—political appointees with a weakly competitive external network will tend to be investors, while those whose network is strong will have incentives to exploit that network for short-term purposes.

The competitive environment only explains when the *collective* returns on political investment are likely to be high, but does not provide much leverage on explaining the decision making of *individual* actors. The evidence above suggests that political investment is most likely to occur when it also generates short- or medium-term gains as well as those of a more distant character. While the originalism project was clearly intended to help get the idea taken more seriously in elite legal and intellectual circles, political executives also thought that it would help guide judicial selection and make the president's legal agenda more competitive by framing it in a more elevated light. While some Reagan officials, like Horowitz, were motivated to identify and mentor young conservative lawyers out of an unalloyed desire to serve the movement's long-term interests, men like Cribb and Meese had mixed motives. They certainly were sensitive to the need for the movement to solve its long-term elite personnel problem. Cribb, for example, had been involved with ISI before

entering government, and headed it after he left, while Meese took a position at the Heritage Foundation and has devoted most of his post-DOJ years to building up legal conservatism's organization base. Even so, it is unlikely that they would have invested as much of their time and resources in creating a cadre of young conservative lawyers if it did not solve their immediate need to exercise control over a department they believed was not enthusiastic to take a conservative lead, or their medium-term need to groom officials who could be put into higher positions later in their own time in office.

The evidence above also suggests that a propensity to engage in political investment is not simply a function of ideological intensity, but is driven more by the presence of a collective movement identity, combined with a managerial instinct toward attaining strategic, rather than simply tactical, advantage. William French Smith was unquestionably very conservative—there is no evidence that his underlying preferences diverged considerably from Meese's. The difference in the two was that Meese was a true creature of the conservative movement whereas Smith's primary commitment was to Reagan personally. Therefore, Smith tended to discount benefits that would accrue after Reagan left office, while Meese weighed them much more heavily. In addition, there is evidence that Meese simply thought about organizing for the long-term as a necessary part of "good management," whereas Smith was more oriented toward managing by clearing out the in-box—an in-box that, in all fairness, was extremely full in the first few years of the Reagan administration.^{cxxxii} Ideology may be strongly correlated with, for example, social movement identity, largely because social movements of the center are typically rare. That said, the case of reformers in the Progressive era suggests that it is, indeed, possible to have a very broad-based social movement organized around such centrist concepts as "efficiency" and "modernization," and that this may drive political executives to quite considerable acts of

political investment. Consider in this regard Stephen Skowronek's case of military reformers in the late nineteenth and early twentieth century. These reformers were not highly ideological men, but their deep commitment to their cause led them to invest in the creation of, for example, alternatives to the military academies, in the hope that these would develop ideas and train personnel that would make reform more likely in the future.^{cxxxiii} It was their movement identity and strategic instincts, not their ideological fervor, that made such action seem rational.

Finally, political investment demands agents with the right motivation situated in institutions that provide them with space to consider future benefits. In any agency, the press of ordinary business is overwhelming. In the absence of activities designed to extend subordinates' time horizons, and without empowering divisions with an explicit mandate to attend to the long-term, even leaders with long time horizons are unlikely to succeed in altering their external environment. Reforming the offices of Legal Policy and Public Affairs, and establishing regular departmental seminars, retreats, and even multiday conferences, were structural devices by which, in Cribb's terms, the department kept "the urgent from overwhelming the important." A properly organized and staffed department will engage in political investment without considerable prodding from on high. Without these structural features, however, orientations at the top are unlikely to translate into action from below.

Political executives, therefore, are not simply administrators of a party program, nor does thinking about them as "bureaucratic entrepreneurs" sum up the full range of effects that they may have. Political executives, at least some of the time, have the capacity to deploy resources under their control that will materially reshape their external environment, and hence the political conditions faced by their successors. Political executives are capable of

being transformative, helping to reconstitute political order, rather than simply operating within its strictures.

Laura Moranchek started out as a co-author on this paper, before taking the bar, getting married, and clerking for the Ninth Circuit snatched her away. She did yeoman's work in the Reagan Library and the National Archives, and helped me think through some of the major issues in the paper. Much that is good here is due to her patience in helping me figure out what, precisely, the paper was about. I would also like to thank those who helped me with the revisions of this paper, especially Chuck Epp, Matthew Holden, Daniel Reid, Adam Sheingate, Sandy Levinson, Amanda Hollis-Brusky, Lawrence Mead, Dan Carpenter, Martha Derthick, Laura Kalman, Tom Sugrue, Reva Siegel, Robert Post, Steve Wasby and the two anonymous reviewers from *Studies in American Political Development*.

ⁱ In *Building a New American State*, Skowronek refers to this as an “alternative governing coalition,” while David Plotke calls it a “reform bloc.” Stephen Skowronek, *Building a New American State* (Cambridge: Cambridge University Press, 1982); David Plotke, *Building a Democratic Political Order: Reshaping American Liberalism in the 1930s and 1940s* (Cambridge: Cambridge University Press, 1996).

ⁱⁱ Charles Epp, *The Rights Revolution* (Chicago: University of Chicago Press, 1998); Steven Teles, *The Rise of the Conservative Legal Movement* (Princeton: Princeton University Press, 2008).

ⁱⁱⁱ Alan Jacobs and Steven Teles, “The Perils of Market-Making: The Case of British Pension Reform,” in *Creating Competitive Markets: The Politics of Regulatory Reform*, ed. Marc Landy, Martin Levin, and Martin Shapiro (Washington, DC: Brookings, 2008).

^{iv} Martha Derthick and Steven Teles, “Social Security from 1980 to the Present: From Third Rail to Presidential Commitment—And Back?” in *Conservatism and American Political Development*, ed. Brian Glenn and Steven Teles (Oxford: Oxford University Press, 2009); Steven Teles, “Conservative Mobilization Against Entrenched Liberalism,” in *Transformations of American Politics*, ed. Paul Pierson and Theda Skocpol (Princeton: Princeton University Press, 2007).

^v Steven Teles, *Whose Welfare? AFDC and Elite Politics* (Lawrence: University Press of Kansas, 1998), chap. 7.

^{vi} Steven Teles, *The Rise of the Conservative Legal Movement*.

^{vii} Jameson Doig and Earl Hargrove, *Leadership and Innovation* (Baltimore: Johns Hopkins, 1987); Thomas McCraw, *Prophets of Regulation* (Cambridge: Harvard, 1984); Martha Derthick and Paul Quirk, *The Politics of Deregulation* (Washington, DC: Brookings, 1985); Martha Derthick, *Policymaking for Social Security* (Washington, DC: Brookings, 1979).

^{viii} The key text on the subject of bureaucratic autonomy in the American political development literature is Daniel Carpenter, *The Forging of Bureaucratic Autonomy* (Princeton: Princeton, 2001).

^{ix} Speech by Governor Ronald Reagan Before the University of Southern California Law Day Luncheon, Los Angeles, April 29, 1967, <http://www.reagan.utexas.edu/archives/speeches/govspeech/04291967a.htm>.

^x These are discussed in detail in Ronald Reagan Oral History Project, Miller Center, Charlottesville, VA, “Interview with Edwin Meese III,” recorded August 9–10, 2001.

^{xi} Bennett Beach, “One More Narrow Escape,” *Time*, November 23, 1981.

^{xii} Jefferson Decker, “The Conservative Non-Profit Movement and the Rights Revolution,” paper presented at the 2006 Meeting of the American Society of Legal Historians, Baltimore, MD; and Teles, *The Rise of the Conservative Legal Movement*, chap. 3.

^{xiii} *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

^{xiv} Teles, *The Rise of the Conservative Legal Movement*, chap. 3.

^{xv} Interview with Michael Horowitz, August 2007.

^{xvi} *Ibid.*

^{xvii} Michael Horowitz, “The Public Interest Law Movement: An Analysis with Special Reference to the Role and Practices of Conservative Public Interest Law Firms” (prepared for the Scaife Foundation, 1980), p. 73.

^{xviii} *Ibid.*, pp. 30, 85–86.

^{xix} *Ibid.*, p. 3.

^{xx} Teles, *The Rise of the Conservative Legal Movement*, chap. 6.

^{xxi} Wallace Turner, “Possible Chief for Law Unit Stirs Concern,” *New York Times*, November 20, 1981.

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- xxxii Zumbrun's colleague in the conservative public interest law movement, James Watt (who before becoming secretary of the interior was the head of the Mountain States Legal Foundation), became a lightning rod, managing to survive in office for only two years.
- xxxiii Michael Greve, "Why Defunding the Left Failed," *The Public Interest* (fall, 1987): 99–100.
- xxxiv Benjamin Ginsberg and Martin Shefter, *Politics By Other Means* (New York: W.W. Norton, 1999).
- xxxv Teles, *The Rise of the Conservative Legal Movement*, chap. 2.
- xxxvi Judith Layzer, "The Politics of Prevention: Conservatives and the Environment, 1980-2006," in Glenn and Teles, *Conservatism and American Political Development*.
- xxxvii In fact, Baxter's antitrust division might be a partial exception to my general claim that DOJ in the first term was less oriented to the long term than in the second term. Baxter made a point of transforming the staffing patterns of the division by hiring more economists, and encouraged the division's lawyers to engage with economics as well. These changes would become institutionalized, influencing the course of antitrust policy to this day. Richard Schmalensee, "Bill Baxter in the Antitrust Arena: An Economist's Appreciation," *Stanford Law Review* 51 (May 1999): 1317–32.
- xxxviii Marissa Martino Golden, *What Motivates Bureaucrats?* (New York: Columbia University Press, 2000), chap. 5. Reynolds's ideological fervor, combined with pressure from key Republican constituencies, was so considerable that it helped push the administration into its politically disastrous role in the *Bob Jones* case, where the administration took the side of a segregationist college that had seen its tax-exempt status eliminated. The best account of this is Eric Stern and Phillip Heyman's "The Case of the Segregated Schools," Kennedy School of Government Case C14-83-541, April 18, 1983.
- xxxix Interview with Kenneth Cribb, August 2007.
- xxx Interview with Richard Willard, July 2008.
- xxxii Interview with Gary McDowell, July 2007.
- xxxiii Bernard Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980).
- xxxiiii Interview with Steven Calabresi, July 2007.
- xxxv Interview with Terry Eastland, July 2007. A good sense of Smith's priorities can be found in William French Smith, *Law and Justice in the Reagan Administration* (Palo Alto, CA: Hoover Institution, 1991).
- xxxvi Interview with Edwin Meese, July 2007.
- xxxvii "Summary of Discussion," Department of Justice Retreat, Wye Plantation, November 19–20, 1984, Box 19, File 56.
- xxxviii "Summary of Discussion," 19–20. Reynolds went on to recommend that others read the Kennedy School case cited above, Stern and Heyman, "The Case of the Segregated Schools," 21. On Grove City, see Hugh Davis Graham, "The Storm Over Grove City College: Civil Rights Regulation, Higher Education, and The Reagan Administration," *History of Education Quarterly* (winter, 1998): 407–29.
- xxxix "Summary of Discussion," 62.
- xl Interview with Meese, July 2007.
- xli Memorandum for T. Kenneth Cribb Jr., From: Steven G. Calabresi, Subject: Priority Issues to be Monitored at the Long-Range Planning Meetings, January 1, 1986.
- xlii Letter from Terry Eastland to Pat Buchanan, April 10, 1985, Reagan Library.
- xliii Interview with McDowell, July 2007.
- xliiii Storing was a student of Leo Strauss, and along with Martin Diamond was one of the most important figures in reviving the study of American political thought, especially of the founding period. A selection of his work can be found in Joseph Bessette, ed., *Toward a More Perfect Union: Writings of Herbert J. Storing* (Washington, DC: AEI, 1995).
- xliv Interview with Cribb, August 2007.
- xlv "Summary of Discussion," 55.
- xlvi "Summary of Discussion," 3.
- xlvii Interview with Cribb, August 2007.
- xlviii Interview with Stephen Markman, August 2007.
- xlix Interview with Cribb, July 2007.
- l Interview with Cribb, August 2007.
- li Interview with Meese, July 2007.
- lii United States Department of Justice, Legal Activities: 1984-1985; United States Department of Justice, Legal Activities: 1986-1987.
- liiii Amanda Hollis-Brusky shows how "Reagan alumni" provided a critical network for developing some of the most important conservative cases in the years after they left the department. Amanda Hollis-Brusky, "The

Reagan Administration and the Rehnquist Court's New Federalism: Reconsidering Presidential Influences on Constitutional Change," http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=amanda_hollis

^{liv} Teles, *The Rise of the Conservative Legal Movement*, chap. 7.

^{lv} Along with the Institute for Humane Studies, ISI is the oldest and most active conservative organization on campus, helping subsidize speakers, organizing conferences of young conservatives, and providing scholarships for graduate education.

^{lvi} Interview with Cribb, July 2007.

^{lvii} David Lewis has found that, "Reagan's head of Presidential Personnel, Pendleton James, recounted how Reagan told him that the administration provided an opportunity to bring bright young people into government, expose them to the administration and they'll go back home and 'there's mayors, governors, city council members' there. Reagan's first head of the Office of Personnel Management recounted how some in the administration viewed Schedule C appointments as a training ground for future Republican appointees. They placed young Republicans in junior appointed positions to start and have them work their way up." David Lewis, "Personnel is Policy: George W. Bush's Managerial Presidency," in Colin Provost and Paul Teske, eds. *Extraordinary Times, Extraordinary Powers: President George W. Bush's Influence Over Bureaucracy and Policy* (New York: Palgrave, Forthcoming).

^{lviii} Interview with Cribb, July 2007.

^{lix} Interview with Cribb, July 2007.

^{lx} These young conservatives proved something of a headache for some of the DOJ's senior officials who were not as ideologically committed as they were. This is a major theme of Solicitor General Charles Fried's *Order and Law: Arguing the Reagan Revolution* (New York: Simon and Schuster, 1991). This point is further elaborated in Amanda Hollis-Brusky, "The Reagan Administration and the Rehnquist Court's New Federalism: Understanding the Role of the Federalist Society"

^{lxi} Interview with Cribb, July 2007.

^{lxii} "Summary of Discussion," 79.

^{lxiii} Interview with Richard Willard, July 2008.

^{lxiv} Interview with Willard, July 2008.

^{lxv} Interview with Willard, July 2008.

^{lxvi} Interview with Willard, July 2008.

^{lxvii} Interview with Michael Horowitz, August 2007.

^{lxviii} Interview with Horowitz, August 2007.

^{lxix} Interview with Horowitz, August 2007.

^{lxx} Interview with Steven Galebach, August 2007.

^{lxxi} As quoted in Teles, *The Rise of the Conservative Legal Movement*, p. 141.

^{lxxii} Interview with Cribb, August 2007.

^{lxxiii} Interview with Cribb, August 2007.

^{lxxiv} Comments of Kenneth Cribb, Conference on "The Legacy of the Department of Justice under Attorney General Edwin Meese III," January 27, 2007, <http://www.fed-soc.org/publications/id.424/default.asp>

^{lxxv} Interview with Cribb, August 2007.

^{lxxvi} "I gave them the idea for it and they ran with it. I think it was when I was clerking, I had the idea that the Intercollegiate Studies Institute ought to start a group for lawyers, just like they had a group for law students." Interview with Galebach, August 2007.

^{lxxvii} Interview with Galebach, August 2007.

^{lxxviii} Interview with McDowell, July 2007.

^{lxxix} Interview with Cribb, August 2007.

^{lxxx} Interview with Calabresi, July 2007.

^{lxxxi} Interview with Cribb, August 2007.

^{lxxxii} Teles, *The Rise of the Conservative Legal Movement*, pp. 141-142.

^{lxxxiii} Interview with McDowell, July 2007.

^{lxxxiv} Interview with McDowell, July 2007.

^{lxxxv} Interview with Meese, July 2007.

^{lxxxvi} Interview with Calabresi, July 2007.

^{lxxxvii} Interview with Calabresi, July 2007.

^{lxxxviii} Interview with Calabresi, July 2007.

^{lxxxix} Teles, *The Rise of the Conservative Legal Movement*, chap. 5.

^{xc} As quoted in Teles, *The Rise of the Conservative Legal Movement*, p. 145.

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- ^{xc}i Interview with Terry Eastland, July 2007.
- ^{xcii} Interview with Cribb, August 2007.
- ^{xciii} Robert Bork, “Neutral Principles and Some First Amendment Problems,” *Indiana Law Journal* 47, no. 1 (1971).
- ^{xciv} Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, MA: Harvard University Press, 1977).
- ^{xcv} A good discussion of the origins of originalism can be found in Jonathan O’Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore, MD: Johns Hopkins University Press, 2005).
- ^{xcvi} Interview with Cribb, August 2007.
- ^{xcvii} Robert Post and Reva Siegel, “Originalism as a Political Practice: The Right’s Living Constitution,” *Fordham Law Review* (November 2006): 554.
- ^{xcviii} Interview with Cribb, August 2007. Eastland agrees that the speech was not primarily aimed at the conservative movement, as such: “I also thought it was suitable for an elite audience that would have all kinds of members of the bar including judges and academics. So it would be something that could be discussed . . . I had no political intent of bringing the conservative movement under some sort of canopy. I didn’t have that thought in mind.” Interview with Eastland, July 2007.
- ^{xcix} Interview with Meese, July 2007.
- ^c Interview with McDowell, July 2007.
- ^{ci} Interview with McDowell, July 2007.
- ^{cii} David Yalof, *Pursuit of Justices* (Chicago: University of Chicago Press, 2001), chap. 6; Sheldon Goldman, *Picking Federal Judges* (New Haven, CT: Yale University Press, 1997), chap. 8.
- ^{ciii} Interview with Markman, August 2007. Meese himself acknowledges that the speeches were “particularly directed at what our view of the judicial role was, and the standards by which we would be recommending to the President the appointment of judges.” Ronald Reagan Oral History Project, Miller Center, Charlottesville, VA, “Interview with Edwin Meese III,” recorded August 9–10, 2001, p. 204.
- ^{civ} Interview with Cribb, August 2007. Meese himself acknowledges the linkage with judicial selection: “It was a matter of [defining] what judges should do, in order to determine what sort of people should be judges.” Interview with Meese, July 2007.
- ^{cv} Interview with McDowell, July 2007.
- ^{cvi} *The Great Debate: Interpreting Our Written Constitution* (Washington, DC: The Federalist Society, 1986).
- ^{cvi} Interview with Meese, July 2007.
- ^{cviii} Interview with McDowell, July 2007.
- ^{cix} Interview with Meese, August 2007.
- ^{cx} Jack M. Balkin, “*Busb v. Gore* and the Boundary Between Law and Politics,” *Yale Law Journal* 110, no. 8 (June 2001): 1444–45.
- ^{cx}i Interview with Calabresi, July 2007.
- ^{cxii} Interview with Eastland, July 2007.
- ^{cxiii} Interview with Richard Willard, July 2008.
- ^{cxiv} Interview with Cribb, August 2007.
- ^{cxv} Interview with Galebach, August 2007.
- ^{cxvi} Interview with Meese, July 2007.
- ^{cxvii} The concept of achieving coordination and direction through ideas, rather than direct hierarchical control, can be found (in very different contexts) in Herbert Kaufman, *The Forest Ranger* (Baltimore, MD: Johns Hopkins, 1960) and Ian Kershaw, *Hitler: Nemesis* (New York: W.W. Norton, 1999).
- ^{cxviii} Interview with Meese, July 2007.
- ^{cxix} *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) addressed the president’s power to remove officers from independent commissions.
- ^{cxx} Interview with McDowell, July 2007.
- ^{cxxi} Interview with Galebach, July 2007.
- ^{cxxii} Interview with Cribb, August 2007.
- ^{cxxiii} Interview with Markman, August 2007.
- ^{cxxiv} United States Department of Justice, Office of Legal Policy, *Original Meaning Jurisprudence: A Sourcebook* (Washington, DC: GPO, 1988).
- ^{cxxv} A much more extensive discussion of the substance of these reports can be found in Dawn Johnsen, “Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional

Change,” 78 *Indiana Law Journal* 363 (2003). A useful critique of Johnsen’s framing of these reports can be found in Amanda Hollis-Brusky, “The Reagan Administration and the Rehnquist Court’s New Federalism”

^{cxxvi} Interview with Markman, August 2007.

^{cxxvii} Interview with Markman, August 2007.

^{cxxviii} A discussion of the historical turn in legal scholarship can be found in Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven, CT: Yale University Press, 1998). Examples of liberal scholarship that has attempted to develop a “liberal originalism” are Akhil Amar, *America’s Constitution: A Biography* (New York: Random House, 2005) and Jack Balkin, “Abortion and Original Meaning,” *Constitutional Commentary*, 24, no. 101 (2007). Bruce Ackerman’s *We the People: Volume One, Foundations* (Cambridge, MA: Belknap/Harvard, 1993) can also be read as a response to originalism.

^{cxxix} Consider that the major effort by the American Constitution Society, which was created to be a liberal counterpart to the Federalist Society, to plan out the future of liberal constitutionalism was called “The Constitution in 2020.” As part of that project, the OLP’s planning documents described above were prominently discussed and treated as a kind of template for action.

See <http://islandia.law.yale.edu/acs/conference/index.asp>.

^{cxxxx} An excellent discussion of “collective identity” can be found in Francesa Polletta and James Jasper, “Collective Identity and Social Movements,” *Annual Review of Sociology* (2001): 283–305.

^{cxxxi} Daniel Galvin, *Presidential Party Building* (Princeton, NJ: Princeton University Press, 2009).

^{cxxxii} I am, of course, treating Smith and Meese for this purpose as ideal types—the reality was certainly murkier.

^{cxxxiii} Skowronek, *Building a New American State*, chaps. 4 and 7.