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## The Law Comes to Campus: The Evolution and Current Role of the Office of the General Counsel on College and University Campuses

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THE LAW COMES TO CAMPUS: THE EVOLUTION AND CURRENT ROLE OF  
THE OFFICE OF THE GENERAL COUNSEL  
ON COLLEGE AND UNIVERSITY CAMPUSES

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DISSERTATION

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A dissertation submitted in partial fulfillment of the  
requirements for the degree of Doctor of Philosophy in the  
College of Education  
at the University of Kentucky

By  
Jason A. Block

Lexington, Kentucky

Director: Dr. John Thelin, Professor of Education

Lexington, KY

2014

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## ABSTRACT OF DISSERTATION

### THE LAW COMES TO CAMPUS: THE EVOLUTION AND CURRENT ROLE OF THE OFFICE OF THE GENERAL COUNSEL ON COLLEGE AND UNIVERSITY CAMPUSES

Much has been written in the literature of higher education on the history and current role of presidents, provosts, and deans. However, higher education scholars have, for the most part ignored the role of institutional in-house attorneys on college and university campuses. Those who have written on the subject of institutional counsel have proffered the idea that in-house general counsel offices were established as a result of the increased regulation of higher education by state and federal governments, and litigation resulting from the faculty and student rights movements of the 1960s and 1970s. This project seeks to provide a detailed justification for the rationale for the proliferation of counsel offices, and to provide a base-line qualitative, interview-based approach to the current role of college and university attorneys.

Using a historical, document based approach this dissertation provides a comprehensive exploration of the argument that the establishment and growth of offices of the general counsel on college and university campuses was rooted in litigation. This dissertation further builds on the notion that as colleges and universities became larger and more complex, federal and state governments increased regulatory and reporting demands and accountability on institutions.

A second issue that this dissertation covers is the way in which modern day institutional counsel view their roles within a college or university. Using Oral History Methodology, three attorneys were interviewed about their perceptions of their roles. Based on those interviews, this dissertation proffers the idea that an institutional counsel's view of his or her role is linked to the nature of the individual campus and its leadership, and the structure of the office in which the attorney works. This dissertation also puts the role of the institutional counsel into the context of institutional actors by comparing it with the role of the academic dean.

In addition to showing that the role of the institutional counsel is institution dependent, the results of this project indicate that the role of the institutional general counsel is an area ripe for additional study.

**KEYWORDS:** Institutional General Counsel, Institutional Governance, Legal History, Litigation, Regulation

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ON COLLEGE AND UNIVERSITY CAMPUSES

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In closing, and aligned with the learning for learning's sake philosophy, it is my hope that as higher education becomes more interdisciplinary, people in general, and specifically members of the academy, will see that a professional degree, like a law degree, is not just a means to a career, but also a pathway to new ways to look at other fields of study. Like the law, the academic world is not black and white; there are indeed countless shades of gray which need to be explored.



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# CHAPTER 1

## Introduction

### Project Introduction and Statement of the Problem

When looking at the organizational structure of a college or university, there is a large corpus of scholarly research on the role of senior administrators in higher education. Much has been written on the roles of presidents, deans, department chairs, and, to some extent, student affairs vice presidents. However, little has been written on the role of the general counsel. If you look at many institutional organizational charts from the largest Association of American Universities institutions to many small liberal arts colleges, the general counsel is usually at the top, either reporting to the president or directly to the board of trustees (Amherst College, 2012; UNC, 2013b). General counsels and their subordinates work on diverse business issues such as employment issues, tax concerns, institutional liability, contracts, people-centered issues such as discrimination, and issues involving students and faculty (UNC, 2013a).

Colleges and universities in the United States face significant legal problems on a daily basis. As noted in several articles, the student rights movement in the 1960s and 1970s significantly increased both the volume and complexity of litigation colleges and universities faced (Bickel, 1974; Daane, 1985; Sensenbrenner, 1974). In addition, courts were quick to hold institutions accountable (Bickel, 1974; Daane, 1985; Sensenbrenner, 1974). Colleges and universities also faced, and continue to face, a regulatory environment where both federal and state governments demand accountability (Ruger,

1997). It is within this environment that the importance of the institutional general counsel has grown (Ruger, 1997).

Although general counsel offices are common on campuses and often impact issues important to higher education scholars, most of the literature that has been written on the office has been practitioner-based and directed toward attorneys (Beale, 1974; Bickel, 1974; Daane, 1985; Epstein, 1974; Orentlicher, 1975; Sensenbrenner, 1974). While this type of writing has, in some cases, asserted how general counsel's offices originated, it has not presented a comprehensive explanation of both the origins of the college or university general counsel's office and its modern day role.

In addition to practitioner articles, three dissertations have looked at the role of general counsels (Geary, 1975; Ripps, 1980; Thompson, 1977). While these three projects provided useful information for the time, they are somewhat dated. These studies utilized surveys to glean information from practitioners about their duties. While survey methodology is effective at collecting a broad swath of data, the approach of this project seeks to take a more personal and less broad based approach. This dissertation seeks to explore and to elaborate on some of the historical impetuses for the office of the general counsel mentioned in the literature and then expand on the literature and history to get a sense of how modern day counsel view their roles and how those perceived roles fit into the context of leadership on campus as a whole.

### **Theoretical Underpinnings**

Three major monographs have influenced this dissertation's approach to this topic. They are Laurence Veysey's *The Emergence of the American University* (1965),

Rudolph's *The American College and University: A History* (1962), and Cowley's *Presidents, Professors and Trustees* (1980). These three books look at the development of the professional bureaucracy in the college and university context. They all theorize that increased competition among institutions for students and resources, and the actions institutions took to respond to that competition, led to both the need to standardize governance within higher education and the greater involvement of outside constituents (Cowley, 1980; Rudolph, 1962; Veysey, 1965).

Laurence Veysey, in his *The Emergence of the American University* (1965), elaborated on the factors that combined to necessitate the establishment of a bureaucracy within colleges and universities. Veysey, throughout the second half of his text, attributed the bureaucratization of higher education to the growth of the demand for a college education, increased student interaction with institutions, formalized course requirements for degrees, the systemization of both academic and non-academic processes, faculty upheaval, and increased interactions between institutions and the public. The reaction of colleges and universities fostered a competitive environment between institutions centered on students, faculty, and later, resources.

According to Veysey (1965), the twenty-year period between 1890 and 1910 was key for the standardization and bureaucratization of American institutions of higher education. Veysey termed this era the "new academic age" of strong presidents. Veysey highlighted Nicholas Murray Butler of Columbia University as a primary example of a strong president bringing about structural changes to his institution. By 1902, under Butler, Columbia had instituted a central Registrar's Office, an Office of the Bursar and created a large Office of the President to manage University affairs (Veysey, 1965, p.

307). During this time, Butler and the presidents of other institutions significantly modified the relationships between institutions and their students. This was, in part, due to a significant increase in student numbers during the late-1800s and early-1900s. Prior to the early 20<sup>th</sup> century, programs of study, particularly for PhD programs, were not standardized within institutions (Veysey, 1965). In an effort to control students and to compete with peers, institutions like Columbia began to standardize their PhD programs. Requirements were set so students knew what to expect and faculty had an objective standard to review student progress. More importantly, PhD standards clearly articulated the relationship between the institution as an entity and the student. Academically, the early 20<sup>th</sup> century brought about the introduction of accrediting bodies (Veysey, 1965). These organizations were outside forces that impartially evaluated institutions based on set standards. Institutions had to present a unified front to accrediting bodies; internal strife could hurt an institution's reputation. A centralized administrative structure allowed for continuity of message.

As institutions continued to grow and become more prominent within their communities, it became important for any given college or university to consider how it was perceived by the public. In his book *The American College and University: A History* (1962), Frederick Rudolph noted that college and university presidents not only had to deal with their internal constituencies, they also had to deal with the general public, including, to a limited extent, the government. As Veysey noted, the university president was as much an administrator as he was a politician; he had to promise something to everyone to be successful (Veysey, 1965).

By 1910, the number of new institutions developing within the United States had declined and existing colleges and universities were faced with the need to compete with their peers for resources. This prompted the rise in prominence of two additional vital constituents: outside foundations/benefactors and alumni (Rudolph, 1962; Veysey, 1965). Both Veysey (1965) and Rudolph (1962) noted the increased involvement of foundations such as the Carnegie and Rockefeller Foundations. Veysey (1965), in particular, discussed that foundations were very hands-on in interviewing institutional representatives before appropriating funds. Similarly, alumni became more interested in how institutions functioned, particularly because they were being asked to contribute. The involvement of alumni, and later foundations, forced institutions to further develop a centralized administration that presented a consistent message, crafted a process for obtaining and utilizing resources, and helped other members of the community, (i.e. faculty) to work within the new reality of institutional competition for resources (Cowley, 1980; Rudolph, 1962; Veysey, 1965).

In the end, a clear articulation of Veysey, Rudolph, and Cowley's theory is that due to the proliferation of colleges and universities, the competition for external resources necessitated the establishment of centralized bureaucracies within colleges and universities to effectively lobby and respond to the needs of those resources. This dissertation takes that theory one step further and argues that the government became a significant outside force with which institutions had to interact. This interaction was the result of increased regulation and a shift in the rationale courts used to sustain individual rights in the context of higher education. Government intervention forced and continues to force institutions to adapt to governmental priorities and policies. As a result, the



institutional in-house general counsel became an integral part of the established institutional bureaucracy.

## **Research Questions and Hypotheses**

**Research questions.** The first of two research questions for this project focuses on the history of the office and seeks to expand on previous articles written about the college and university general counsel. In the literature on general counsel's offices, other writers have asserted that litigation during the 1960s and 1970s and/or government regulation of institutions during the 1960, '70s, and '80s brought about the need for on campus legal offices (Bickel, 1974; Ruger, 1997; Sensenbrenner, 1974). While these authors have proffered this theory, none has provided an extensive illustration of the cases or regulations that could have brought about this shift. The most extensive treatment of this issue, in Ruger (1997), was only a few paragraphs long. The first question of this dissertation seeks to present a broad description of the regulatory and case law environment during the period from the 1960s to the 1980s in order to provide the first extensive exploration of the assertions made in the literature. This dissertation first asks: What examples can be offered to support previously made assertions that the impetus for the proliferation of in-house university counsel offices in the 1960s, 1970s and 1980s was, in part, the result of increased governmental regulation, and litigation?

Within the context of the impetus for the establishment of general counsel offices on college and university campuses, the second question, and the question that will serve as the basis for the non-document based research, seeks to understand the role of the institutional counsel on the modern day campus. This section of this dissertation will be

answering the question: How do institutional counsels view their roles within the institutional bureaucracy?

To elaborate even further on this question, the points of view of the interviewees will be placed into the context of leadership as a whole on campus by comparing the role of the general counsel as articulated by the attorneys, with literature on the role of academic deans. Both the position of a general counsel and that of a dean are senior level in most higher education institutions. In addition, literature on the history and role of deans in higher education is extensive (Dibden, 1968; Gould, 1964; Tucker & Bryan, 2001; Wolverson, Gmelch, Montez, & Nies, 2001). By comparing and contrasting both the career path of deans, and the role and responsibilities of the dean's office with those of the general counsel, the contours of the role and limitations of the general counsel become more evident. This delineation further expands on the literature on the general counsel cited in Chapter Two.

**Hypothesis.** When this dissertation concludes, I believe that it will show that attorneys see their roles as advisers. That is the role emphasized in law school and in private practice (where most institutional counsel originate) (interviews, April, 2014). However, factors like longevity, familiarity with administrators on campus, and investment in the institution could erode the line between attorney/adviser and decision making administrator. It is also my belief that my research will ultimately find that there is a gray area between attorney as adviser and attorney as decision maker and that most institutional counsel find themselves within that middle ground.

## **Conclusion**

The importance of the general counsel cannot be overstated. Understanding the history and the role of the general counsel might force scholars to look at decisions made by presidents and boards differently. In addition, it may force scholars to acknowledge that the law and issues related to the law have a greater impact on university decisions than previously thought. This research could help the university counsel legal community as well. An in-depth examination of the roots of the general counsel's office and its current role can help current counsels understand what their roles could or should be within their institutions. By understanding the roots of the position, this work might also help current boards of trustees or presidents/CEOs better manage institutional attorneys.

This project is meant to be a general historical study of the currently perceived role of the in-house college and university attorney. To that end, following the literature review in Chapter Two and methodology review in Chapter Three, Chapter Four will take a document based, historical, exploratory view of how regulation and case law could have both served as impetuses for general counsel offices on campuses as proffered in the aforementioned literature. Chapter Five serves to link the discussion in Chapter Four to the present day by exploring, through the use of Oral History techniques, how current or recently retired university counsel view or viewed their roles within the college or university. Chapter Five also briefly explores how the counsel role fits into institutional notions of campus leadership and bureaucracy by comparing the counsel's role with the role of the academic dean. This discussion is meant to help both college attorneys and the people with whom they work understand the scope and limitations of the general

counsel's office. Finally, in Chapter Six this dissertation will conclude by reflecting on this project and offering some suggestions for further research.

Before moving on to the substantive discussion of the research questions presented above, it is important to understand how others have approached the impetus for, and role of, the college or university general counsel. That discussion follows in the next chapter.

## **CHAPTER 2**

### **Literature Review**

The literature on the role of the general counsel is limited, with sporadic articles written over the course of the thirty years from the 1970s to the 2000s. In general, articles were written by practitioners looking to either share best practices or reflect on their years of service in general counsel roles. These articles touched on two issues: methods of obtaining legal advice, and the role a general counsel should take within an institution of higher education (Bickel, 1974; Daane, 1985; Orentlicher, 1975; Sensenbrenner, 1974; Thomas, 1998).

#### **Methods of Obtaining Legal Advice**

When discussing methods of obtaining legal counsel, Richard Sensenbrenner (1974), a former counsel for the California State University System, suggested that there were three ways of hiring attorneys: individual departments hiring attorneys to suit their immediate needs, an institution hiring outside counsel, or an institution hiring an in-house general counsel. While mentioning these three options, Sensenbrenner (1974) was clearly a proponent of an institution engaging in-house counsel and creating an internal pool of lawyers of varying specialties. In addition to controlling costs, he cited six primary advantages to in-house attorneys versus outside counsel.

First, Sensenbrenner (1974) believed that a staff of in-house attorneys would be better suited to test one another's conclusions and approaches to legal issues. A group of in-house counsel would also be able to focus and help one another focus on the large

amount of work they have to do. In asserting this point he implicitly suggested that attorneys in an outside firm might be able to move off and do other work rather than focus on the problems of the institution.

Sensenbrenner (1974) endorsed the idea of a general counsel's office being a brain trust of people with differing interests. He noted that an issue might arise every few years and that having people with varying expertise would serve the institution well in helping to solve those types of problems. Sensenbrenner's next point went back to the idea of controlling costs. With an in-house law practice, institutions would only have to pay for legal research tools once. When hiring outside law firms, institutions, through the hourly rate they pay, are supporting each individual firm's research abilities.

Sensenbrenner's (1974) last two points dealt with relationships with clients. On-campus attorneys were just that, on campus. They were quickly available and accessible to clients. In addition, by working in the same environment, Sensenbrenner (1974) asserted that institutional attorneys were and are better able to understand the situations they face. In addition to a campus-based presence, a centralized counsel's office also allows for consistency of advice, something Sensenbrenner said was key to viable institutional representation (Sensenbrenner, 1974).

Another former institutional counsel, J. Rufus Beale, writing in 1974, expanded on Sensenbrenner's (1974) ideas about how institutions engage attorneys. To Beale the emergence of the need for colleges and university attorneys was directly rooted in the student rights movement of the 1960s and 1970s. Students, through lawsuits, challenged the social standards. Robert Bickel echoed this sentiment in an article he wrote around

the same time for *Journal of Law and Education* (1974). Both Bickel and Beale were counsels for institutions in the South. Beale served the University of Alabama System and Bickel served the University of Florida. The South, in particular, was a focal point of the student rights movement in the 1960s and 1970s.

Like Sensenbrenner (1974), Beale (1974) presented the same perceived benefits of in-house counsels. However, Beale (1974) built on Sensenbrenner (1974) by suggesting three other methods of obtaining legal advice. Beale mentioned the idea of a trustee attorney. The concept behind this approach is that a member of the board of trustees would serve as the institutional attorney. This, according to Ruger (1997), was the primary means of obtaining legal advice prior to the 1960s. Additionally, in many cases an attorney trustee provided legal advice free of charge (Ruger, 1997). The rationale behind this approach focuses both on the individual's familiarity with the institution, his or her standing with the community, and his or her position of respect within the board and senior administration. While viable in some situations, this individual would most likely have his/her own practice and might not be able to devote enough time to institutional issues (Beale, 1974).

Another approach articulated by Beale (1974) was the idea of a law professor as institutional attorney. Beale (1974) indicated that this model might work for some institutions due to a law professor's intellect, access to student researchers, and knowledge of higher education. While in theory this approach may have seemed workable, in reality law professors tended to be focused on their individual research and, unless on a clinical track, were not really interested in practicing. In addition, there might have been a conflict of interest with a faculty member working on a legal issue involving

his or her peer. Beale's (1974) final method of obtaining legal advice, at least for public schools, was utilizing an attorney general's office. Beale (1974) touted the viability of attorney general's offices by saying that the attorney general speaks with authority and has the resources to provide strong legal and investigative services (Beale, 1974).

While most of the authors of articles on the legal needs of college and universities discussed, and advocated for, in-house general counsels, there was one novel approach discussed in the literature (Beale, 1975; Bickel, 1974; Bickel, 1994; Daane, 1985; Epstein, 1974; Mosier & Mosier, 1989; Orentlicher, 1975; Sensenbrenner, 1974; Thomas 1998). In an article for *Planning for Higher Education* in 1996, Michael Roster and Linda Woodward, both from the Office of the University Counsel at Stanford University, described the approach they took toward representing Stanford during a period of extreme budget cuts. Roster, who was the General Counsel, was told to cut \$500,000 from his budget and to end overruns of \$300,000. Roster's office had grown in staff size from thirteen in 1980 to twenty-six by 1993 (Roster & Woodward, 1996). Roster's approach was to creatively outsource legal work. He solicited bids for flat rate fees from area law firms. Based on those bids and the firms' areas of expertise, he chose representation. Among the requirements he had was that firms send people to work in Stanford's offices. Attorneys were assigned Stanford phone numbers and e-mails. To the outside world they were in-house counsels except for the fact that they were paid by their individual firms. The office went down to six attorneys and shortly after this plan enacted saved the University \$500,000 to \$800,000 (Roster & Woodward, 1996). While Sensenbrenner and Bickel presented an either/or approach, Stanford's initiative merges the two into a viable alternative to a purely in-house operation.



## **Role of the General Counsel**

The vast majority of the authors who wrote articles on the topic of the role of the university general counsel agreed that it was not an institutional attorney's role to make or be intimately involved in policy making on campus (Bickel, 1974, 1994; Mosier & Mosier, 1989; Orentlicher, 1975; Sensenbrenner, 1974; Thomas, 1989). Mosier and Mosier (1989) further implied that sometimes institutions were at a disadvantage if they waited for institutional counsel to give an opinion: "attorneys are cautious, and this could limit innovative administrative action... Full legal review might result in suggestions that would be more administrative than legal and thus delay decisions" (p. 15). As Bickel (1974) noted, an attorney's role is to prevent a legalistic approach to institutional decision making by leaving the decisions in the hands of the non-lawyer administrators (p. 78).

The majority of authors who indicated that a counsel's role was advisory stressed that a university general counsel should be a generalist (Beale, 1974; Bickel, 1974; Sensenbrenner, 1974). As a result, that individual has limited knowledge about many issues that impact college and university campuses. Attorneys, therefore, needed to rely on administrators with specific knowledge in their individual fields to help apply legal concepts (Sensenbrenner, 1974).

While most of the authors advocated the attorney's role as advisor, they did not advocate the attorney being passive. Most of the authors viewed the role of the attorney as being, in part, responsive to the needs of the campus. For example, as Daane (1985) noted, the role of an attorney on campus is also serving as a drafter of agreements for campus constituencies. In addition to responding to the needs of campus, Beale (1974),

Daane (1985), Mosier & Mosier (1989) and Sensenbrenner (1974), each espoused the idea of a college or university attorney as a “preventative practitioner.” The authors indicated that attorneys, rather than waiting for problems to come to them, should be proactive in reviewing university policies and procedures for potential legal pitfalls. Areas specifically cited included: layoffs, contracts, open records laws, campus police, student affairs, and collective bargaining (Sensenbrenner, 1974, p. 23). Attorneys were up-to-date on current law and had the analytical skills to apply that law to existing policies. It was at this point where the line between the role of the attorney as advisor and as decision maker could be crossed. Under the point of view espoused by the authors who believed that an attorney’s role was that of an advisor, the attorney, finding a problem with policies and procedures, would then take the issue to the person or persons responsible for the university function involved (Beale, 1974; Bickel, 1974; Daane, 1985; Sensenbrenner, 1974). While the attorney might have suggested an outcome or change, ultimately it would have been up to the client or constituent to implement any change. “Preventative law” allowed for the identification of problems by the attorney and for the remedying of problems by the unit leader with more experience in the direct issue (Beale, 1974; Bickel, 1974; Daane, 1985; Sensenbrenner, 1974).

Up to this point this section has explored what the components of a university counsel’s role should be in the eyes of the majority of the authors writing on the topic. The question remains: What would the ideal relationship between institutional lawyers and their clients look like? In a commentary article in the *Journal of Higher Education*, Epstein (1974) explored how the interaction should (at least in his opinion) take place. At the time, Epstein was the Vice Chancellor and General Counsel of the California State

University System. When presented with an issue from an on-campus client, Epstein wrote that an effective institutional attorney should have presented advantages and disadvantages of one course of action or another, presented the degree of risk of the various options, and, as a whole, helped administrators make informed decisions (Epstein, 1974). At no point did Epstein indicate that attorneys should have made decisions on behalf of their clients. In fact, Epstein encouraged clients to challenge attorneys by asking good questions, and telling attorneys not to hedge answers (Epstein, 1974). Similarly, Ruger (1997) stressed the importance of the attorney retaining his or her independence from campus machinations. “A campus counsel should not be just an administrator with a law degree. Independence from organizational pressure or intrigue is essential” (Ruger, 1997, p. 184).

While university administrators were the individuals on campus most likely to interface with institutional attorneys, one author in particular stressed that a counsel’s role goes beyond the administration. Herman Orentlicher, in a 1975 piece, argued that the role of the general counsel in providing advice should have been extended to supporting the faculty. Orentlicher (1975), while he was writing this piece, was a law professor at Emory University. Prior to that appointment he had been the first staff counsel for the American Association of University Professors. Orentlicher (1975) stressed that the counsel was the *university* counsel and as such had a responsibility to all university constituents. In addition to working toward protecting the administrative bodies of the institution, Orentlicher (1975) believed that the university counsel had a responsibility to provide advice to faculty because “such advice and assistance is cardinal to the very fulfillment of the college or university’s academic and intellectual endeavors

and goals” (Orentlicher, 1975, p. 515). While Orentlicher’s points were valid, he failed to delineate where the line between institutional counsel and personal counsel started and ended. One example he gave was of a situation where institutional counsel could defend a faculty member accused of slander (Orentlicher, 1975). Orentlicher was unclear whether the university counsel should have always represented a faculty member or only in a situation where the institution itself was a party. An institutional counsel who represented a faculty member in a largely personal case would not be appropriate.

While the authors agreed on the general role of the university counsel, the vast majority were silent on an important aspect of that role: to whom the attorney reports. In most institutions, a board of trustees is charged with setting broad policy expectations and goals for the institution (Sensenbrenner, 1974). Boards then rely on others (usually an institution’s president or CEO) to implement those policies (Sensenbrenner, 1974). As Sensenbrenner (1974) noted, the distinction between implementer and visionary is key. If a general counsel reported directly to the board of trustees, the expectation would be that the counsel directly implements the goals of the board. This, according to Sensenbrenner (1974), would place the counsel in the unappealing role of decision-maker. In an ideal situation a board of trustees would look to the president/CEO to enact the board’s agenda. The president/CEO would then have the support of the general counsel and the board would have one person to look to for policy implementation (Sensenbrenner, 1974). While the counsel might interact with the board, in line with Sensenbrenner’s view of the role of the general counsel, he or she is ultimately responsible to the president/CEO. It is at this point that my study picks up with the question: Where do counsels see themselves as fitting into the organizational structure of a higher education institution?

The next chapter discusses the methods used to further explore many of the assertions made in the existing literature. Chapter Four will, through a document based approach, elaborate on the argument made in the literature that the impetus for the proliferation of institutional counsel was the result of the student rights movement of the 1960s and 1970s and increased governmental regulation in the period from 1960 to the 1980s (Bickel, 1974; Ruger 1997; Sensenbrenner, 1974). Chapter Five serves to link the discussion in Chapter Four to the present day by exploring, how current or recently retired university counsel view or viewed their roles on campus. Chapter Five also explores how that role fit or fits into existing notions of institutional governance by comparing the role of the counsel with the role of the academic dean. Chapter Six concludes this discussion.

## **CHAPTER 3**

### **Methodology**

The overarching purpose of this study is to help readers, whether inside or outside the higher education field, understand the evolution, current role, and context of the university counsel's office on college and university campuses. To accomplish this goal, two main research issues guide this study. The first is to provide a broad description of the regulatory environment of the 1960s, '70s, and early '80s, and the case law environment during the 1960s and 1970s in order to explain the assertions made in previous articles on the proliferation of general counsel's offices on college and university campus (Bickel, 1974; Ruger, 1997; Sensenbrenner, 1974), while the second is to understand what the current role of the institutional counsel is within the context of the university hierarchy.

While document-based work provided a significant amount of data to help understand why institutional counsel offices were established, to understand their current role required a different approach, namely, interviews. When deciding to interview individuals for qualitative research projects, researchers must determine what interview approach is the most appropriate (Creswell, 2008). In the case of this project, rather than take the traditional route of using either structured or unstructured interviews, I decided to take an Oral History approach as modified from Ritchie (2003). In addition to discussing the process and rationale behind the documentary approach, this chapter will also discuss the process and rationale behind applying Oral History methods to interviews.

## **The Nature and Process of Document and Oral History Based Research**

Unlike ethnography, which involves observations and interviews in the modern day, historical research is focused on the past (Gasman, 2010). In looking at the past, historical researchers are not just focused on people. Historical researchers are concerned with events, movements, institutions, and, of course, individuals (Cohen & Manion, 1994). Most importantly, historical research seeks to link all of the aspects of the research in an attempt to answer the central questions on which the research is based (Creswell, 2008).

Methodologically speaking, historical research requires that researchers collect all possible data related to the topic, cull through the data organizing facts and themes in a clear way, and present the data in a logical fashion (Wise, Norberg, & Reitz, 1967). Once data is collected, the most logical means of presenting the data is chronologically, thematically, or a combination of the two (Borg & Gall, 1983). Choosing the organization of the presentation requires the researcher to ascertain the best match between the nature of the data, the research question(s), and the hypothesis. (Borg & Gall, 1983).

As with most forms of qualitative data, historical research can be subjective. The researcher is both collecting and interpreting the data (Borg & Gall, 1983). The goal of a researcher should be, according to Wiserna (1996), to remain as trustworthy as possible in keeping with the data found. To do so, historians have to take the data and place it in the context of the era from which the data originated. To apply a modern day context to data from the past undermines the validity of the data involved (Edson, 1988). In

addition, as mentioned in Creswell (2008), researchers have to proactively watch to ensure that they are not applying their own personal bias to the data.

Unlike purely scientific research where researchers run experiments and document results and, ultimately, conclusions, historians use both documents and Oral History as data (Kyvig & Marty, 2010). Evidence can take two forms: primary and secondary sources. Primary sources are firsthand accounts, either written or oral, as well as documents originating during the time period being explored (Kyvig & Marty, 2010). Examples include: journals, interviews with people involved, documented first-hand experiences, documents from the period, etc. For the purposes of this study, journal articles from the period in question, interviews, legislation, and court cases were used as primary sources data (Kyvig & Marty, 2010). Secondary sources are second-hand oral or written accounts and post-event analysis by others. It is important to note, as Wiersma (1996) does, that second-hand accounts written near the time in question are more reliable than accounts or analysis written long after the time period. For the purposes of this study, many journal articles written during the time period were examined. While these documents were considered secondary sources at the time they were written, today they could be considered primary sources due to their being written close to the time period being studied and their direct link to both the topic being studied and the purpose that these documents serve within this study (Kyvig & Marty, 2010).

In addition to Wiersma's caution, Kyvig & Marty (2010) note, "the utility and reliability of documents vary nearly as much as their form. The circumstances of creation, intended purpose, and preservation all influence historic value" (p. 61). When looking at any historical evidence, in particular documentary evidence, a researcher must



be leery of the source. Kyvig & Marty (2010) encourage the researcher to ask questions to him/herself about the nature of the document, the person doing the writing, the purpose of the document, when the document was created, and the version of the document (p. 62).

The same cautious approach needs to be taken toward Oral History. For the purpose of this project, Oral History will be defined as the spoken recollections of individuals recorded through an interview (Ritchie, 2003). In general, according to Ritchie (2003), an Oral History consists of a prepared interviewer questioning an interviewee, often times with open-ended questions, and recording his or her responses via video or audio. Oral History, as both Ritchie (2003) and Kyvig & Marty (2010) caution, is very much focused on the interviewee's perspective of history. A researcher must keep in mind potential bias of the interviewee when analyzing the data.

While bias is a potential problem with Oral History, historical interviews allow researchers to document the stories and recollection of individuals who might not have the desire or ability to document their experiences (Ritchie, 2003). Lawyers, however, tend to not be overly open to sharing their experiences. In law school, it is stressed that the attorney/client privilege is sacrosanct. Therefore, it is rare for an attorney not in a significant public role to take the initiative to proactively reflect on his/her previous role. An Oral History interview with targeted questions is a way to encourage attorneys to provide insight into their practice.

The challenge with Oral History is that the process is not a passive one (Ritchie, 2003). Prior to interviews, researchers have to do thorough background research to

become familiar with the context in which the interviewee's knowledge is based. Oral historians tend to find that the older the interview subject is, the less likely he or she is able to recall specific dates or experiences. Prior research on the part of the researcher helps the interviewer fill in some of the gaps in the interviewee's memory (Ritchie, 2003). An example of this concept would be Douglas Boyd's 2011 book *Crawfish Bottom*. While based on a topic unrelated to this dissertation, Boyd's book was thoroughly researched and he used that research to both frame and apply the recollections of his interviewees to the story he told. Oral History interviews are both about the information gleaned from the interviewee but also that person's interpretation of those events. The interviewee lived in the period and was in a far better position to understand the implications and context of the memories than the interviewer. It is the responsibility of the researcher to place those interpretations and contextual insights into the broader historical narrative (Ritchie, 2003).

Oral History, combined with the document-based analysis discussed, allowed me to provide a far more comprehensive and nuanced approach to the issue of the impetus for general counsel's offices and their current roles on college and university campuses. Documents, and the information drawn from close readings of those documents, cannot substitute for the human experience (Ritchie, 2003). By combining these two methods of historical research, the goal of this project was to expand upon points made in the literature and introduce some new insights to help compliment assertions made in the past. In the next section, I will discuss the procedure undertaken to better understand the impetuses for the establishment a general counsel's office on college and university campuses and their current roles on those campuses.

## Procedure and Data Analysis

**Document-based material.** Much of the existing literature on the topic of the creation of college and university legal counsel's offices focuses on the recognition by the courts of student and faculty rights during the 1960s and 1970s (Bickel, 1974; Ruger, 1997; Sensenbrenner, 1974). While case law was a major force behind the establishment of those offices, greater regulation on the part of federal and state governments in the period from the 1960s to the 1980s also contributed significantly to the need for in-house lawyers (Bickel, 1974; Ruger, 1997; Sensenbrenner, 1974). Fundamental to this project was the ability to find and use specific examples within both of these focuses in order to devise a comprehensive explanation of the impetus for the counsel's office. The procedure for the document-based aspect of this project substantially mirrored that used in a previous dissertation that looked at the establishment of another office on a university campus (Stepp, 1999). In addition, it followed the basic principles for document based research outlined in Linda Eisenmann's chapter in *The History of U.S. Higher Education: Methods for Understanding the Past*, edited by Marybeth Gasman (2010, p. 60).

The process of formulating a cogent argument to support the assertions made by Ruger (1997) based on governmental regulation for the impetus for the university counsel's office was approached in a systematic way. Writing about a project she undertook on the history of women's education in the United States, Linda Eisenmann wrote, "after honing the list and reading the submissions of 100 different authors, I worked to portray the larger picture...looking at the individual entries and seeing their relationships across the timeline shows me how women had initially searched for

education wherever they could find it” (Eisenmann, 2010, p. 60). In essence this project took the same approach. A large number of articles and cases were read and categorized eventually yielding a viable explanation for assertions made in Bickel (1974), Ruger (1997), and Sensenbrenner, (1974).

To start the process outlined by Eisenmann (2010) above, germane articles were sought using scholarly databases such as JSTOR and ERIC. Articles that dealt with the initiation of, modification of, or impact of regulatory schemes were considered germane. Specifically, pieces written from the 1960s to the present that focused primarily on the time period from the 1960s to the 1980s were pulled. This time period was selected based on the timeline presented in the literature (Bickel, 1974; Ruger, 1997; Sensenbrenner, 1974).

During the document gathering phase, articles were pulled by noted authors on the issue of the regulation of higher education. Those authors included Lawrence Gladieux, Michael Olivas, Robert Berdahl, and Aims McGuinness. After finding almost 30 articles by these authors, each one was read to determine which articles addressed issues of regulation. Some were not relevant to the topic. Michael Olivas, for example, does not exclusively write on the issue of regulation. After a first reading of all of the articles, they were placed in chronological order for a second reading and coding. The rationale behind the chronological ordering was to see if a progression in the content and quantity of regulation existed (Eisenmann, 2010). In addition, reading the articles in a chronological manner, oldest to newest, allowed me to see how the issues the authors addressed were interconnected. Certain authors, i.e. Gladieux, limited themselves to

writing about certain topics. Chronological reading versus reading all of one author's material at one time facilitated the finding of linkages between the articles.

The articles themselves focused on various topics such as federal financial aid policy, federal research policy, state funding issues, etc. During the second reading, the articles were coded by paragraph using codes based on the overarching themes and how they related to the issue of regulations increasing the need for attorneys on campus. The analysis of text utilized in this study falls within the methodology known as content analysis. Weber (1990) defined content analysis as "a research method that uses a set of procedures to make valid inferences from the text" (p. 9). He also offered the view that in order to use content analysis, a researcher must define the recording unit to be recorded. Weber (1990) offered six options including: words, word sense, sentence, theme, paragraph, and whole text. As previously mentioned, because I was looking for themes within the broader issue of regulations that brought about the need for general counsel's offices, I took a thematic, paragraph based approach to the articles studied. Since my goal was to present the data in a systematic and thematic way, this approach seemed the most logical. While Weber (1990) indicated that word or sentence coding is more effective, the goal of the coding in the case of this project was to find similarities in articles on regulations with often significantly differing goals, subject matter, and sources. Due to these differences the language and terms used in the regulations, and the articles on those regulations, coding for words or sentences would not have been effective. In addition, because the question governing this aspect of the research was broad, the coding unit had to be broad as well to create data which could be categorized and analyzed. This is why thematic coding was utilized. In addition, according to Weber (1990), analyzing text for

themes helps the researcher understand, in-depth, the interactions between the perceiver of an action and the target of the action. This distinction is important in looking at relations between the governmental entities and college and university campuses. Complementing the broad use of thematic analysis, paragraph analysis allowed for the coding of larger sequences of text. Given how legal articles are often written, paragraph and thematic analysis allowed for the most efficient use of time given that computer assistance was not be available for this project (Weber, 1990).

After the second reading, there were five different themes within the various articles; specifically they were: access, changing national interests, diversity, changing federal government interests, and state issues. At this point in my research, I realized that these themes were too specific. My goal was to draft an overview of examples of how regulations could have contributed to the need for in-house counsel offices on college and university campuses. To accomplish this goal, the categories needed to be broader. To that end, rather than look for thematic differences to further distill the different regulations, I looked for commonalities between them and, because this is a historical project, commonalities between the historical contexts of the regulations. I did this by finding commonalities between my codes, as suggested by Weber (1990). This approach helped to create two broad categories of regulations: federal regulations and state regulations. There was, however, one additional nuance. Within the context of federal regulations there were two different historical contexts: regulations initiated by the federal government, and regulations initiated by institutions and instituted by the federal government. This forced me to change my coding scheme which ultimately resulted in

three broad themes which became the headings in the following chapter: federal initiated regulations, institution supported regulations, and finally, state initiated regulations.

The same process was undertaken when looking at case law as an impetus to the establishment of general counsel offices on college and university campuses. Instead of consulting articles, I culled through case decisions. Normally when an attorney marshals cases to cite in a brief to a court, he or she looks to the persuasive value and authority of a case (Statsky & Wernet, 1995). The authority and value of a case is based primarily on the court that issued the opinion (Statsky & Wernet, 1995). When talking about both national and state issues, US Supreme Court cases carry the most weight followed by US Circuit Courts of Appeals cases (generally Circuit Court opinions apply to the circuit in which they originate) (Statsky & Wernet, 1995). On state issues, the federal courts trump state courts; however, if a federal court has not intervened, state supreme court rulings have the most weight, followed by state appellate court decisions. Cases that present precedent that a court must follow are termed mandatory authority (Statsky & Wernet, 1995, p. 161). Mandatory authority comes from the higher state appellate court (including the state supreme court), federal courts (in the area), or the US Supreme Court. Cases which help an attorney prove his or her point but which are not mandatory authority are termed persuasive authority (Statsky & Wernet, 1995). Since I was exploring in greater detail the topic of the impetus for general counsel's offices using a pre-set date range and specific themes to look for, I looked for cases that exemplified those themes as opposed to cases which would support a specific assertion in a specific court venue. For example, a case from a circuit court of appeals on the issue of faculty free speech from 1965 would

have been of more value to this project than a U.S. Supreme Court case from 1995 on the same topic.

The distinction mentioned above is important to note. This part of the project is putting legal decisions in a historical context. If this project were to fall under the standard definition of legal research, I would have been forced to limit myself to the law that controls at the time, i.e. the most recent opinion dealing with my issue (Statsky & Wernet , 1995). Because I was looking for historical trends in the law, as represented by case law, I worked with a hybrid approach. It was at this point that I ran into difficulty. Initially, I used legal principles to gauge the applicability of a case. In essence I conducted legal analysis of historical cases as opposed to historical analysis of legal cases (Olivas, 2013). Legal analysis of historical issues seeks to take cases from the past and explore how courts or governments interpreted those issues over time. As Scott Gelber (2014c) notes in a forthcoming book, historical analysis pays far more attention to the *context* of the laws, court decisions, and/or regulations and how those laws, court opinions, and/or regulations complemented or contradicted the broader societal trends of any given time period, i.e. the outcomes of legal cases or deliberations over regulation. Legal analysis is far more focused on the text of a case and why courts made the decisions they did. In his 2013 book, *Suing Alma Mater*, Michael Olivas, who is both a trained attorney and historian, goes so far as to indicate that he would not usually quote a significant amount of legal text in an historical volume (p. 91). If his text were intended for a more law based audience, he might not have been as terse with the legal analysis.

Within this context and theoretical approach I explored historical texts by Thelin (2011), Gelber (2014a; 2014b; 2014c), and Geiger (2004), to set the historical scene on



campuses and in society. Specifically I focused on the rise of the recognition and importance of Constitutional and civil rights. I then placed specific cases against colleges and universities from the 1960s and 1970s in the context of society and the societal forces of the time. The ultimate goal was to show that the confluence of societal changes and changes in the interpretation of the law necessitated that colleges and universities establish in-house counsel offices on campus.

As noted in Chapter Two, articles by practitioners proffered the idea that the student rights and faculty rights movements of the 1960s and 1970s helped solidify the need for institutional in-house counsel (Bickel, 1974; Ruger, 1997; Sensenbrenner, 1974). I began my search for cases with case books written about higher education law. Because they usually contain both state and federal cases, case books are usually an efficient starting point for topical legal research. I chose to use the three major case books on higher education law: Judith Areen's (2008) *Higher Education and the Law, Cases, and Materials*; Michael Olivas' (2006) *The Law and Higher Education: Cases and Materials on Colleges in Court*; and Daniel, Gee, Pauken, and Sun's (2012) *Law, Policy and Higher Education*. These texts were comprehensive in their coverage and provided excellent examples of cases from the entire twentieth century. I chose to stop my research for cases after reviewing these books because I found a significant amount of overlap in the cases each author or set of authors chose to include. In addition, I found that if an issue was given a limited treatment in one book, a different text addressed the issue in far more detail. Based on my experience and the opinion of authors like Kyvig & Marty (2010) when duplicate information is found in multiple resources that often signals that material collection can stop and analysis can begin.

While both the analysis of regulatory issues and case law issues were meant to provide an extensive explanation of assertions made in the literature concerning the impetus for the establishment of general counsel offices, there was a slight, but important, difference in the nature of how that information had to be presented. This nuance impacted the methodology used for analyzing the case law.

When presenting the regulatory information, the goal was to show the significant increase in the amount and type of regulations governmental bodies were placing on institutions of higher education. As will be discussed in the next chapter, the goal of the case law section was not just to present an increase in volume of litigation as the rationale for the need for campus counsel, but more importantly to show that a change in the nature of the legal analysis by courts brought about the need for institutional counsel. The application of law to institutions of higher education by courts had far deeper roots in history than the regulation of higher education by federal and state governments. As a result, the frame of analysis used to analyze cases had to recognize that difference in order to effectively present a potential rationale for the assertions made concerning the impetus for general counsel offices.

In a similar manner to the approach taken for exploring increased regulations above, the first step in the coding process was to review all cases in all three casebooks that related to student or faculty rights issues during the time period proffered by Bickel (1974), Ruger (1997), and Sensenbrenner (1974). After reading the cases to ensure that they dealt with the issue of student or faculty rights, the cases were divided into the broad categories of cases involving faculty, and cases involving students. They were also ordered chronologically in an attempt to show a progression of reasoning by courts. The

rationale for this process was the same as the rationale for the ordering of the regulations (Eisenmann, 2010).

The initial approach to the issue of case law was that the need for in-house general counsel was rooted in an increase in the volume of cases against colleges and universities during the 1960s and 1970s. However, scholarship by Scott Gelber in the field of the legal history of higher education (Gelber, 2014a; 2014b; 2014c) indicated that litigation was not new to higher education. Colleges and universities faced court challenges dating back to the 19<sup>th</sup> century. Therefore, the novelty of volume argument presented in the forthcoming regulatory section was analogous to case law to a point. What was significantly new regarding case law in the 1960s and 1970s was the law courts used when examining issues related to faculty and student rights. It was within this context that I applied a coding scheme to the cases.

To analyze the cases, I applied a paragraph based, thematic content analysis (Weber, 1990) approach to the case law. The codes primarily focused on the rationale used by courts to decide cases. Here again, paragraph based, thematic coding was chosen due to the differing topics of the cases resulting in differing language which would have been difficult to code and analyze on the sentence or word level. As cases were read and coded, the coding analysis resulted in the understanding that the courts' decisions were based on Constitutional Due Process or Equal Protection standards. The initial themes were, like in the case of the regulations, overly complex. Specifically, under the faculty rights heading, thematic categories included the limiting of institutional authority in the areas of: academic freedom, procedural due process, and financial issues. On the student rights side, thematic categories included the limiting of institutional authority in the areas

of: First Amendment free speech, Fourteenth Amendment due process, and Fourth Amendment search and seizure. Because the goal of Chapter Four was to explain the historical shift in what laws courts applied to disputes between institutions and faculty or students, I decided the use of these themes was too cumbersome and more legalistic in nature than was appropriate. Therefore, I reduced the complexity of the themes by categorizing the language of the cases based solely on the constituency they impacted (Eisenmann, 2010).

Based on the coding scheme outlined above, articles by Gelber (2014a; 2014b; 2014c), and the question this part of this dissertation is working toward answering, I constructed a narrative of this evolution in court analysis. It should be noted that cases were chosen for analysis and cited in Chapter Four because they dealt with issues related to faculty or student rights as cited in the literature (Bickel, 1974; Ruger 1997; Sensenbrenner, 1974). The goal was to present the application of Constitutional rationale to cases involving higher education as a potential explanation of the proliferation of general counsel offices, not to present a legal argument. Therefore, cases from many different levels of courts from the US Supreme Court to state trial courts were integrated into the discussion. Legal trends were and are not always set by the US Supreme Court. Often, lower courts set standards which are never reviewed by state or federal intermediate appellate or supreme courts. Cases were ultimately cited based on their ability to move the historical narrative forward by either providing additional context or an additional nuance to the analysis.

**Rationale for document-based research.** While the underlying theoretical framework for this project is rooted in the history of the bureaucratization of higher education in the United States, specific notions about the evolution of the general counsel's office come from articles written during a period of significant growth of these offices on college campuses (Beale, 1974; Bickel, 1974; Daane, 1985; Epstein, 1974; Orentlicher, 1975; Sensenbrenner, 1974). Primary sources are sources of information that are the closest in time to the period of issue being studied (Kyvig & Marty, 2010). In the case of the research issues presented in this study, the basic notions that the proliferation of general counsel's offices came from an increase in regulation and more activist courts is rooted in articles written by practitioners in the 1960s and 1970s. This was the period of time during which the proliferation was at its height. Therefore, as discussed earlier, these articles could be considered primary sources because they were written during the time frame in question (Kyvig & Marty, 2010). One would think that the relatively recent (at least in terms of history) age of the articles would lend themselves to other forms of data collection rather than document based study, i.e., interviews with the authors. However, one must realize that the authors of these articles, for example, Sensenbrenner (1974), were late-middle-aged when they wrote their pieces. Many of the authors have subsequently passed away in the years between the publishing of their articles and today. As a result, all we have is their writings and secondary documents that complement their assertions. This is part of the rationale for basing part of the research on looking at historical documents.

The second rationale for document based research centered on the data itself. In the first part of the analysis, I expanded upon the assertions of the practitioner/authors.

The only effective and efficient way to do this was through a comprehensive review of regulations and case law directed toward higher education during approximate time period those articles cited. State and federal governments routinely propose and either enact or reject regulations. Obtaining the texts of all proposed and/or enacted regulations over the course of thirty to forty years and then analyzing those laws or regulations would have been a daunting task. This is, in part, why I used articles from the period that analyzed changes and trends in regulations. It is important to note that although the documents I consulted were considered secondary sources at the time of their publishing, now they could be considered primary sources due to their age and the nature of the material they cover (Kyvig & Marty, 2010).

**Oral History.** It is commonly known that attorneys, unless they are in a high profile case, tend to keep the details of their clients' matters to themselves. This secrecy is not an unspoken aspect of the legal profession. The practice of law is governed by strict rules based on a code of ethics promulgated by the American Bar Association (ABA) and adopted by states and state courts. Rule 1.6(b) of The ABA Model Rules of Professional Conduct (2013) explicitly states "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." As a result, it is very difficult to get practicing attorneys to talk about their current practice and cases.

Previous studies from the 1970s and 1980s have looked at the role of the institutional counsel through a quantitative lens (Geary, 1975; Ripps, 1980; Thompson, 1977). Despite an extensive literature search, it seems that there has never been a

historically qualitative approach taken toward this issue. The purpose of the interview portion of this project was to fill in that gap and understand how attorneys view or viewed their roles as general counsel or associate general counsel for institutions of higher education from an anecdotal perspective. Oral History provided the best method of obtaining personal recollections (Ritchie, 2003). The Oral History method mandates open-ended questions that allow the interviewee to explain issues fully (Perks & Thomson, 2006; Ritchie, 2003). Oral History methodology is designed to elicit the unbiased recollections of the interview subject in a detailed way (Perks & Thomson, 2006; Ritchie, 2003). Closed ended questions would undermine this goal by cutting off a subject's ability to elaborate on issues. In addition, closed ended questions create the opportunity for more interviewer bias to show (Ritchie, 2003).

In order to start the Oral History aspect of this project, I had to first gain an exemption from the Institutional Review Board (IRB) at the University of Kentucky (UK). To obtain the exemption I had to submit a copy of the questions being asked, the letter of introduction, and the informed consent along with the necessary application. Oral History qualifies for an exemption because it deals with issues from the past, i.e. already existing data, and has been deemed, at least by University of Kentucky's IRB, as at low risk for harming the interviewee (UK, 2014). After a short wait, I received permission to begin.

The concept of Oral History evokes many different definitions. For the purposes of this project, the definition of Oral History drew upon a definition rooted in Ritchie (2003): a collection of spoken memories and personal commentaries and insights of historical significance recorded through interviews. These interviews generally consist of

a prepared interviewer questioning an interviewee and recording their exchange. It is important to note from the outset that an Oral History interview is different from a standard qualitative interview. A well-done Oral History interview, according to Ritchie (2003), provides the opportunity for the interviewee to elaborate on experiences in a detailed way. This requires the interviewer to prepare well thought out open-ended questions that do not require a significant amount of follow-up on the part of the interviewer. In addition, the interviewer must be an active listener and, if necessary, provide prompts to allow the interviewee to elaborate. These prompts must be used sparingly (Ritchie, 2003).

While Oral History seeks to record the memories and insight of individuals, the nature of memory does not lend itself to exact fact and figures. For that reason, it is important for the interviewer to be well-versed in the topic being discussed (Perks & Thomson, 2006; Ritchie, 2003). As established in the previous section, I have read the literature and case law surrounding the impetuses for the establishment of the general counsel's offices. In addition, having attended law school and practiced to a limited extent in two higher education environments, I am familiar with the language any interview subject might use. Once subjects were identified, I researched the individual's career and familiarized myself with any significant challenges or issues he or she faced while in the general counsel role. As Ritchie (2003) emphasizes, and as examples in Perks & Thomson (2006) show, an Oral History interview is only as productive as the interviewer is prepared.

The interview aspect of this dissertation was meant to be an exploratory, initial look at how institutional attorneys viewed their roles, a topic that, to this point, has never



been studied in this manner, and how they viewed their roles in the context of other university professionals such as deans. To that end, I used a convenience sample to find participants (Creswell, 2007). As will be explained in Chapter Five, two of the attorneys I interviewed are currently practicing attorneys either for an institution or for a higher education system. They were selected based on my personal contacts who provided an introduction. Their proximity to my location was also a consideration. The third attorney, a retired general counsel, was interviewed following a call for participants issued by a member of my committee to institutional counsel within his professional network. This interview was conducted via Skype. I also sent four e-mails to some other local general counsels who never responded. Of the seven solicitations only the three individuals chose to participate. All three were instances where an introduction was provided by a third party. Because the approach to these interviews was qualitative, generalized conclusions could not be made (Creswell, 2007, 2008). The goal of these interviews was, as is the case with Oral History, to obtain anecdotes and information that told a story and represented the views of the individuals being interviewed (Perks & Thomson, 2006; Ritchie, 2003). Because this dissertation is dealing with individual histories, a large number of interviewees were not necessary (Ritchie, 2003). In addition, because a large number of interviewees were not required to achieve an initial sense of practitioner views on the role of the general counsel, a convenience sample method was sufficient (Creswell, 2007). Had this project been designed to be larger in scale, a more systematic approach to sampling would have been required (Creswell, 2007). As will be discussed in Chapters Five and Six, this small sample, and the format of some of the questions, limited my ability to produce a multi-layered or generalizable result. However, the conversations

and anecdotes shared did allow for some preliminary results about the role of the counsel based on the opinions of the interviewees. Those opinions also allowed for the comparison of the general counsel's role to that of an academic dean in order to place the counsel position in the context of institutional leadership.

After I confirmed the individual's willingness to participate, I obtained informed consent. The interviews were recorded so that they could be transcribed and/or re-heard for analysis as suggested by Ritchie (2003) and Kyvig & Marty (2010). Because I was dealing with one aspect of an individual's career, the interviews were no longer than an hour. While I was interested in the background of my interviewees, my subject matter was limited in scope. That being said, I did not artificially end interviews. If the subject of the interview provided important and valuable information relevant to the topic, Oral History protocol required that I allow the interviewee to continue (Ritchie, 2003). I also kept the identities of my interviewees confidential so as to foster the dissemination of more detailed accounts (Kyvig & Marty, 2010). In addition, following the transcription of the interviews, I sent the transcript to my interviewees so that they could validate their statements to ensure that the transcription was accurate (Ritchie, 2003).

My method of analysis was similar to that used for the documentary material. Interviews were coded thematically (Weber, 1990), looking for data that conveyed the interviewee's view of the role of the general counsel. Rather than code based on paragraph, data was coded by question asked. This was due to the conversational nature of the interviews. In addition to the interviewee's articulation of his or her view of the role, I was most concerned with the reason(s) behind that view and any examples of that view being implemented during their careers. It is within these two broad topics that

themes were developed to explain the issues. The ultimate goal of the interviews was to find data that either complemented or contradicted the views of the practitioner/authors of the literature on the topic of the general counsel's office and to present that data in an unbiased way.

## **Conclusion**

Through a historical lens, this research sought to better understand the relationship between regulation, litigation, and the establishment of general counsel's offices on college and university campuses. Using a combination of documentary analysis of regulatory trends and case law, along with the use of Oral History methods, this project provided a multi-dimensional look using both documents and personal recollections. As a historical, qualitative study, the goal was not to answer all of the questions surrounding the intersection of the law and higher education institutions. The goal of this exploratory study, rather, was to provide a starting point for further exploration of the topic.

The next chapter discusses the results of the document-based research scheme explained in this chapter by exploring the historical impetus for the establishment of in-house counsel offices on college and university campuses. Chapter Five applies the methods discussed in this chapter to interviews with current and former counsels regarding their roles, and places the role of the institutional counsel within the context of higher education leadership. Chapter Six concludes this dissertation.

## CHAPTER 4

### Regulation and Case Law as Impetuses for On Campus General Counsel Offices

#### Introduction

On modern day college or university campuses, from a large Research One institution to a small liberal arts college, the institutional counsel or institutional counsel's office plays a significant role in the administration of the college or university. While these offices vary in size and scope of responsibility, they all deal with complex issues centering on litigation, regulation, and compliance. Laws like FERPA, HIPAA, The Clery Act, Title IX, Title VI, Title IV, and other federal and state laws require experts who can help institutions navigate the legal realm. For example, the Vice Chancellor and General Counsel's office at the University of North Carolina at Chapel Hill employs ten attorneys who cover fifty-one enumerated legal areas of interest or expertise ranging from athletics to environmental law to insurance to tax (UNC, 2013a). Contained within these fifty-one topics are issues involving both regulation and litigation.

As noted earlier in this dissertation, Peter Ruger, in a 1997 article in the *Stetson Law Review*, briefly mentioned case law and regulation as impetuses for the need for general counsel offices. In addition to mentioning case law, Ruger (1997) wrote "the 1970s witnessed a significant growth in the federal regulation of higher education" (pp. 178-9). The number of cases involving higher education also increased. Ruger (1997) noted that in West's case digests, a publication that catalogs recent cases, the number of

cases focusing on higher education grew by 53% from 1936-1986. In addition, Ruger(1997) wrote “the 1970s witnessed a significant growth in the federal regulation of higher education” (pp. 178-9). Numerically speaking, during this time period the number of counsel offices increased. According to Ruger (1997), prior to the 1960s about twelve general counsel offices existed on college campuses. During the 1960s, twenty more were created, and by 1970 sixty more were added (Ruger, 1997). Ruger’s figures were based on a study by the National Association of College and University Attorneys.

This chapter elaborates on the issues touched on by Ruger (1997) and others including Bickel (1974) and Sensenbrenner (1974). The aim of this section of the dissertation is to add some substance to the assertion that case law and increased regulation necessitated the creation of in-house general counsel offices on campus. The first part of this chapter will focus on developments in the area of governmental regulation as a means to explain the proliferation of general counsel offices. The second part of this chapter will look at case law and the evolution of case analysis from a basis in contract law, to deference to institutions, to a more complex approach involving the use of Constitutional law principles.

### **Organization of the Chapter**

As noted in the previous chapter, the purpose of the following discussion is to, for the first time, elaborate on assertions made in the literature that the impetus for the proliferation of in-house institutional counsel offices was rooted in the expanded regulation of higher education, and the student and faculty rights movements of the 1960s and 1970s (Bickel, 1974; Ruger, 1997; Sensenbrenner, 1974). To accomplish this goal,

two different organizational forms are used in this chapter to present the information. The regulation section is organized as it was coded--by the sources of the regulation. This organizational scheme allows the reader to see the multiple levels of accountability institutions faced.

The case law discussion is not designed to be all encompassing nor to cover certain laws. It is designed to be a narrative of how courts applied the law to cases involving higher education from the beginning of the 20<sup>th</sup> century to the individual rights movements of the 1960s and 1970s. It is intended to show that an increase in the volume of cases and, more importantly, in the nature and complexity of the law used to analyze cases, illustrating the points made in the literature (Bickel, 1974; Ruger 1997, Sensenbrenner, 1974). The latter part of the case law discussion is split into issues involving faculty and issues involving students, allowing the reader to understand the progression in the legal relationship between both constituencies and the institutions. This approach is in-line with the coding scheme outline in Chapter Three.

## **Regulation**

**Federally initiated regulation.** The 1960s and 1970s marked the beginning of a major shift toward access to higher education for all eligible students in American society. The *Brown v. Board of Education* decision in 1954 and the Civil Rights Act of 1964 opened the door for African-Americans to gain access to higher education (Thelin, 2011). However, other groups, like women and the economically disadvantaged were still somewhat precluded from attending or working at colleges or universities (Wolanin & Gladieux, 1975). According to a 1975 article from the *Journal of Law and Education*

written by Thomas Wolanin and Lawrence Gladieux, the Educational Amendments of 1972 created new mechanisms to ensure that colleges and universities were accessible to any eligible student. More germane to this study, the Educational Amendments of 1972 created new programs, rules, and reporting requirements which put additional pressure on the relationship between higher education institutions and the federal government, necessitating someone, or several people, who could interface with the government regularly and appropriately.

Access to higher education was a federal priority as far back as the Higher Education Act of 1965, in which the federal government expressed an explicit commitment to equalizing opportunity to access higher education in the United States (Gladieux, 1986). In the beginning of their 1975 article, Wolanin and Gladieux noted that to them, laws expressed both the policy judgments and aspirations of the government (p. 302). This point is most adept when one looks at the financial aid programs initiated by the Educational Amendments of 1972. As President Nixon noted at the time, “no qualified student who wants to go to college should be barred by lack of money” (Wolanin & Gladieux, 1975, p. 303). To support this articulated aspiration, the law included the creation of Basic Educational Opportunity Grants or BEOGs. These grants, which were the precursors to the modern day Pell Grants and Stafford Loans, provided students with four-year grants up to \$1400 per year. Grant amounts were adjusted based on an individual family’s income (Wolanin & Gladieux, 1975). In addition to the BEOGs, the federal government introduced an expanded version of the TRIO Program designed to prepare more economically disadvantaged yet academically talented students for higher education. Another important aspect of the 1972 law was that the act extended

eligibility for BEOGs to private institutions. This expansion of the eligibility of financial aid effected a dramatic growth in student aid programs (Gladieux, 1986). This expansion also extended the reach of federal reporting requirements to non-public institutions. Therefore, as a result of accepting financial aid from the federal government virtually all institutions of higher education became subject became accountable to the federal government. The federal government wanted data on how the money was being spent, who was receiving the aid, and later, an aggregate assessment of how successful those students were.

In addition to creating economic mechanisms to facilitate access to higher education, the federal government included a section of the 1972 Act that broadly protected women from discrimination based on gender in the educational setting. The law stated “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subject to discrimination under any educational program or activity receiving federal financial assistance” (Wolanin & Gladieux, 1975). This broad prohibition was modeled off Title VI of the Civil Rights Act of 1964 that prohibited discrimination in education based on race. Prior to the passing of Title IX, women had been broadly discriminated against both in undergraduate and graduate admissions in the higher education context (Wolanin & Gladieux, 1975).

While the Educational Amendments of 1972 provided additional financial opportunities for individuals and precluded discrimination based on gender, the law represented a significant shift in the federal approach to higher education institutions. As Wolanin and Gladieux noted:



[t]here was a forceful rejection of the philosophy that the continued existence of institutions of higher education qua institutions was a federal purpose justifying institutional aid. Instead the federal purpose that was deemed to justify institutional aid was the purpose identified above...equalization of opportunities for higher education (p. 309).

The above quotation represented an extremely important point about the nature of the relationship between higher education institutions and the federal government. Prior to 1972, the federal government had been concerned with bolstering institutional enrollments in order to keep the higher education system in the United States strong (Gladieux, 1986). No longer was the government concerned about the wellbeing of individual institutions. Instead, the government was concerned with those institutions being accessible to all people. With that change came a shift from a more lax approach to regulation to a more demanding approach to ensure that the government's priorities were accomplished.

The change in the nature of the relationship between the government and the post-secondary education world resulted in increased accountability on the part of the institutions to the federal government (Gladieux, 1986; Wolanin & Gladieux, 1975). The government was interested in whether the money it was spending on higher education met several requirements: Were expenditures within the manner and purpose of the law? Was the spending faithful to legislative intent? Was the program receiving the funds achieving its intended goal? What were the costs versus the benefits? Finally, was budget money being used in the most efficient way possible? (Wolanin & Gladieux, 1975). All of these questions relied on data from institutions to answer. In addition, accountability trickled down to institutions, and those institutions had to present viable arguments as to

how they were in compliance with federal goals and guidelines (Wolanin & Gladieux, 1975).

By the late 1980s, the government's emphasis on access began to backfire as the demand for federal dollars in the form of guaranteed loans began to grow while the overall economy slowed down. In a 1989 article in *Change*, Gladieux, who had in articles in the 1970s and early 1980s heralded the involvement of the federal government in higher education, began to note significant changes in the government's approach to assisting with access. In particular, the debate over the government's involvement in access to higher education rose to the forefront of public debate during the 1988 presidential race between George H.W. Bush and Michael Dukakis (Gladieux, 1989).

Gladieux noted that in the 1970s family income levels had risen, available aid was growing at a faster pace than tuition, grant aid was more common than borrowing, and the cost of tuition was rising more slowly than the Consumer Price Index (Gladieux, 1989). By the late 1980s, all of those positive indicators had shifted. Loans became more popular, with Stafford loans "provid[ing] over \$9 billion in aid annually" (Gladieux, 1989, p. 36). Similarly the "buying power" of a Pell Grant fell by 25% (Gladieux, 1989). College costs were also rising (Gladieux, 1989). This set the stage for an imminent conflict between the federal government, which, by the 1988 presidential election, was running significant deficits, and institutions that needed federal money in the form of aid to survive (Gladieux, 1989). It also set the stage for an era of even more demands for accountability on the part of colleges and universities to the federal government. If the government was providing through students (in the form of loans) more money, then it

expected significantly more information on how that money was being used (Gladieux, 1989).

As discussed earlier, Title IX of the Educational Amendments of 1972 was a landmark law in terms of creating access to higher education for women both in roles as students and employees (Olivas, 1984). During the 1984 Supreme Court term, the Court decided an important case that greatly expanded the role of the Department of Health, Education, and Welfare (now the Department of Education) to regulate and penalize institutions that did not comply with Title IX (Olivas, 1984). While this expanded role for the Department was enumerated in case law, it represented the delegation of enormous regulatory and enforcement power to the federal government and, therefore, is germane to a discussion of regulation as an impetus to an on campus general counsel's office.

The case cited by Olivas (1984), *North Haven Board of Education v. Bell*, involved a school district that refused to rehire a tenured female after she took maternity leave. The teacher filed a complaint with the Department of Health, Education, and Welfare (HEW). HEW, as part of its investigative process, requested information from the district. The district refused to comply with HEW's request and sued claiming HEW did not have the authority to enforce Title IX in the employment context (Olivas, 1984). The Supreme Court, with Justice Blackmun writing for the majority, noted that the "no person" clause in Title IX was meant to include employees as well as students. In addition, Blackmun relied on excerpts from the pre-enactment debate, specifically statements by Senator Bayh, the bill's main sponsor, which indicated that the law was meant to ban sex discrimination in all aspects of the educational environment (Olivas, 1984).

What the *Bell* decision did was further expand the ability of the federal government to regulate gender access to higher education. Previous interpretations, including the one promulgated by the school system in the case, had already acknowledged the ability of the federal government, to regulate female student access to higher education. This case took that determination one step further and expanded the role of the federal government creating even more opportunities for activities of colleges and universities to be scrutinized.

The examples of the financing of higher education and, gender equity in higher education discussed above are just two instances of the government's emphasis on access in the 1970s and 1980s intensifying regulatory pressure on colleges and universities. This trend toward increased reporting and a greater focus on access continues to this day as noted in President Obama's priority of lowering college costs, and contributes to the need for attorneys on campus. Campus attorneys are educated in the terminology used in regulations, laws, and demands from the government. Therefore, they are in a position to help others respond to government data inquiries and standards. In addition, attorneys, practicing proactive law, can help ensure that requirements are followed and respond to problems if they are not. In the next section of this paper, I will explore another aspect of the federal government's involvement in higher education: research and development (R&D) funding.

While ensuring access and safety are large parts of the federal government's role in higher education, in a publication produced by The College Board in 1987, Gladieux and Gwendolyn Lewis noted that the federal government "provid[es] about a quarter of all college and university revenues" (p. 1). In addition, the authors wrote, "Washington

supports higher education through direct student aid [access] and funds for university-based research and development” (p. 1). With funding for research and development came regulations about how money could be spent, and how results should be reported. These rules, along with funding levels were constantly changing. Colleges and universities needed individuals, like attorneys, focused on the changing federal landscape to help the institution, and its constituents, maneuver and adapt to changing funding levels, reporting requirements, and regulatory language.

The impetus for government funding of research grew out of the Tenth Amendment to the Constitution (Gladieux & King, 1987). The Tenth Amendment reserved all powers for the states not specifically delegated to the national government (U.S. Const. amend. X.). This included the responsibility for developing higher education. As a result, no national university was created. To forward the priorities of the national government, the federal government provided money to colleges and universities to forward its goals (Gladieux & King, 1987). During the nineteenth century, the federal government provided money to the states, which then distributed funds to institutions (Gladieux & King, 1987). While effective and fully respecting the Tenth Amendment, this scheme did not create a level of accountability to the federal government. By the twentieth century, the disbursement model had shifted to the federal government directly funding colleges and universities at significant levels. In fiscal year 1985, the federal government provided approximately 23.7% of funding for higher education (Gladieux & King, 1987). In addition, prior to 1985, 400 programs based in over 25 federal agencies provided some support to higher education (Gladieux & King, 1987).

While the numbers noted above seem high, the late 1980s represented an increase in research and development funds given to higher education institutions (Gladieux & King, 1987). Historically, those numbers have fluctuated, creating an environment in which institutions needed to adapt. From World War II until the mid-1960s, research and development (R&D) funds were significant. This was in part due to the defense industry needing institutional partners and the federal government encouraging those collaborations. By the late 1960s and 1970s, with the country and its resources focused on the Vietnam War, resources for R&D became less available. This trend continued until the early 1980s when funding again grew. Between 1980 and 1985 federal funding for R&D grew by almost two-billion dollars (Gladieux & King, 1987).

By 1993, what had been nearly a quarter of revenue for higher education in 1985 fell to about 10% (Gladieux & Lewis, 1995). This shift was due primarily to the federal government's focus in the early 1990s on deficit reduction (Gladieux & Lewis, 1995). In addition, the allocation of federal resources to R&D, which had been a systematic process prior to the 1990s, took a piecemeal approach in which R&D projects were added to bills as "pork barrel" projects. This was in part due to the fact that legislators did not want to be seen passing large R&D spending bills. Congressmen were content to hide appropriations in other spending and non-spending legislation (Gladieux & Lewis, 1995). Over the course of the 1990s and 2000s, R&D funding for colleges and universities recovered, peaking in 2003 at \$22.5 billion (NSF, 2010). However, with the election of George W. Bush, funding levels dropped back to about \$20 billion (NSF, 2010).

The information presented above leads to the question: How does R&D funding and the changing federal approach to funding levels and purpose link back to the need for

a general counsel? The answer is two-fold and is rooted in both accountability and flexibility. As John Thelin noted in a 2000 article from *The Case International Journal of Educational Advancement*, when initial charters were granted to institutions in the eighteenth and nineteenth centuries, there was no expectation of state or federal funding. Government funding of higher education is a modern construct and with the funding came the need for accountability. As Thelin wrote, the 1980s brought about a “reliance on timely information and careful data analyses” (Thelin, 2000, p. 15). Thelin aptly noted that this need for accountability brought about the need for an office of government relations. At the same time, the need for clear communication and adherence to laws and contracts with the government, coupled with the ever changing priorities of the government, created legal issues which required the services of legal counsel.

While the current section of this chapter has focused on federal government initiated regulations and their impact on colleges and universities as impetuses for general counsel’s offices, institutions themselves lobbied for increased regulation when the regulation benefitted the institutions. The next section will explore one such regulation and why that law could have spurred the need for in-house university legal counsel.

**Institution-supported regulation.** One byproduct of increased governmental funding of research was the need to decide who owned the discovery, product, or invention that resulted from the research funded by a governmental agency. The right of ownership was created when an entity filed a patent application with the U.S. Government’s Patent and Trademark Office (Mowery, 2000). Patenting was not a new concept to colleges and universities. Institutions of higher education had been patenting inventions since the 1920s (Mowery, 2000). What did emerge in the 1960s, ‘70s and ‘80s, and may have

significantly contributed to the need for in-house counsel, was the desire of research universities in particular to be able to patent discoveries reached using federal funding. The difficulty was convincing the federal government to create a comprehensive mechanism to allow institutions to do just that. Once the federal government capitulated in 1980 with the passage of the Bayh-Dole Act, attorneys were needed more than ever to both patent products and ensure compliance with federal regulations (Berman, 2008).

In an article in *Social Studies of Science* from 2008, Elizabeth Popp Berman, a sociologist at the University at Albany, provided a comprehensive chronicle of how the Bayh-Dole Act came to fruition. Berman's fundamental argument was that the institutionalization of patent officers at colleges and universities unified institutions behind the idea of a comprehensive and uniform method of ensuring patent rights for the institutions.

During the 1950s, only a few institutions employed patent counsel (Berman, 2008). This was primarily a result of few, if any, agencies offering patent rights to institutions for federally funded projects. The Department of Defense permitted contractors to retain patents. The Atomic Energy Commission, on the other hand, refused to relinquish rights to patents funded by agency funds (Berman, 2008). During the 1950 to 1970 time period one major agency, the Department of Health, Education, and Welfare (HEW) and its subordinate agency, the National Institutes of Health (NIH), had a policy of granting patent rights to colleges and universities (Berman, 2008). At the time, HEW and NIH combined granted about 55% of all federal research funding for colleges and universities (Berman, 2008).



Prior to 1963, the HEW ran a two track patent process. Institutions could ask the Department to waive title to any invention (Berman, 2008). The institution had to show that it had the administrative capacity to advance the project—meaning it had both the financial and human resources to complete and ultimately use and/or market the invention (Berman, 2008). To establish this showing an institution had to provide a significant amount of paperwork to the Department. In addition, the office reviewing the documentation was short staffed (Berman, 2008). Institutions could also only apply for one title waiver at a time (Berman, 2008). The other option institutions could avail themselves of was an Individual Patent Agreements or IPA (Berman, 2008). IPAs granted universities patent rights to all inventions produced with HEW funds provided the institutions met certain criteria. The difficulty with these initial IPAs was that the aforementioned criteria varied by institution-- there was no uniformity across institutions (Berman, 2008).

While the IPAs themselves were not uniform, a somewhat uniform response across institutions with IPAs was to hire individuals to administer patents (Berman, 2008). These individuals could be both attorneys and non-attorneys. IPAs themselves required a person be identified to be the liaison with HEW (Berman, 2008). By 1974, the Society of University Patent Administrators (SUPA) was established to represent the interests of patent officers and university based inventors (Berman, 2008). By 1977, two major and conflicting events had happened. First, the SUPA had grown in its ability to lobby Congress and, second, a new Secretary had been appointed to oversee the Department of Health, Education, and Welfare (Berman, 2008). The new Secretary ordered that all IPAs and patent release application be placed under the review of the

Department's general counsel's office, effectively stopping the ability of universities to patent inventions. The new Secretary felt that the government should have benefitted financially from inventions created with its money. He did not agree with the process of allowing institutions to patent and potentially profit off federally funded research (Berman, 2008).

The Department's actions galvanized both universities and the SUPA. Both began to lobby key senators including Birch Bayh, Ted Kennedy, and Bob Dole. Previous attempts to gain blanket legislation allowing for universities to patent federally funded inventions had failed (Berman, 2008). During the debate in late 1970s, proponents of a law were far more skilled in their lobbying tactics. Proponents of legislation placed the argument for a blanket law in the context of the innovation gap with Japan. They argued that because US laws were so unequal and cumbersome, scientific and engineering developments were behind Japan (Berman, 2008). In addition, SUPA argued that since the virtual hold at HEW, thirty innovations that could have helped to save lives had been held up (Berman, 2008). As a result of actions by universities and the SUPA, the Bayh-Dole Act passed Congress and was signed into law in 1980. The law created a system where the default was that colleges and universities retained title to any inventions developed with federal funds (Berman, 2008).

While Bayh-Dole did create a universal mechanism for institutions to retain the patent rights to inventions discovered with federal funds, it also created a complex legal process that necessitated the hiring of experts both in patent law and administrative regulations. Under the Act, institutions retaining rights to patent inventions was the standard. However, there were certain exceptions to the rule. Institutions had to allow the

government to use the invention free of charge. In addition, the government could “march-in” and require that institutions license the invention to a third party, provided that the third party did not commercialize the invention (Raubitschek, 2005). This process required that the department in question to conduct a 30-day fact-finding proceeding with the contractor being given the opportunity to present an argument against the department’s request. Any decision then made by the department could be appealed to the Court of Federal Claims. To ensure that the institution’s rights were respected and to participate in, or contest, the government using this process, institutions needed attorneys familiar with the intricacies of both patent and administrative law (Raubitschek, 2005).

A 1984 amendment to the original Bayh-Dole Act set a timeline for institutions to exercise their patent rights (Raubitschek, 2005). Prior to Bayh-Dole, under the IPA scheme, an institution had to notify an agency of its intent to patent an invention within six months of fabricating the invention. This, in the opinion of institutions, made the process longer and less certain (Raubitschek, 2005). Institutions lobbied for, and received a change in the law. The language changed from notification within six months to notification within a “reasonable time” which was defined by the law as two months (Raubitschek, 2005). This allowed institutions to have a more expedited process. Following notification of the discovery, an institution or inventor had two years to elect whether to retain title. Following the election of title an institution had one year to file the patent. Only if the inventor failed to meet the deadlines in the law or if the inventor declined to patent an invention could the government patent an invention (Raubitschek, 2005).

The Bayh-Dole Act represented an institution driven shift toward a regulated and uniform approach to the patenting of the results of federally funded research. It allowed institutions to profit from their work and offered incentives for higher education to produce innovative products and ideas that could ultimately help the country and its people. The Act also created the need for increased bureaucracy and expertise within the university setting. This set the stage for both institutional patent offices and in-house attorneys able to deal with intellectual property laws and regulations. Not only did institutions need lawyers capable of navigating the patent process under Bayh-Dole, they also needed attorneys able to defend their property interests if a patent was violated.

Federal regulation of higher education takes many forms. Most of the regulations were initiated by the government itself. Other federal level regulation came with the support of institutions. Regardless of the impetus for the regulation, experts were required to help institutions work within and ultimately benefit (if possible) from the regulations. In many instances, these experts were institutional counsel trained in either topical law i.e. patents, or basic regulatory law. This training helped institutions navigate the constantly shifting terrain of regulatory law during a period of time where the amount and impact of regulations increased dramatically.

The previous sections have discussed aspects of federal regulation of higher education institutions both initiated by the federal government on its own volition and regulation supported by institutions. Along with the federal government, state governments were and are additional important factors in the regulation of institutions. State governments, both through law making and administrative processes, have enormous regulatory authority over colleges and universities due to the direct funding of

institutions by states. The next section of this chapter explores state related regulatory issues and their potential impact on the establishment of general counsel offices on college and university campuses.

**State regulation.** It is important to note from the outset that when talking about a state's impact on higher education, most scholars refer to a state's relationship with public institutions within its borders. For the most part, private schools are insulated from state government machinations and changes. The same holds true for this section. In this section the terms colleges and universities are used to refer to public schools which receive a significant portion of their funding from state governments.

The relationship between an individual college or university campus and the state administrative body that either regulates or coordinates the activities of the institution is complex and varies by state. As early as 1982, only thirty percent of "senior" public institutions were governed by individual governing boards. The rest were under multi-campus systems (Berdahl & Peterson, 1982). As Aims McGuinness (2003) noted, there were nineteen different structures of public higher education across the country. These models ranged from a strong governing board for all higher education in the state, to a strong governing board for four-year institutions and another for two-year schools, to a weak coordinating board with little direct authority (McGuinness, 2003). Regardless of the nature of the relationship between institutions and governing/coordinating agencies, colleges and universities had to have staff who could help institutions adapt to changing demands or requirements of state boards. Like the federal regulations discussed above, those staff members were, according to Ruger (1997), attorneys. Another potential

complication was that board priorities and policies were and still are often dictated by legislators and governors who are subject to political pressures and can often be inconsistent due to those pressures (Berdahl & Gove, 1982). With changing priorities and outside governance came rules and regulations that needed to be analyzed and made understandable to the various campus constituencies. This is the role of a general counsel. In-house counsels become familiar with the people involved with decision making at the system level. In addition, due to their knowledge of both their institutions and how to understand and interpret regulatory language, they can advocate on behalf of their institution in an effective way.

While a discussion of state governing boards is important, talking about organizational charts and changing requirements is a bit theoretical in nature. In a 1988 article in *The Journal of Higher Education*, Michael Olivas presented a tangible example of state laws and priorities impacting higher education. His commentary also presented a compelling reason for the need for a general counsel to manage state regulations.

Olivas' (1988) piece is focused on residency requirements. Most states charge differential tuition based on whether a student is a resident of the state or not. The responsibility for setting residency rules is vested in different bodies on a state by state basis. In addition, the residency requirements vary state by state. Whether a student is a resident or not has a significant impact on institutions. Institutions bring in significantly more tuition revenue from out-of-state students than from in-state students (Olivas, 1988).

In 1988, the main test of residency was whether a student intended to make a state his or her permanent domicile (Olivas, 1998). However, before a student could stand for review on that question, he or she had to, depending on the state, wait up to twelve months. That is essentially one full school year of out-of-state tuition. Different states also used different methods when reviewing the two fundamental questions of domicile: whether the student resided in the state and whether the student had “an intention to make that residence the home and abode” (Olivas, 1988, p. 266). The rationale Olivas and states gave for this rather subjective test is that states want to ensure that “students establish and maintain genuine ties to the state; to ensure that students do not ‘forum shop’ and pick from several states where they can manufacture or allege contacts; to make the declaration of residence more meaningful and seriously considered than mere presence requires.” (Olivas, 1988, pp. 266-67).

While the questions asked by states are similar, who sets the specific requirements and makes the residency decision varies by state. It is this variance that is an example of a legal issue that warrants the assistance of counsel. Olivas (1988) divided states into five types based on requirements for residency. Type I states, of which there were twenty in 1988, reserved the power to the legislature to decide residency policy. Seven Type II states delegated residency determination policy to state agencies or coordinating boards. Two Type III states gave power to the institutions to make the decision. In twenty-two Type IV and V states, there were no specific laws on who makes the determination of residency. In the seven Type IV states, a state agency or board had assumed the responsibility for the determination. In the remaining Type V states, institutions had assumed the authority to make residency decisions (Olivas, 1988). Complicating the

decision-making process further, numerous states had exceptions or offered waivers allowing some classes of people immediate residency. These classes include: minors, military personnel, or other miscellaneous categories (Olivas, 1988).

This lack of uniformity and, in some cases, direct accountability to state agencies or legislatures could have served as an additional impetus for a general counsel's office. Attorneys are capable of developing comprehensive policies and procedures that ensure uniformity in decision making and process (in as much as the individual state laws allow for uniformity) and can interface with state agencies or legislatures, if need be. In addition, in-house counsel can deal with student challenges to residency determinations in an effective way.

While regulation of higher education could have played a significant role in the need to establish in-house law offices on college campuses, so did the reemergence of litigation. The next section of this chapter will discuss the history of campus-based litigation and explain a historical and societal shift in the 1960s and 1970s that could be used to illustrate an assertion in the literature that the student and faculty rights movements of the 1960s and 1970s led to the proliferation of institutional counsel (Bickel, 1974; Ruger, 1997; Sensenbrenner, 1974).

### **Case Law**

Earlier in this dissertation, it was noted by Bickel (1974), Sensenbrenner (1974), and Ruger (1997) that the student and faculty rights movements of the 1960s and 1970s led to increased litigation and the need for campus counsel. However, their articles made it seem like institutions had not previously dealt with a significant number of court cases.



That is not a true assertion. College and university campuses faced a substantial amount of litigation at the beginning of the 20<sup>th</sup> century without needing in-house counsel. In addition to an increase in the volume of cases, as evidenced by fact that the number of cases involving higher education reported by West went up by 53% between 1936 and 1986 (Ruger, 1997), the individual rights movements also brought about a shift in the law courts used to resolve cases. This new reliance on Constitutional principles created a far more complex and nuanced legal environment for institutions to work within—providing a possible explanation for the need for in-house attorneys. This section tracks that progression.

**Courts and campuses up to the era of *in loco parentis*.** Historically speaking, in the early part of the 20<sup>th</sup> century, the basis for courts interfering with the student/faculty/institution relationship was primarily based on statutory and contract law, both of which were fairly straightforward and lacked nuance (Gelber, 2014a). Following this period of decisions based on statutory and contract law and the period of significant deference to institutions (also known as *in loco parentis*), shifts in society during the 1960s caused courts to apply Constitutional and civil rights to cases which may have been treated differently during the first part of the century. This application of Constitutional and civil rights principles to colleges and universities created extremely nuanced law that required strong analytical skills, and both a proactive and reactive response on the part of institutions. This section is designed to illustrate the relationship between courts, campuses, and attorneys during the early to mid-20<sup>th</sup> century in order to show the stark shift that came about in the 1960s and 1970s.

In a forthcoming article in the *Teachers College Record*, historian Scott Gelber discusses in great length the primary nature of court cases against colleges and universities during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. At the time, courts were either unable or unwilling to put a significant amount of time into complex analysis and often relied on the plain language of the controlling law or document. For example, in 1910, Purdue University banned fraternities on campus (Gelber, 2014b). A student challenged the University's policy. The University responded that enrolling at the institution was not a legal right and therefore the University could do as it pleased. The Indiana Supreme Court disagreed. Citing the plain language of the law establishing the University, the Court wrote that Purdue had an obligation to educate anyone living in the state who was not ill nor incapacitated (Gelber, 2014a). While this outcome was ultimately against the institution, the analysis was straightforward and not nuanced. Similar language was written in a 1908 case from Minnesota in which the University of Minnesota expelled a student purportedly for academic and character reasons. In fact, the real reason was that the student was involved in trying to usurp control of athletic teams away from the school (Gelber, 2014a). The Minnesota Supreme Court reinstated the student based on the same rationale used in the Purdue case—statutory language. (Gelber 2014a).

The same basic language-based approach to the student/institution relationship was also present during the late 1800s and early 1900s in cases involving private schools. As Gelber (2014b) noted “contracts emerged as the dominant legal structure for regulating financial affairs in the late-eighteenth and early-nineteenth centuries...Over time, contractual logic also emerged as a common framework for defining a wide range of other relationships” (p. 15). Courts viewed a student or faculty member's relationship

with a college or university in the same light. As an example of this approach, Gelber (2014b) talks about an 1887 case from Dickinson College. At the time, Dickinson students were divided into two major camps: students who respected the authority of the faculty and students who sought to test the authority of the faculty. As a prank, students would disable the College's bell in order to delay classes from starting (the bell signaled when it was time for classes to change). Following such a prank, the College's President convened a meeting of the faculty in his office. In order to disrupt the meeting, students threw rocks at the President's window, and the window was shattered. One student, John Martz Hill, was interviewed and expelled because "he seemed uncomfortable during his interrogation" (Gelber, 2014b, p. 14). Hill sued and the Court found that the case was not unlike a contract violation case in that the accused student deserved a hearing and the ability to defend himself versus a summary dismissal (Gelber, 2014b).

In addition to working against the interests of colleges and universities, sometimes the contractual, non-nuanced approach worked *for* institutions. Another case Gelber (2014a) cited was a 1901 case against Case Western Reserve University. Case expelled a student after completing a disciplinary hearing. The Ohio court found that the University had acted with "prudence and discretion" as required by the contract with the student (Gelber, 2014a). A similar decision was reached by a New York court in a 1902 case against New York University (Gelber, 2014a).

Under the scheme of the early 20<sup>th</sup> century, institutions could rely on either external counsel or on staff law professors to represent their interests. Unlike Constitutional law, plain language law was not overly complex. In addition, institutions were not dealing with the frequency of litigation or legal challenges like they do in

the modern day (Ruger, 1997). Therefore, due to both the nature of the cases and their lack of frequency it would not have been prohibitively expensive to hire outside counsel when necessary.

By 1910, the vast majority of courts had moved away from the analysis of contracts and statutes and toward offering significant deference to colleges and universities. Gelber, (2014a) credits two factors with this shift. First, higher education boomed during the early 1900s. Campus populations grew, as did faculty and administrative staffs. To courts, this growth warranted a higher level of deference since courts did not feel they had the expertise to address issues involving colleges and universities. Second, the 1910s brought with them the emergence of a progressive philosophy which rejected older methods of operation like reliance on common law and contracts and embraced the expertise of administrators and faculty members (Gelber, 2014a). This rejection of contract rights and adoption of progressive philosophies led to the emergence of the *in loco parentis* approach of colleges and universities and the acceptance of this approach by courts. One court case, *Gott v. Berea College* (1913), which is cited by (Gelber, 2014b), shows the authority institutions possessed toward students in the early part of the twentieth century.

In 1913, Berea College, a private institution in Kentucky, established a rule stating that students could not eat in establishments not owned by the College. The penalty for breaking the rule was expulsion. Gott, a restaurant owner in Berea, sued Berea College for interfering in his business and for slander (*Gott*, 1913). The College defended itself, noting that it was a private institution and that the policy was designed to ensure that its students did not waste money and stayed engrossed in their studies. The

Kentucky Court of Appeals agreed with Berea's argument. Berea owed no duty to Gott. In addition, the Court stated that the College stood *in loco parentis* of its students and therefore, could make rules a parent could. The Court affirmed Berea's ability to draft and enact broad by-laws for governance and operations except when public monies were involved. Since Berea was private, no public monies were in play. Therefore, the College could create any rule it wanted (*Gott*, 1913).

*In loco parentis* remained the standard approach of colleges toward students well into the mid-twentieth century. As mentioned above, the acceptance of the progressive philosophy idea of higher education institution as benevolent parent became the norm. As a result, colleges and universities were rarely challenged by students. The acceptance of this philosophy negated the need for the use of attorneys whether in-house or external. As the next section will show, a more activist and involved society led to more activist courts during the 1960s and 1970s. These courts, in keeping with shifts in the priorities of the overall American society, began to attribute Constitutional and civil rights to students and faculty alike. Courts were no longer willing to accept *in loco parentis* or the granting of significant deference to colleges and universities in employment matters. Courts, in keeping with social trends, were also not willing to revert back to the use of contract law as the primary means of regulating relationships between higher education institutions and their constituencies. Instead, courts relied on highly nuanced Constitutional law that could have significantly contributed to the establishment of in-house counsel's office to deal with the ramifications of new student and faculty rights.

**The great societal shift: Constitutional rights come to campus.** The 1960s were a decade of significant disruption and change on college and university campuses. Students were less apt to accept and follow the orders or requirements of campus administrators and were more likely to make their discontent known. One example of student discontent occurred at the University of California, Berkeley in 1964. The administration decided that a sidewalk in front of campus could no longer be used for political meetings or other expression purposes. Students disobeyed and were disciplined by the institution. Following the disciplining of these students, other students staged sit-ins and strikes (Geiger, 2004). Similar events took place at the University of Chicago, the University of Wisconsin, CUNY, and Columbia University (Thelin, 2011). While these events occurred on university campuses, according to Geiger (2004), the students' response to the administrations of these campuses was rooted in far broader societal issues. To Geiger, the student rebellion on campus drew its strength from "opposition to the war in Vietnam...the civil rights movement...and the universities themselves" (Geiger, 2004, p. 231; Ruger, 1997).

The push for more individual rights was not just limited to college and university campuses. The 1960s brought with them significant activism across the country and a shift away from a paternalistic sense of government and society. As Geiger (2004) noted, this push toward individual rights was also reflected in the law and policy of the government. An example of this was the Civil Rights Act of 1964. The Act banned discrimination based on race in most public fora. Initially, colleges and universities were not subject to the anti-discrimination laws. Diversity was an institutional matter. The Civil Rights Act and executive orders that followed its passage changed that exemption

and required institutions of higher education to comply with non-discrimination laws. The same held true when Title IX was passed in 1972 (Geiger, 2004).

The Civil Rights Movement was an example of a trend in society and among courts and law makers toward a greater emphasis on individual rights, oftentimes rooted in the US Constitution. The acceptance by courts of Constitutional rights, versus the use of contractual rights, and their application to the higher education context, created a complex and nuanced legal environment which regularly contradicted the desired actions of the higher education community. This shift from court-given deference to institutions necessitated the presence on campus of people who could both reactively defend colleges and universities and proactively help colleges and universities avoid legal troubles. In the rest of this section, I will present several examples of how courts used novel, at least to the higher education environment, rationale based in the US Constitution to alter the relationship between campuses, students, and faculty. This analysis of the change in reasoning is in keeping with the assertions made by Bickel (1974), Ruger (1997), and Sensenbrenner (1974) regarding the proliferation of in-house counsel on campuses.

One of the most cited cases by higher education law scholars is the case of *Dixon v. Alabama* (1961). *Dixon* (1961), which was rooted in the Civil Rights Movement, represented both a stark departure from *in loco parentis* and a significant shift toward recognizing individual rights in line with societal trends (Ruger, 1997). In *Dixon* (1961), the US Circuit Court for the Fifth Circuit answered the question: Are notice and a hearing required at a public institution before a student can be expelled? The Court answered in the affirmative and, using Constitutional rationale, changed requirements in conduct cases involving significant penalties.

In *Dixon* (1961), African-American students from Alabama State College staged a sit-in at a white's only lunch counter in Montgomery, Alabama. Following the sit-in, there was significant political pressure on the College's president to expel the students. Ultimately, the decision fell to the State Board of Education which voted to expel the students. No hearing or notice was provided to the students prior to the decision (*Dixon*, 1961). Because Alabama State College was a state actor, the Court found that the Fourteenth Amendment's right to due process applied. To decide whether notice was required in the *Dixon* case, under the Fourteenth Amendment, the Court had to balance the students' private interest with the governmental power being used (*Dixon*, 1961). The Court found that the private interest being impacted by the expulsion was the students' ability to gain admission to another public school. As a result, the student would be permanently damaged. The Court additionally found that if the students were to be permanently impacted in such an extreme way, the government power exerted needed to be done in a reasonable way so that Constitutional principles would be respected. Instead of hearing one side of the case, the board needed to hear both sides. Therefore the students were entitled to notice and a hearing (*Dixon*, 1961).

*Dixon* (1961) was a remarkable case for two primary reasons. The first reason was based in the outcome. *Dixon* (1961) articulated the requirement that a process be followed that allowed for the accused student to defend him or herself (*Dixon*, 1961). No longer could a college or university summarily dismiss students. Second, *Dixon* represented a fundamental shift in the means to achieving the ruling. As discussed earlier in this chapter, prior to the early 20<sup>th</sup> century, courts would have used contract law to resolve cases such as *Dixon* (Gelber, 2014a; Gelber 2014b). Contract law could have



produced the same outcome in the case. However, here the Court chose to use Constitutional means to address an expulsion reflecting a shift in societal norms towards the respecting of fundamental rights (Ruger, 1997).

To ensure a student's Constitutional rights, the Court created a flexible process for the institutions to follow. Institutions needed to provide a statement of the charges and an opportunity for a hearing which could be formal or informal as long as the information was presented in detail. The hearing itself could be adversarial, but the respondent had to be able to present a defense (*Dixon*, 1961). Absent these processes, a state institution could not take significant action against a student for a conduct violation. This flexibility presented an institution with a loose framework to follow. Professionals would be required to ensure a process was created and followed on campus that kept in line with legal requirements. In some cases, those individuals were on-campus attorneys.

As mentioned above, much of the student discontent that occurred on campuses during the 1960s was based in part on institutional attempts to limit student free speech. Students, like greater American society, were rebelling in part against what they viewed as a monolithic establishment attempting to usurp fundamental rights (Thelin, 2011). During this time period, and into the 1970s courts, including the US Supreme Court, wrestled with the free speech right of students in the education context. This issue further complicated the legal relationship between institutions and students which had been fairly clear prior to this period of time.

The First Amendment to the US Constitution prohibits any governmental entity from abridging a person's right to speak freely and assemble to make their voices heard.

Many of the First Amendment cases from the 1960s to 1980s period concerning students and institutions of education centered on students who took some action involving speech that ran counter to the wishes of the institutions. The institution then took action to stop the speech, and that action was then challenged in the courts. One such case, *Tinker v. Des Moines Independent Community School District* (1969), was a US Supreme Court case involving a public school system. While not involving an institution of higher education, the principles of *Tinker* (1969) were then applied to public higher education as well.

In *Tinker* (1969), students wanted to wear black armbands to school to protest the Vietnam War. The school system objected and adopted a rule where students wearing armbands would be asked to remove them. If they refused, they would be suspended until they removed the armbands. The impacted students sued the school system alleging a violation of their First Amendment rights to free speech (*Tinker*, 1969). The school system argued that their policy was reasonable in that they feared the arm bands would create a disturbance (*Tinker*, 1969).

The Supreme Court rejected the system's arguments, deciding instead to preserve the students' rights to expression, even in school. The court wrote, "...it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker*, 1969, p. 504). The Court indicated that schools did have the right to control conduct subject to Constitutional limitations which centered on the intrusiveness of the conduct.

*Tinker* (1969) is an interesting case when applied to the higher education context. While overall it stands for the principle that speech cannot be regulated just based on a fear of disturbance, it still acknowledges that school systems do have some authority to control students. In higher education, the students are adults. So while *Tinker's* fundamental holding, that the state cannot abridge free speech based on fear of a disturbance, applies to colleges and universities, the boundaries of the authority to control may be different in a higher education context.

In 1972, three years after *Tinker* (1969), the Supreme Court took the principles of *Tinker* (1969) one step further and applied them to a case involving a controversial student group. In *Healy v. James* (1972), students at Central Connecticut State University sought approval to register a campus chapter of Students for a Democratic Society (SDS). During the late 1960s and early 1970s, with the Vietnam War underway, many people were suspicious of left leaning organizations. SDS was such an organization. To ameliorate concerns, the local chapter of the SDS vowed not to affiliate with the national organization. The committee charged with screening student groups approved the application and sent the recommendation to the University's President. The President rejected the recommendation noting that SDS' philosophy was antithetical to the school's policies and that he doubted the group would truly be independent of the national organization (*Healy*, 1972). As a result, the group filed suit.

Initially, the US District Court found that the students had been denied due process. Following that decision, a hearing was held and the group was not approved. SDS filed suit again and the case was dismissed. An appeal had the same result. The Supreme Court, however, strongly disagreed with the lower courts. The Court said that

because a college campus is a “marketplace of ideas,” a state’s requirement to uphold the First Amendment should be even stronger on campuses (*Healy*, 1972, p. 180). By not recognizing the campus SDS group, the Court indicated that the University’s actions were tantamount to disbanding the group based on its beliefs. If the group had actually violated a law or campus policy or was a substantial threat to campus, the institution would have been proper in the action it took. Absent those two occurrences, the University had no justification for denying the group’s recognition (*Healy*, 1972).

One year after *Healy* (1972), the Supreme Court decided another First Amendment case originating from a university campus. In this case however, the Court was dealing with institutional action surrounding a publication by a student. In *Papish v. Board of Curators of the University of Missouri* (1973), the University expelled a student for publishing an “obscene” cartoon on the front of a magazine sold on campus. The institution said that the cartoon violated “generally accepted standards of conduct” (*Papish*, 1973). In a relatively short opinion, the Supreme Court applied *Healy* (1972), and said that by expelling the student, the University, as a state actor, discriminated against him based on the protected content of this cartoon. Free expression could not be stopped based on standards of decency alone (*Papish*, 1973).

The line of cases talked about above only represent the evolution of cases based on one Constitutional principle—free speech. However, even within this one area of the law there was great change and increased complexity in line with societal changes. Seventy or so years prior, courts would most likely not have looked to the Constitution to settle these speech and association issues. They would have looked to contracts or contract-like documents between the institution and students (Gelber, 2014a). Thirty

years earlier courts would have most likely accepted the right of the institution to dictate the behavior of the student (Gelber, 2014a). By the mid-1970s, based on Constitutional principles, courts had dictated that institutions had to consider such issues as the intrusiveness of speech, whether a group was a substantial threat to campus, and had to justify whether an action taken was based on the beliefs of the person or group (*Healy*, 1972; *Papish*, 1973; *Tinker*, 1969). These new complexities, along with court decisions rooted in Constitutional law in the areas of Fourteenth Amendment Due Process for students (*Dixon*, 1961; *Goss*, 1975) and Fourth Amendment search and seizure protections for students living in college housing (*Piazzola*, 1971), created a challenging legal environment in line with society at the time. Institutions needed individuals on staff who could understand and work within the confines of court decisions. In addition, institutions needed people who could skillfully work to prevent lawsuits and, if necessary, argue to a court why an institution's policy fit into the limitations placed on institutional action by courts. Institutional counsel could fill that role.

While institutions of higher education were facing the application of Constitutional law to their relationships with students, the societal trend toward the importance of respecting individual rights and liberties impacted the relationship between institution and faculty/employees as well. Court recognition of the individual rights of faculty during the 1960s and 1970s, like those of students, centered on free speech and due process. The McCarthy Hearings in the 1950s brought to light the intense fear of the Communist infiltration of American society, particularly in academia. The Vietnam War in the 1960s and 1970s reignited that fear (Geiger, 2004). Within this context, state

institutions reacted and, in doing so forced courts to balance individual freedoms with institutional priorities.

An example of this balancing of institutional priorities and individual rights was the 1952 case of *Wieman v. Updegraff*. Updegraff, a citizen of Oklahoma, sued to enjoin faculty and staff of Oklahoma Agricultural and Mechanical College from assuming their jobs as a result of those employees not signing an oath of loyalty as required by Oklahoma law. The oath stated that the employee taking it was not associated with “a communist front or subversive organization” (*Wieman*, 1952, p. 186). The employees impacted by the suit intervened and challenged the law requiring the oaths. In its opinion the Supreme Court scoffed at the fact that mere association, knowingly or not, was grounds for disqualification for employment. The opinion noted: “to thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources...Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power” (*Wieman*, 1952, p. 191).

Another important case involving loyalty oaths came before the Supreme Court fifteen years after *Wieman* (1952). This case, *Keyishian v. Board of Regents*, dealt with a similar issue as in *Wieman* (1952). Unlike *Wieman* (1952), this case was decided based on free speech rationale instead of due process rationale.

In 1962, the privately operated University of Buffalo merged with the State University of New York at Buffalo. New York law required that public higher education employees had to sign a statement indicating that they were not Communists. Keyishian and others who had been on the faculty at the private University of Buffalo refused to

sign the statement. Keyishian's year to year contract was not renewed by SUNY Buffalo due to his failure to sign. The Supreme Court ruled that New York law was highly ambiguous and had no objective measure (*Keyishian*, 1965). The means of rebutting the assumption of membership, in the eyes of the Court, were insufficient to stand up to First Amendment scrutiny. Therefore the law as a whole failed due to "overbreadth" (*Keyishian*, 1965, p. 609). Institutions could not enforce the law and, in addition, could not take steps to ensure that faculty were not Communists.

The fundamental argument of this section is that the shift from straightforward contract law as the basis for court decisions to a more nuanced Constitutional analysis contributed to the need for institutional counsel on campus. These two cases are prime examples of the increased complexity of the analysis. The loyalty oaths in both cases were statutory law, under the courts described in Gelber (2014a), they would have most likely been declared legal. However the courts in *Wieman* (1952) and *Keyishian* (1965) forced institutions to consider both the arbitrariness and the scope of laws and policies. This was a far more in-depth and technical approach that required individuals, like attorneys, versed in such analysis.

Another important case that highlights the complex nature of Constitutional analysis in the higher education context was the 1972 case of *Perry v. Sindermann*. The case established a potential property interest in employment for non-tenured faculty. *Perry's* (1972) initial facts were very similar to other faculty employment cases. Sindermann was a faculty member at Odessa Junior College in Texas. He was a non-tenured year-to-year faculty member and part of a faculty union. Sindermann was elected chair of that union and placed an advertisement critical of the school's regents' reluctance

to turn Odessa into a four-year institution. Following the publishing of the article, Sindermann was terminated. Sindermann was not provided a hearing or a rationale for the termination (*Perry, 1972*).

The Supreme Court noted that a year-to-year employee was not required to have a hearing if his or her contract was not renewed unless he or she could show that the decision to rehire deprived him or her of a “liberty” or “property” interest (*Perry, 1972, p. 601*). The burden was on Sindermann to show that he did indeed have a “liberty” or “property” interest in his employment.

Sindermann focused on language in the “Faculty Guide” that said that Odessa wished for faculty members to feel as if they had permanent tenure (even though there was no formal tenure system) as long as their teaching was good, they were cooperative, and were happy (*Perry, 1972*). In addition, Sindermann focused on a Texas college and university system guideline which indicated that if a person were employed with the system for seven or more years, he had some form of tenure (*Perry, 1972*). In response to Sindermann’s claims, the Court re-emphasized that the “property” interest Sindermann sought to prove was not “limited by a few rigid, technical forms” (*Perry, 1972, p. 601*). The Court followed by saying that a “property” interest might exist if there were rules or “mutually explicit understandings” that support a claim of a “property” interest (*Perry, 1972*). The Court agreed with Sindermann’s argument and sent the case back to the District Court for trial. The Court finished its opinion by noting that the finding that Sindermann had a “property” interest would not necessarily have indicated that he should have been reinstated. Instead, the Court reasoned that a finding of a “property” interest would necessitate a formal process, i.e., a hearing before he could be terminated or not



renewed (*Perry, 1972*). This point is key in that it used the Due Process Clause of the Fourteenth Amendment to limit an institution's ability to make a unilateral employment decision absent a process. Here again, we see a dramatic shift in analysis. Rather than simply relying on Sindermann's status as a year-to-year employee according to contract law, the Court created a complex analysis that gave Sindermann additional rights and required a process before he could be terminated.

### **Conclusion: Some Universal Notes on the Transition to In-house Counsel**

This chapter has provided examples of issues that contributed to the need for in-house counsel offices on college and university campuses. Before concluding, there are two additional rationales that are more universal in nature and add an additional layer to the discussion started by Bickel (1974), Ruger (1997), and Sensenbrenner (1974).

Lawyers in private practice are expensive. If a large institution such as the University of North Carolina at Chapel Hill were to engage outside counsel for all legal matters, the cost, based on an hourly rate, would be prohibitively high. Hiring attorneys on a salaried basis allows institutions to control costs (Sensenbrenner, 1974). In addition, hiring staff counsel fosters a positive work environment and a sense of loyalty (Sensenbrenner, 1974). Many firm attorneys are focused on billable hours and bonuses. In-house counsel do not have to worry about billable hours and are therefore able to focus more on producing quality work and building relationships with campus constituents. This work environment also creates a sense of loyalty to the institution. In-house counsels allow institutions to both control costs and foster a quality working environment for staff members (Sensenbrenner, 1974).

Additional cost savings are realized by shifting regulatory work from faculty to attorneys. For example, Robert Scott, a former associate dean at Cornell in a 1978 article for *Change*, noted that in 1974-75, faculty at Harvard spent 60,000 hours at a cost of \$8.3 million on compliance with federal regulations (Scott, 1978). That number would be about \$35 million in 2013 dollars. The Ohio State University in the same year spent over a million dollars on compliance (Scott, 1978). Instituting larger general counsel offices allowed these institutions to siphon off some of the compliance work from the faculty to attorneys to help save both monetary and personnel resources. In addition to increased costs, Scott noted a rise in outside review of university actions, “not only legislatures and federal agencies but the courts are willing to scrutinize every exercise of discretion on the basis of a complaint. This is the twilight of authority and autonomy” (Scott, 1978, p. 20).

Finally, Scott’s fundamental point, and an important generalized rational and impetus for a general counsel’s office on campus, relates to the nature of government and the nature of colleges and universities. Scott noted that universities are seen as social leaders, by means of promoting democracy and equality. To that end, university governance reflects those goals. As Scott wrote:

Most regulations seem to have been written for hierarchical management systems, not for horizontal collegial systems where authority is shared...The government officials who oversee regulations are lawyers, accountants and bureaucrats, not educators; and they [educators] work in staff committees, not as individuals with authority (Scott, 1978, p. 19).

Scott’s argument is compelling; the people making the rules that colleges and universities need to follow are not versed in how colleges and universities run. Regulators are familiar with a top-down approach, not the shared-governance, everything-is-discussed approach of higher education. Regulators do not fully understand issues like academic

freedom or tenure. In addition, courts do not understand that many faculty and administrators do not fully understand the language used in court decisions. This is where the general counsel's role is vital. Attorneys, familiar with institutions and higher education can serve as a form of translator, taking regulatory or legal language and making it accessible to non-lawyers. In addition, attorneys can see issues, and, if necessary, form coalitions that non-lawyers may not have initially viewed as necessary.

The use of outside law firms, which was the model during the first half to three-quarters of the 20<sup>th</sup> century, was viable during a time of less nuanced regulation from all branches of government. Firm attorneys did their legal work and billed institutions. As issues became more complex, colleges and universities realized that in addition to cost savings, they needed individuals who were familiar with the relative peculiarities of academic environments and could be the interface between the hierarchical outside legal/regulatory world and the institution and its constituents (Scott, 1978). By hiring in-house counsels, institutions could ensure that the attorneys became familiar with the environment, that the incumbents to the positions wanted to work in higher education, and that they were capable of serving as the bridge between the government and the world of higher education.

Throughout this section on case law, I have endeavored to, through the use of history, both detail and expand on assertions made by higher education law practitioners (Bickel, 1974; Ruger, 1997; Sensenbrenner, 1974). The student and faculty rights movements of the 1960s and 1970s, which were representative of significant shifts in society, were not unique in the sense that courts interacted with higher education issues. What these movements, and society at large, did help to bring about was a substantial

change in what law was used when deciding cases involving students and faculty. No longer were courts only willing to look at statutes and contracts. Instead courts at all levels, in line with the philosophy of the time, applied Constitutional standards and tests which increased the complexity of the analysis. This required individuals who had the training and expertise to both respond to, and prevent legal issues from arising. Those individuals were, as Ruger (1997) noted, institutional counsel.

This chapter was designed to answer the question: What examples can be offered to support previously made assertions that the impetus for the proliferation of in-house university counsel offices in the 1960s, 1970s, and 1980s was, in part, the result of increased governmental regulation, and litigation? It did so by, building on Bickel (1974), Ruger (1974) and Sensenbrenner (1974), demonstrating the increased amount of governmental regulation during the 1960s, '70s and '80s, and by showing how the application of complex Constitutional law to the relationships between faculty, students, and institutions in the 1960s and 1970s created an environment where contract lawyers were no longer sufficient. The next chapter will take this research one step further and analyze, in an exploratory way, how current and former general or associate counsel view or viewed their role(s) within the college or university environment. The goal is to take the historical context above and bring it into the modern day in order to show how the role of the general counsel has integrated into campus bureaucracies. To complement the interviews, the next chapter will also put those views into context by comparing the resulting commentary on the role of the general counsel with the role of the academic dean as presented in the literature. After exploring these issues, this dissertation will conclude with remaining questions and potential topics for additional research.

## CHAPTER 5

### The Role of the University Counsel

Up until this point, in the broad scheme of the history of the university general counsel's office, this project has focused on the "distant" past, examining the impetus and early thoughts on the role of the office. In the literature concerning the role of the institutional general counsel, some authors either alluded to, or directly talked about, two main types of general counsel: the advisor or the decision maker (Beale, 1975; Bickel, 1974, Orentlicher, 1975; Sensenbrenner, 1974). Based on conversations with the three attorneys, in the modern day, due primarily to the increased complexity of higher education law, the advisor role has shifted ever so slightly into a more active facilitator/resource role while the decision maker model still holds true (interviews, April, 2014).

This chapter looks at the modern day by describing and analyzing three interviews conducted with three different institutional counsels. As described in Chapter 3, these conversations were conducted using Oral History methodology (Kyvig & Marty, 2010; Ritchie, 2003). Participants were asked to relate opinions and anecdotes based on ten questions which are included in the Appendix. The individuals interviewed for this project all hold or held positions within public institutions. One individual, who will be referred to as Attorney 1, is currently an associate counsel at a Research One flagship institution in the southeast. Attorney 2 is currently in a senior position at the system level and previously served as an associate counsel at a Research One flagship institution in the southeast (the same institution as Attorney 1). Attorney 3 is a retired general counsel

from another, smaller Research One flagship institution located in the Deep South. As mentioned in Chapter Three, in addition to their expertise, these three individuals were chosen based on their accessibility. Two were interviewed in person and one via Skype. After providing some background on the three attorneys, this chapter will compare and contrast their views on the role of the general counsel and explain factors which could account for their differing views. In addition, this chapter will place those views in the context of institutional leadership by comparing the perceived role of the general counsel with that of the academic dean.

### **The Interviewees**

**Attorney 1.** The first interview conducted was with an associate counsel at a large Research One institution. This individual had graduated with a Bachelor's degree from the institution he now represents. In addition, members of his family had been in the administration at the same institution. As a result, he has a strong affinity for his employer. After graduating from a top-25 law school, this individual began his practice with a large regional law firm. In the modern age of institutional counsel, most college and university attorneys, at least according to Attorney 1, follow a typical path: law school to associate in a firm to in-house institutional counsel (interview, April, 2014).

Attorney 1's primary interest coming out of law school was contractual agreements between corporations and businesses. While employed at the law firm, he spent much of his time working on high value financial transactions involving creditors and borrowers. After five years of practice, Attorney 1 faced a pivotal decision. As a fifth year associate, the expectation was that he would begin building a "book" of his own

clients; that is, clients he brought to the firm. He was also expected to commit to practicing financial transaction law for the rest of his career. Attorney 1 decided that he did not like the idea of having to find clients. In addition, he feared the “monotony” of finance law would grow tiresome (interview, April, 2014). He was forwarded the job description for his current position and applied. He has been in his current position of an associate university counsel for almost ten years. At the time of his hiring, the counsel’s office at his employer had experienced a change in leadership. It was also experiencing a significant increase in workload. Attorney 1 was hired in the early 2000s, along with an attorney specializing in student issues and an attorney who specialized in technology issues. Since then the office has grown by seven attorneys, each with their own specialty and sub-specialty (interview, April, 2014).

**Attorney 2.** During her interview, Attorney 2 admitted that she took an unusual route to her long term positions as first an associate general counsel for an institution and then a senior associate counsel for a state system of higher education (interview, April, 2014). Attorney 2 indicated that most institutional counsel start on a path very similar to that of Attorney 1 (interview, April, 2014). She also noted that in the late 1990s, when she graduated from law school, the firm to in-house counsel route was not the exclusive way to enter into an in-house higher education law practice setting (interview, April, 2014). However, she followed up by saying in the modern age of relatively large university counsel offices, the firm to in-house path is the norm (interview, April, 2014).

Attorney 2’s path toward the role of an associate general counsel for a Research One institution was in some ways in “her DNA” (interview, April, 2014). Her father was a college professor and her mother was an attorney (interview, April, 2014). Attorney 2

majored in history and ultimately went to law school at the institution that later was her employer. As a history major, she enjoyed the reading, writing, critical thinking, and analysis that went along with working with history. This facility with writing and critical thinking led her to law school. While in law school, she took higher education law which was then taught by the institution's general counsel. Following law school, she joined the institution's Office of the University Counsel first as a clerk, then as a paralegal, then finally as an attorney. Unlike Attorney 1, who "came up" in a firm setting, Attorney 2 developed her skills in an in-house counsel setting (interview, April, 2014).

The office that Attorney 2 joined in 1994 was significantly different from the office twenty years later. In 1994, the office had 5 full time attorneys—the general counsel and four associate counsels (today the office has more than 10 full time attorneys). In addition, rather than being housed all together, the attorneys and clerks were imbedded in the offices of the institutional clients they served. There was a weekly staff meeting which brought the attorneys together. In addition, legal services were not solely the responsibility of the university counsel's staff. Individual units also hired attorneys who were responsible to unit leaders as opposed to the university counsel (interview, April, 2014).

In the early 2000s, the structure of Attorney 2's office changed dramatically. A new university counsel consolidated the attorneys into one space and significantly expanded the size of the office. Attorney 2 indicated this change was the result of the workload tripling due to an increase in the research enterprise, technology, record requests from the public, and an overall increase in litigation (interview, April, 2014). Even though the number of lawyers and support staff increased, the workload also



increased making it hard for attorneys to maintain a work/life balance. It was this work/life issue that served as the impetus for Attorney 2's transition from the role as a campus based lawyer to the system office. As will be discussed briefly later, Attorney 2 views the role of a campus attorney and system attorney as similar in nature but different in practice (interview, April, 2014).

**Attorney 3.** While Attorney 3 practiced at an institution which statistically seemed similar to the institutions of Attorney 1 and Attorney 2, her experiences and background were significantly different—as was her experience at her institution. Attorney 3 is older than Attorney 1 and Attorney 2, and is a retired general counsel. Attorney 3 also practiced in a far smaller general counsel's office than Attorney 1 and Attorney 2.

Attorney 3's interest in law was rooted in her father, who was an attorney. At home during their evening meal, Attorney 3's father would talk about cases he was working on, and often posed questions for his children to debate (interview, April, 2014). While this sparked Attorney 3's interest in becoming an attorney, she was influenced by the social mores of the Deep South in the 1950s. In 1959, as her graduation from college grew closer, she approached the dean of the law school at her undergraduate institution, the same institution she ultimately represented, and was told that there was no place for a woman in law school (interview, April, 2014).

Following graduation, Attorney 3 married, taught school, and had four children. In 1974, following the birth of her fourth daughter, Attorney 3 entered law school at the same institution which had previously rejected her. In her first year, she was one of only

five women to attend law school at her large state institution in the Deep South (interview, April, 2014). Following graduation, she joined the litigation practice of a forty person law firm in the same college town in which her university was located. For the town, a forty person firm was considered enormous. Even though the firm was highly respected, Attorney 3 still encountered stiff resistance to women practicing law (interview, April, 2014). In 1980, Attorney 3 had successfully litigated a civil case with the jury finding for her client and awarding damages. In a side-bar, the judge presiding over the case indicated that a courtroom was no place for a woman and as such he was going to issue a judgment notwithstanding the verdict for the defendants, overturning the jury (interview, April, 2014). Attorney 3 was appalled but not surprised.

In the late 1980s, Attorney 3's life changed when her husband was diagnosed with and succumbed to terminal liver cancer. By this point in time, Attorney 3 had built up a reputation as a formidable litigator and attorney (interview, April, 2014). She had also built up contacts in the university town during her years of practice. By the late 1980s, the general counsel's office at her university had been well established, mostly, according to Attorney 3, due to the student rights and Civil Rights Movement of the 1960s and 1970s (interview, April, 2014). The University needed a new general counsel and Attorney 3 needed a more family friendly position. Attorney 3 also had a strong relationship with the University's chancellor and was offered the position and held it until her retirement in 2003 (interview, April, 2014). Now back in private practice, Attorney 3 serves in a senior attorney role to the firm she worked for early in her career.

## The Role of the Institutional General Counsel

Before starting an in-depth discussion of the attorney's views on the role of the general counsel, it is important to first link back to the discussions in the previous chapters. Chapter Four was designed to explain assertions by Bickel (1974), Rugger (1997), and Sensenbrenner (1974) that increased regulation, and case law created the need for institutional counsel on campus. During the interviews for this chapter two of the three attorneys also mentioned these factors as impetuses for the establishment of counsel offices on campus. Attorney 1, in his April, 2014 interview noted:

I think there are a few primary drivers, one of which is the growth in regulations. Higher education institutions have really...since the '60s and '70s, really... started to come under increased regulatory scrutiny from the federal government, from state regulatory bodies, and even here locally, municipal bodies with land use regulations, parking, and related regulations. You almost could have a law office devoted solely to regulatory work that would fully employ 11 attorneys. I think that trend is going to continue.

In fact, I should also throw in there international regulations, because like many other leading research institutions and ones with very robust study abroad programs, we are in just about every country across this globe either with study abroad or research or both.

This sentiment was echoed by Attorney 3 (interview, April, 2014).

**The views.** Attorney 1 and Attorney 2 described the role of the institutional counsel, at least at the associate counsel level, as someone who facilitates a course of action. In many instances, an institutional client representing an office wants an attorney's help in resolving an issue. While it is an institutional counsel's job to help the client resolve the issue, an attorney has to realize that he or she represents the university as a whole and not just the individual client. This is where the "facilitator" role comes

into play. As Attorney 1 noted, “you just realize that this deal’s not going to get done unless...you, as the attorney, put together the building blocks to make a deal happen” (interview, April, 2014). Institutional counsel has to have, as Attorney 1 described it, a “tough conversation” with an institutional client over how any course of action would impact other units within the university (interview, April, 2014). Rather than say, “here’s what you could do,” the attorney creates a process by which others are consulted and a course of action agreed upon (interview, April, 2014).

Attorney 1 gave an example of a project to improve cellular service on his campus. His campus’ information technology office wanted to install university owned cell towers on various buildings across campus (interview, April, 2014). The campus’ IT office would then lease space on the towers to the various cell carriers. The carriers supported the plan. When approached to help work out the contract, Attorney 1 had to help IT officials understand that there were other offices that had to be consulted (interview, April, 2014). Over the course of several months, representatives of several offices within the facilities department were brought into the conversation to discuss utilities infrastructure and maintenance. In addition, representatives of the office that administers campus space had to be consulted. In essence, what IT had thought would be a quick process was significantly lengthened because more consultation was needed (interview, April, 2014). However, in the end, the attorney facilitated an internal conversation which ultimately led to the success of the project. Here the attorney did not advise an outcome, he facilitated one (interview, April, 2014). As Attorney 1 noted, his role is and was not to stop projects or ideas, but to point out issues and “let projects move forward or not, naturally” (interview, April, 2014). In the end, Attorney 1 said that his

role was to help “campus constituents...reach a happy spot on a fairly substantial infrastructure project” (interview, April, 2014).

Another example of this facilitator role was when Attorney 1’s institution decided to renovate its football stadium (interview, April, 2014). Attorney 1’s institution is a Division 1 school with a strong football program. As part of a stadium project, and in order to raise revenue, the athletic department wanted to be able to sell alcohol in new luxury boxes to be built during the renovation. After being approached with this request, Attorney 1 and his colleagues realized that the request might conflict with the campuses’ overall commitment to reduce underage drinking (interview, April, 2014). The general counsel’s office had to “tee up” conversations between athletics and student affairs to get the issue resolved (interview, April, 2014). To Attorney 1, the fundamental role of the general counsel’s office is to point out risks to clients and help the client work through those risk or issues, not to decide for the clients how to proceed.

Attorney 2 has a similar philosophy and related a similar anecdote based on the notion of facilitating a resolution. During the 2011-12 academic year, Attorney 2 was asked to co-chair her university’s Title IX self-study in the area of athletics (interview, April, 2014). While Title IX is now well known for its impact on sexual harassment reporting, prevention, and adjudication on college campuses, the law was and still is in place to ensure, among other things, parity in athletic opportunities for women on college and university campuses (interview, April, 2014). Attorney 2’s panel was charged with looking at the then current situation on campus regarding gender and athletics and to make recommendations to the athletic director for potential changes (interview, April, 2014). Attorney 2’s co-chair was a senior administrator in the athletic department.

At this point it is important to ask, if the argument being made is that the role of an institutional counsel is that of a facilitator, why was Attorney 2 put in a position of authority as co-chair of the committee? On her campus, Attorney 2 was considered an expert on Title IX in athletics (interview, April, 2014). From her early days as a clerk in the then decentralized University Counsel's Office, Title IX had been an area in which she specialized. She not only held the institutional memory on Title IX, she had a facility with the intricacies of the law and the expectations of regulators. As she said, "you're there because you have some legal expertise" (interview, April, 2014). In this case, she used her expertise to help facilitate recommendations on how her institution could better comply with Title IX (interview, April, 2014).

Both Attorney 1 and Attorney 2 indicated one major exception to the institutional counsel as facilitator philosophy—the blatant violation of laws (interview, April, 2014). Attorney 1 directly indicated that if an approach by a client were to violate laws or regulations, it was the duty of the institutional counsel to step in and tell the client they could not proceed. Attorney 2 agreed with that approach. Both Attorney 1 and 2 agreed that it would then be the attorney's role to help the client reach his or her goal while staying in compliance with laws or regulations (interview, April, 2014). Attorney 1 noted that if a proposal from a campus client violated FERPA, HIPAA or other regulatory schemes, he "would not allow a deal to go forward if it did not comply" (interview, April, 2014).

Attorney 3 presented a significantly different picture of the role of the general counsel's office. She acknowledged that part of her role was to advise, but she said that both administrative duties and managing and pursuing or defending litigation were the

office's primary responsibilities (interview, April, 2014). For Attorney 3, advising a client often meant her choosing a course of action. Unlike Attorneys 1 and 2 who felt that it was the client's responsibility to come to a decision, Attorney 3 understood that her "advice" would be followed. She based her views on the fact that people respected her familiarity with the institution. She went to the school for her degrees, she was more experienced and more mature than most administrators, and all of the chancellors she served under were close personal friends (interview, April, 2014).

On the administrative side, Attorney 3 indicated that a great deal of her time was spent ensuring that due process requirements were followed for both students and employees. As she said, "We gave everyone a hearing on everything" (interview, April, 2014). Hearings were clearly time-consuming. Litigation also played a considerable role in her daily practice. Attorney 3 believed that potential plaintiffs saw her institution as having deep pockets. She also alluded to the idea that people viewed her institution as media adverse due to issues it had during the Civil Rights Movement. As a result, people believed that if they sued, the university would settle (interview, April, 2014).

One example of a law suit which she had to defend was an employment discrimination suit based, ironically, in the institution's law school (interview, April, 2014). The law school had done a search for a legal writing professor. The two finalists for the position were an older woman (around 60) who had a law degree and a PhD and a 33-year-old woman with just a law degree. The older woman had taught English but not law. The younger woman had been a permanent law clerk for a federal judge. The University hired the younger woman based on her actual experience. The older woman sued under alleging age discrimination (interview, April, 2014). After a six day trial the

University lost, in part, according to Attorney 3, due to hostility from two African-American jurors. The University appealed to the Fifth Circuit and won on appeal (interview, April, 2014). Preparing for the trial, traveling to the trial site, trying the case, and later pursuing the appeal took a great deal of time for an office of only two people. This was just one example of the litigation Attorney 3 faced during her career (interview, April, 2014).

Regardless of the differences in views on the role of the institutional counsel, there were two significant commonalities. First, they all felt they needed to work zealously for the benefit of their individual institutions. Second, they all agreed that the amount and nature of the work of general counsels offices had grown and diversified since the 1960s, '70s and '80s (interview, April, 2014). It is how offices responded to that work where the discrepancies between Attorney 1 and 2's approach and the approach of Attorney 3 lie.

### **Explaining the Differing Views**

To reconcile the different views of the role of a general counsel's office related by Attorney 1 and 2, and Attorney 3, there are two key factors that need to be considered: the nature of the individual campus and its leadership, and the structure of the office itself. Each will be discussed in turn.

**The nature of the individual campus and its leadership.** The university where both Attorney 1 and 2 work/worked is a campus where shared governance is respected (interview, April, 2014). All classes of employees, from faculty to administrators, have representatives who serve on governance committees. This university is also extremely



decentralized, meaning individual colleges, schools, and units have a significant amount of autonomy over their individual operations, budgets, personnel, and policy (interview, April, 2014). The central university administration plays the important role of coordinating the units, setting the overall mission of the institution, managing the politics of a public university, and supporting the schools and colleges. Both Attorney 1 and Attorney 2 noted that the diffusion of authority is what has helped the institution succeed (interview, April, 2014).

While Attorney 3's institution is similar to that of Attorney 1 and 2, in that it, too, is a public flagship research university, it is smaller and from the outset has had more decision making power centralized in its provost and chancellor (interview, April, 2014). Throughout its history, according to Attorney 3, and in particularly during the Civil Rights Movement (as mentioned earlier, Attorney 3's university is in the Deep South), decision making authority was vested in the central administration, not the units. As Attorney 3 said, the "institution believes in 'shared governance...' but the Chancellor and Provost control decisions" (interview, April, 2014).

At an institution like that of Attorney 1 and Attorney 2, an authoritarian office of the general counsel would not be a viable model. The office's clients are accustomed to making decisions based on the nuances of their individual schools or programs. They would most likely view a general counsel or associate general counsel taking a decision making approach to their work as an intrusion and overstep on the part of the central administration. Given the model of governance and institutional culture of Attorney 1 and 2's institution, the facilitator model is the most appropriate. Contrast that with the more centralized culture of Attorney 3's institution. At Attorney 3's university, the culture

allows for more centralized authority. By Attorney 3's account, units expect decisions to come from the central university administration (interview, April, 2014). This culture would lend itself more toward the institutional counsel suggesting or, in extreme cases, mandating a course of action, and the units following that recommendation. In an organization like Attorney 3's institution, there is little-to-no need for facilitation on the part of institutional counsel.

**The structure of the office.** Another key factor in the nature of the role of the general counsel's office, as gleaned from the conversations with the three attorneys, is the size and structure of the individual general counsel's offices (interview, April, 2014). As mentioned earlier, Attorney 3's office was small with only two attorneys on staff. With challenges such as NCAA investigations, federal investigations, and general litigation, Attorney 3 and her staff did not have the time to facilitate campus discussions about potential issues. While trying to practice Beale (1974), Daane (1985), Mosier & Mosier (1989) and Sensenbrenner's (1974) idea of "preventive law," Attorney 3 lamented that sometimes she did not have the time to focus on proactive policy (interview, April, 2014).

Attorneys 1 and 2 work/worked in a significantly different environment. Under the laws of their state, any litigation against their institution is managed by the institution's general counsel's office but is actually litigated by the state's Office of the Attorney General (interview, April, 2014). In a situation where their university is sued, in essence the institutional attorneys become the clients, and the Attorney General's Office, the lawyers. This model alleviates much of the litigation pressure Attorney 3 felt. In addition to not having to litigate, the size of Attorney 1 and Attorney 2's office was far

larger than Attorney 3's. At its height, which is in the modern day, Attorney 1 and 2's office had over ten attorneys, several paralegals, and additional support staff (interview, April, 2014). While both Attorney 1 and 2 indicated that the workload was still substantial even with a large staff, the mere presence of many attorneys, each with one or two specialties, allowed for more diffusion of work across the office, which in turn gave individual attorneys the ability to spend more time with specific campus clients and issues (interview, April, 2014).

Another important component that differentiates the general counsel's office on Attorney 1 and 2's campus versus Attorney 3's campus is the hierarchy within the office itself. While Attorney 3 was the general counsel on her campus, she only had one associate counsel (interview, April, 2014). The general counsel's office at Attorney 1 and 2's campus had a general counsel, associate general counsels, and assistant general counsels (interview, April, 2014). A model like that creates an environment where the actual general counsel is able to deal with high profile issues while advising the president and provost. Lower level problems can be addressed by associate and assistant general counsels. Take for example the anecdote Attorney 1 shared about the cell towers. On Attorney 3's campus, she would have most likely had to play a role in that decision. On Attorney 1's campus, the IT office would not have considered contacting the general counsel herself (interview, April, 2014). Instead, they contacted Attorney 1, who could take the time and facilitate an institutional discussion of the issue. As these interviews have shown, size and structure of the office is a factor in the role attorneys play on any given campus (interview, April, 2014).

## **A Note on the Role of the General Counsel's Office on the System Level**

While this project focuses on the role of the counsel on the college campus, before concluding the discussion of the role of the institutional counsel, I would be remiss if I did not touch on the role of the counsel within a system office. As mentioned in the introduction to the attorneys interviewed, Attorney 2 moved from a campus based position into a similar role at the same institution's system office. She indicated that while the issues she works with changed, the facilitative nature of her role has not changed (interview, April, 2014). On campus, Attorney 2 dealt with Title IX, students, and some employment issues. At the system level, she currently does the same type of work but serves as support for smaller, less financially resourced campuses in the system. A large part of her work is also supporting the system's Board of Governors. She indicated that this work requires a great deal more political thinking since the Board is a political entity. Attorney 2 noted, "There's a political component to the job here that is not so direct...as it was on the campuses" (interview, April, 2014). The work also requires that she think in terms of how she can facilitate a centralized or legislative approach to an issue. Here again, her role is not to make decisions but to facilitate people coming together to make decisions that impact many campuses and constituents—a similar role to an on campus counsel, but on a larger and perhaps more sensitive scale (interview, April, 2014).

The preceding sections in this chapter were designed to explore the question: How do institutional counsels view their roles within the institutional bureaucracy? This question was addressed through interviews with attorneys who either represent or represented institutions of higher education. Through the use of open-ended questions

designed to elicit descriptive responses, data was collected which helped answer the research question. The results of the interviews show that an attorney's view of his or her role depends on his or her individual background, the nature of the campus, and the structure of the office in which he or she works.

Oral History research is by its very nature subjective (Ritchie, 2003). The data and conclusions in the preceding sections are therefore subjective as well, in that the opinions of the interviewees were based on their personal experiences. The next section of this chapter is designed to provide additional context for those opinions by comparing and contrasting the interviewees' opinions on the role of the general counsel with accepted literature on the role of the academic dean, another senior position in institutions of higher education. This context is important as it provides an additional frame in which to look at the research question which guides this chapter.

### **General Counsels in Context: Institutional Counsel vs. the Academic Dean**

As mentioned in Chapter One of this dissertation, there has been relatively little written in the literature of higher education on the role of the general counsel. While this chapter has explored perceptions of the role of the general counsel through interviews, it is important to provide some comparative context for the general counsel position within the bureaucracy of modern higher education. In order to accomplish this goal, this section will briefly compare the role of the general counsel to the role of the academic dean. The role of the dean was chosen because, like the general counsel, it is a senior level position within an institution of higher education—reporting to either the president, in the case of a small liberal arts college, or the provost at a larger university (Amherst College, 2012;

UNC, 2013b). In addition, the role of the dean has some striking similarities to the general counsel roles, but also some stark differences. There is also a significant corpus of literature on the role of the dean.

In 1930, Herbert Hawkes, then Dean of Columbia College at Columbia University wrote “[t]here is no such thing as a standardized dean” (Gould, 1964, p. 9). Hawkes was essentially saying that one could not take a dean from one institution and insert him or her into the deanship at another institution and expect the same results. Individuals who accept dean positions come from varied backgrounds. Like dean roles, the same can be said for individuals who enter the in-house practice of higher education law. As noted in the interviews, attorneys who join university counsel offices often times come from various practice background and have varied interests. Attorney 1, for example came from a financial practice backgrounds, while Attorney 3 was a litigator (interviews, April, 2014). In a similar vein, an academic dean could come from a field such as sociology or a hard science like physics. In both instances, both in-house counsel and deans can bring unique perspectives to their roles.

While the individuals who eventually hold dean and in-house counsel positions may come from different practices or scholarship fields, they are similar in the fact that, for the most part, there is a set path to follow to either the dean or in-house counsel positions (interview, April, 2014; Wolverson, et al., 2001). As both Attorney 1 and 2 noted in their interviews, the most common means to an associate counsel or general counsel position is to first gain experience in a law firm setting (interviews, April, 2014). The firm environment allows attorneys to learn practical skills to use later in their career. Deans follow a similar path. In a 2001 monograph on the changing nature of the dean

position, Mimi Wolverton and her co-authors discuss a 1981 book by V.C. Morris which suggested paths to a deanship (Wolverton et al., 2001). The most common of Morris' paths was "professional ascension" (Wolverton et al., 2001, p. 10). "Professional ascension" involved faculty members working their way through the ranks from assistant professor to associate professor to professor and then to a deanship, or gaining tenure then going on to an administrative track. Like the law firm experience for attorneys, in that as attorneys stay at a firm longer they get more and more independent responsibility, progression through the faculty ranks allowed prospective deans the opportunity to gain experience in both in understanding faculty issues and in working with colleagues. In addition, as the attorneys interviewed noted, the most common path to an in-house counsel position was through a firm (interviews, April, 2014). A 1964 study showed that most deans had, like general counsels, progressed through the ranks. The study showed that 82 percent of deans had established academic careers and ascended through the faculty ranks before becoming a dean (Wolverton et al., 2001).

To understand a primary difference between the role of a dean and the role of a general counsel it is important to understand the history of the office of the dean on college and university campuses. The first dean at a US college or university was appointed in 1870 at Harvard (Dibden, 1968). The Board of Governors, along with President Eliot, deemed that the President of the University had too much to do (Dibden, 1968). The "Dean of the College Faculty" was appointed to preside over faculty meetings and to deal with students, both in admitting them and disciplining them. In addition, the dean was charged with administering aid programs and certifying students for graduation (Dibden, 1968).

Between the late 19<sup>th</sup> and early-mid 20<sup>th</sup> centuries the role of the dean included both administrative and teaching responsibilities (Wolverton et al., 2001). However, by the time World War II started, deans “actively supervised curricula, faculty, and budgets, with less of their time devoted to interaction with students” (Wolverton et al., 2001, p. 13). By the 1960s, presidents had delegated significant administrative authority to the academic dean due to “expansion problems” and “public scrutiny” (Wolverton et al., 2001, p. 14). In essence, presidents had to deal with external issues and did not have the time to address internal academic problems. By the 1960s, the delegated functions of the dean had expanded to include: directing the educational activities of the institution, being the chief advisor to the president, formulating educational policies, developing the budget for either the academic enterprise of the institution or his or her academic unit, supervising curriculum and instruction, and finally the hiring and review of faculty (Dibden, 1968). The position evolved even further in the 1970s and 1980s when finding economic efficiencies became a priority for institutions (Wolverton et al., 2001).

The shifts noted above are another key similarity between the general counsel and the academic dean. The previous chapter presented justification for the argument that external forces created the need for an in-house legal practice on campus. Wolverton et al. (2001) and Dibden (1968) were essentially making the same argument—that is that external forces, growth, and the ramifications of that growth created the need for the academic dean to take some delegated authority from an institution’s president. While the basic impetus for the creation of the general counsel and the dean might be similar, as will be discussed below, that issue of delegated authority is a key difference between the general counsel and the academic dean.



The office of the college dean is far older than the office of the general counsel. It has therefore become far more institutionalized within the bureaucracy of higher education. The institutionalization and evolution of the dean's office has also resulted in substantial delegated authority which general counsel offices do not have (interviews, April, 2014; Wolverton et al., 2001). Deans have the authority to hire faculty and set courses of action regarding programs (Dibden, 1968; Wolverton, et al., 2001). Most importantly, deans have the ability to allocate both financial and facility resources to programs and people (Dibden, 1968; Wolverton, et al., 2001). These powers allow deans to alter how institutions function. General counsels and general counsel's offices do not have this inherent authority. Their function is to serve and advise institutional clients like dean's offices (interviews, April 2014). Attorney 3 indicated that often her advice was followed by her campus clients (interview, April, 2014). While she may have had significant sway with decision makers, in the end the client chose to follow her advice and most likely communicated the course of action to either internal or external constituents. This power to directly cause change is the key distinction between the purposes of a general counsel versus a dean.

The general counsel, particularly at a large institution, also has a significantly larger scope of involvement in university affairs. A dean at a large institution has primary responsibility for his or her college or school (Wolverton et al., 2001). Institutional counsel are involved with virtually every college, school, non-academic unit, or in some cases, healthcare enterprise on campus (interviews, April, 2014). This scope of responsibility is also a key distinction between the offices.

Regardless of the range of responsibility both offices, as evidenced by the interviews for the general counsel's office or by the literature for the office of the dean, the individuals who hold the offices have to be consensus builders and facilitators (Dibden, 1968; Gould, 1964; interview, April, 2014; Tucker & Bryan, 2001; Wolverton et al., 2001). While the dean holds considerable delegated authority, as Dibden (1968) noted: "the faculty has a right to be consulted and to make decisions on educational questions...A dean succeeds with the consent of the governed" (Dibden, 1968, p. 65). In order to be successful in a tenure system, a dean has to facilitate agreement, or at least acceptance, on the part of his or her faculty. As noted during the interviews with institutional counsel, the same facilitation and consensus building skills are needed when negotiating issues between and among departments.

The office of the academic dean and institutional counsel both share senior status within an institutional hierarchy (Amherst College, 2012; UNC, 2013b). In addition, both positions have a general path individuals follow to gain their posts (interviews, April 2014; Wolverton et al., 2001). Both positions were also conceived out of necessity due to external pressures on the institution (Bickel, 1974; Dibden, 1968; Ruger, 1997; Sensenbrenner, 1974). The positions also require similar consensus building and facilitation skills (interviews, April, 2014; Wolverton et al., 2001). However, because of its history and delegated authority, the office of the academic dean has a far greater ability to affect an outcome reflective of its incumbent. In addition, academic deans have the ability to take unilateral action in the academic arena (Dibden, 1968; Wolverton et al., 2001). General counsel, as evinced by the interviews conducted for this dissertation, do

not have unilateral authority; their position within the hierarchy is one of consultation (interviews, April, 2014).

The discussion in the preceding section was designed to provide a point of comparison for the role of the general counsel, as articulated by the interviewees, within some of the accepted literature of higher education, specifically on the role of the academic dean. As alluded to in Chapter Three, one criticism of Oral History Methodology is that it can be subjective. One way to counter that subjectivity, as noted in Ritchie (2003) and Kyvig & Marty (2010) is to provide historical context for the Oral History. The discussion of the general counsel versus the academic dean is an example of that historical context. In addition, comparison with the dean role provides an additional insight into role of the general counsel by placing this new area of inquiry up against an area of study which is well established. This discussion, along with the results of the interviews above, all help provide greater awareness of the role of the general counsel within an institutional bureaucracy.

### **Concluding Observations**

In addition to specifically addressing the interviewees' views of the role of the general counsel's office, the interview protocol for this project also asked questions relating to challenges facing general counsel's offices and how the interviewees saw those offices evolving over the next ten to twenty years. It was with these types of questions where the Oral History Methodology was not overly effective. The interviewees each took the questions to have different meanings. For example, when asked about challenges Attorney 3 took the question to mean while she was practicing.

As such, she responded with NCAA issues and federal investigations (interview, April, 2014). Attorney 1 answered in more global terms emphasizing the ebb and flow of work, changing priorities of institutions, the balancing of urgent and non-urgent matters, and prioritizing work (interview, April, 2014).

Similarly, when talking about the future of the general counsel's office on campuses, the attorneys had significantly different responses. Attorney 3 talked about new areas of law that campuses will need to face, i.e., Title IX in the area of sexual misconduct and the Americans With Disabilities Act, while Attorney 2 talked the need for more client counseling and dealing with more interdisciplinary issues (interview, April, 2014). Attorney 1 felt that general counsels would have to deal with online and international education issues (interview, April, 2014). While methodology used for these interviews and the ultimate outcome makes it difficult to reconcile these views, possible explanations could be again, the nature of each person's campus environment, and the attorneys' individual backgrounds and approaches to the practice of law.

This chapter was intended to present, discuss, and compare and contrast three different in-house university counsels views on the role of college and university counsel within an institutional bureaucracy. While the methods may have made the discussion more difficult, the ultimate outcome showed that the campus environment and structure of the counsel's office play a significant part in the role that attorneys have on campus. In addition, the comparison of the general counsel role to that of the academic dean provided additional insight into the counsel's role within an institutional bureaucracy. The next and final chapter, will conclude this dissertation by looking back at the initial

hypotheses, methodology, and discuss remaining questions and potential topics for additional research.

## **CHAPTER 6**

### **Concluding Thoughts**

A dissertation such as this one, in addition to being well written and researched, has to provide the reader with some form of knowledge or analysis which is either new in its origin or expands upon previous literature in a novel way. This project was designed to accomplish both of those goals. First, through the use of documentary evidence, this dissertation fully expanded on assertions which had not previously been explained in significant detail (Bickel, 1974; Ruger, 1997; Sensenbrenner, 1974). Specifically, this dissertation addressed the question: What examples can be offered to support previously made assertions that the impetus for the proliferation of in-house university counsel offices in the 1960s, 1970s and 1980s was, in part, the result of increased governmental regulation and litigation? Second, this project, for the first time, used a qualitative, interview based approach to understand how institutional counsel view or viewed their roles on campus. While this data was exploratory and limited in scope, as discussed later in this chapter, it did present a novel approach to the issue which could be expanded upon in later research. In addition, this project placed the role of the general counsel in context by comparing it with the role of a dean as presented in established literature.

Chapter Four answered the first research question by elaborating on previous literature which asserted that both courts' consideration of cases involving faculty and student rights, and increased regulation on the part of federal and state governments, necessitated in-house legal practices on campuses (Bickel, 1974; Ruger, 1997; Sensenbrenner, 1974). Chapter Four provided concrete examples of increased regulations on the part of the federal and state governments. Chapter Four also detailed the

progression of courts' relationships with colleges and universities from one based on contract law, to providing institutions with significant deference, to applying Constitutional principles to disputes involving faculty and students.

Chapter Five answered the second research question of this dissertation: How do institutional counsels view their roles within the institutional bureaucracy? Chapter Five found that two of the three attorneys interviewed saw their role, not as passive advisers, nor decision makers, but as active facilitators working with campus clients to find the best and most comprehensive approach to remedying a client's issue (interviews, April, 2014). Attorney 3, through her decision-maker approach to her general counsel position, showed that there is no absolute when discussing the role of an institutional counsel (interview, April, 2014). Chapter Five also showed that the nature of campus leadership and the structure of the office on any given campus also impact the role of institutional attorneys. Additionally, Chapter Five provided insight into the role of the institutional counsel by comparing and contrasting the opinions of the interviewees with established literature on the role of the academic dean. This comparison provided an additional, more proven frame with which to analyze the interview data.

While the ultimate outcome of the interview portion of this study was consistent with my initial hypotheses, after analyzing the data, I believe that my adherence to strict Oral History principles may have hampered the consistency of my data. As discussed in Chapter 3, Oral History interviews call for broad, open-ended questions and discourages follow-up from the interviewer (Ritchie, 2003). The goal is to allow for a story to be told. The open-ended questions, from my perspective, were fairly clear. Unfortunately, the interviewees took questions to have different meanings. For example, two of the

interviewees took the question: “What are the greatest challenges you faced as a General Counsel?” as a broad question about the field at large. The other attorney took it as it was written and focused on her specific practice (interview, April, 2014). This made reconciling the data difficult.

When I was drafting Chapter Five, I began to think that one additional factor that could determine how an attorney viewed his or her role was their individual personality. The Oral History interviews provided insight into the individual attorney’s mind-set. I decided not to include that discussion because I did not feel I had the training or competency in psychology to make that analysis. Had the questions been more specific, I could have focused the conversation more on issues I have the expertise to discuss.

In the end, this study may have been enhanced through the use of a more structured interview protocol with very specific questions and an interviewer who made sure that the interviewees answered those questions. The problem with that approach is that the anecdotes may not have been as rich (Kyvig & Marty, 2010, Ritchie, 2003). Information about the perceived role of the in-house university counsel could also have been obtained in the same manner as Geary (1975), Ripps (1980), and Thompson (1977)—through the use of surveys. The problem with qualitative surveys is that the researcher is not there to ensure questions are being answered in the way he or she intended. Surveys produce the same issue as the Oral History approach did, although probably with less detail. Quantitative surveys, most likely, would not provide detailed and nuanced enough information. For a project like this, the personal interaction component is key. If someone else were to undertake a similar project, I would recommend the use of a more structured interview protocol.



Another difficulty encountered was an inability to locate actual documentation from a college or university showing why the institutional general counsel's office was created. While Attorney 3, during her interview, indicated that increased regulation, and litigation were primary drivers of the need for counsel, it was difficult to find any official documentation verifying that opinion. I was able to obtain a budget statement from the University of Mississippi which indicated an attorney was brought on staff in 1978. Unfortunately, the document did not indicate why. At The University of North Carolina at Chapel Hill, I was able to locate newspaper articles from as early as the late 1970s discussing the institution's attorney (then referred to as an assistant to the chancellor). However, there was no archival information on the appointment of that individual or the transition of that person into the University Counsel role. One explanation could also be, as communicated to me by a former provost of The University of Mississippi, that institutions included money for an institutional counsel's office in omnibus budgets and board members either did not discuss or choose to raise the issue when the budget was approved (G.W. Walton, personal communication, August, 30, 2014). In essence adding institutional counsel was an administrative action which did not require the type of documentation which would end up in an archive.

This project was meant to provide background and baseline information to serve as a springboard for a more detailed look into the dynamics between campus counsel offices and college and university campuses. Additional studies could expand this study by asking the same questions but taking a different or refined methodological approach. In addition, a researcher might want to undertake the tangential question of how other administrators or units view the role of the campus general counsel. Another interesting

study would be to find a way to quantify just how much actual influence campus counsel have on decision-making on campus. On the documentary side of this dissertation, a researcher might want to look at how case law from the 1980s to the present has influenced the practice of college and university in-house counsel. In addition, a study to expand on the comparison with the academic dean could be undertaken to compare the role of the institutional counsel compares to that of other senior on-campus leadership. Needless to say, the topic of institutional counsel is a deep and under-researched area of study in the field of higher education.

From as far back as the Dartmouth College case in 1819, which was an early court case involving an institution of higher education, to the present day, the law has impacted college and university campuses. As courts have changed their methods of analysis and governments increased their regulatory requirements, the need for lawyers to help colleges and universities navigate the processes associated with litigation and regulation has grown exponentially. Through the use of documentary analysis and interviews, this dissertation has sought to provide some additional and detailed insight into the foundations of the in-house legal practices on college and university campuses. There is no doubt in my mind that as the years move forward, the size of the offices and complexity of the issues they face will continue to grow. Just as higher education scholars have looked extensively into the roles and persona of presidents, provosts, and deans, it is my hope that soon those that study higher education will turn their attention to general counsels, for they, too, represent an important component of the operation and governance of colleges and universities.

Dear Sir or Madam:

I am writing to request your participation in an historical research study designed to understand the impetus for, and current role of, the office of the general counsel on college and university campuses. This study is the culminating activity in my Doctor of Philosophy program in Higher Education at the University of Kentucky.

Past studies of the office of the general counsel have focused on survey data. In this project I am taking a more qualitative approach utilizing historical documents and Oral History. An Oral History approach to a topic seeks to document an individual's past experiences and recollections of an event or series of events. I am interested in discussing with you how you developed a professional interest in higher education law, how you ended up working in a college or university environment, what your role was, what the role of your office was, and finally how and if you saw or see the role of the general counsel changing over time.

Oral History sessions are designed to present the subject with open ended questions and to allow the subject to relate information in as unencumbered a way as possible. Due to the limited scope of this project, I foresee this conversation as lasting no longer than an hour and a half.

Our conversation will be recorded for transcription. In the actual dissertation only general information will be used to identify the source of the data i.e. "former associate general counsel at a large public university." Following the successful defense of the project all transcripts and recordings will be destroyed. I am open to meeting with you at a time and place of your choosing or via electronic methods such as Skype.

My research is being supervised by Dr. John Thelin, Professor of Education and Public Policy at the University of Kentucky. If you have any questions or concerns that I cannot address please feel free to contact Dr. Thelin at [john.thelin@uky.edu](mailto:john.thelin@uky.edu).

It is my sincere hope that you will agree to participate in this project. An Oral History approach to the role of the college/university general counsel's office is a novel one. I have no doubt that the information you provide will be invaluable to this endeavor. Please feel free to contact me with any questions. I look forward to talking with you soon.

**Consent to Participate in a Research Study**

**The Law Comes to Campus: The Historical Underpinnings and Current Role of the College and**

**University General Counsel's Office**

**WHY ARE YOU BEING INVITED TO TAKE PART IN THIS RESEARCH?**

You are being invited to take part in a research study about the history and current role of the Office of the General Counsel on college and university campuses. If you volunteer to take part in this study, you will be one of about 4 people to do so.

**WHO IS DOING THE STUDY?**

The person in charge of this study is Jason A. Block, M.S.Ed, JD of University of Kentucky Department of Educational Policy Studies and Evaluation. He is being guided in this research by Dr. John Thelin, University Professor of Education. There may be other people on the research team assisting at different times during the study.

**WHAT IS THE PURPOSE OF THIS STUDY?**

The purpose of this study is to gain insight into the role of the college or university counsel on the modern day college or university campus. Information gleaned from this study will be used to expand the knowledge base regarding the campus attorney and his or her role within the bureaucracy of institutions of higher education.

**WHERE IS THE STUDY GOING TO TAKE PLACE AND HOW LONG WILL IT LAST?**

The research procedures will be conducted via telephone using Oral History interview methodology and at a time convenient for the Oral History interviewee. Your one-time participation should require 45-60 minutes. The interview will be recorded for transcription.

**WHAT WILL YOU BE ASKED TO DO?**

You will be asked to participate in an Oral History interview with Mr. Block. You will be asked a series of questions about your professional background, how you came into a general counsel or associate general counsel role and you opinions on the role of the Office of the General Counsel. You may also be asked to share, in as much detail as you are comfortable giving, anecdotes to explain your opinions. Your answers will be audio recorded for accuracy. Following the interview you will be provided with a transcript and asked to correct any errors or clarify any statements you deem necessary.

**WHAT ARE THE POSSIBLE RISKS AND DISCOMFORTS?**

To the best of our knowledge, the things you will be doing have no more risk of harm than you would experience in everyday life.

**DO YOU HAVE TO TAKE PART IN THE STUDY?**

If you decide to take part in the study, it should be because you really want to volunteer. You will not lose any benefits or rights you would normally have if you choose not to volunteer. You can stop at any time during the study and still keep the benefits and rights you had before volunteering.

#### **WHAT WILL IT COST YOU TO PARTICIPATE?**

There are no costs associated with taking part in the study.

#### **WILL YOU RECEIVE ANY REWARDS FOR TAKING PART IN THIS STUDY?**

You will not receive any rewards or payment for taking part in the study.

#### **WHO WILL SEE THE INFORMATION THAT YOU GIVE?**

We will make every effort to keep private all research records that identify you to the extent allowed by law.

Your information will be combined with information from other people taking part in the study. When we write about the study to share it with other researchers, we will write about the combined information we have gathered. You will not be personally identified in these written materials. We may publish the results of this study; however, we will keep your name and specific identifying information private. In the final document the only identifying information that will be used is your role/former role and the type of institution you work/worked for, i.e. Associate General Counsel at a large public university.

We will make every effort to prevent anyone who is not on the research team from knowing that you gave us information, or what that information is. The recordings will be maintained on an encrypted server until the completion of the study. Transcripts of the interviews will be maintained in text form without personal identification and will be destroyed six years after the successful defense of the dissertation.

We will keep private all research records that identify you to the extent allowed by law. However, there are some circumstances in which we may have to show your information to other people. Also, we may be required to show information which identifies you to people who need to be sure we have done the research correctly; these would be people from such organizations as the University of Kentucky.

#### **CAN YOUR TAKING PART IN THE STUDY END EARLY?**

If you decide to take part in the study you still have the right to decide at any time that you no longer want to continue. You will not be treated differently if you decide to stop taking part in the study. The individuals conducting the study may need to withdraw you from the study. This may occur if you are not able to follow the directions they give you, if they find that your being in the study is more risk than benefit to you, or if the agency funding the study decides to stop the study early for a variety of scientific reasons.

#### **WHAT IF YOU HAVE QUESTIONS, SUGGESTIONS, CONCERNS, OR COMPLAINTS?**

Before you decide whether to accept this invitation to take part in the study, please ask any questions that might come to mind now. Later, if you have questions, suggestions, concerns, or complaints about the study, you can contact the investigator, Jason Block, at 919-962-7989. If you have any questions about your rights as a volunteer in this research, contact the staff in the Office of Research Integrity at the University of Kentucky at 859-257-9428 or toll free at 1-866-400-9428. We will give you a signed copy of this consent form to take with you.

\_\_\_\_\_  
Signature of person agreeing to take part in the study

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed name of person agreeing to take part in the study

\_\_\_\_\_  
Name of [authorized] person obtaining informed consent

\_\_\_\_\_  
Date

1. Please describe how you became interested in practicing law?
2. Please describe how you came into the role of a General Counsel for a higher education institution?
3. Please describe what you see as the modern day role(s) of the University Counsel/University Counsel's Office on a college or university campus?
4. With as much or as little detail as you feel comfortable sharing, can you provide me with an example of how you fit into that role?
5. How do you think other University administrators view/viewed the role of the Counsel's Office?
6. With as much or as little detail as you feel comfortable sharing, can you provide me with an example of how that view impacted interactions between the OGC and the departments/offices?
7. What are the greatest challenges you faced as a GC?
8. With as much or as little detail as you feel comfortable sharing, can you provide me with an example(s) of how you overcame those challenges?
9. How do you think practicing in a college or university environment differs from practicing in private practice? As in-house counsel at a for profit entity?
10. Why do you think Offices of General Counsel have grown in size and scope in the past 30 or so years?
11. Where do you see the in-house practice of law on college and university campuses going in the next 20-30 years?

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*academic deanship*. San Francisco: Jossey-Bass.

## VITA

JASON A. BLOCK

### I. EDUCATION

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**Doctor of Jurisprudence, 2007**

The Ohio State University, Moritz College of Law  
Admitted to the Ohio Bar (on inactive status)

**Master of Science in Education, 2004**

The University of Pennsylvania, Graduate School of Education  
Higher Education

**Bachelor of Arts, *summa cum laude*, 2003**

Dickinson College

*Phi Beta Kappa*, Presidential Scholarship, Mullin Prize for Excellence in Political Science, Shuman Award for Freshman Excellence.

### II. PROFESSIONAL EXPERIENCE

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**Program Compliance Coordinator**

Office of Institutional Research and Assessment  
University of North Carolina at Chapel Hill, Chapel Hill, NC (June 2013-present)

**Distance Learning Law and Policy Associate**

Office of Distance Learning Programs  
University of Kentucky, Lexington, KY (May 2012-June 2013)

**Director of Student Rights and Responsibilities**

Gettysburg College, Gettysburg, PA (August 2008-July 2010)

**Assistant Director of Residential Life**

Kenyon College, Gambier, OH (August 2007-April 2008)

### III. PUBLICATIONS

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Hutchens, N.H., Young, M., & **Block, J.A.** (2012, October 25). Testing the limits of faculty authority: Graduate students challenge professionalism standards as infringement of First Amendment rights. *West's Education Law Reporter*.

**Block, J.A.** (2013). "Prompt and equitable" explained: How to craft a Title IX compliant sexual harassment policy and why it matters. *The College Student Affairs Journal*, 30(2), 61-71.

Hutchens, N.H., Wilson K.B., & **Block, J.A.** (2013). "But we don't want them in our group:" Legal challenges by student organizations to campus nondiscrimination policies. *Journal of College and University Law* 39(3), 541-566.

Hutchens, N.H., **Block, J.A.**, & Young, M. (2013). Counselor Educators' Gatekeeping Responsibilities and Students' First Amendment Rights. *Journal of Counselor Education and Supervision*.

#### **IV. PAPERS, PRESENTATIONS, BOOK REVIEWS**

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**Block, J.A.** (2011). *Title IX and sexual misconduct: Understanding the modern legal and policy requirements*. Poster presented at the Education Law Association Annual Conference in Chicago, Illinois. November, 2011.

Hutchens, N., Wilson, K., & **Block, J.A.** (2011). "*CLS v. Martinez*" and evolving notions of judicial deference to co-curricular decisions. 75 minute session presented at the Education Law Association Annual Conference in Chicago, Illinois. November 2011.

**Block, J.A.** (2012). *Title IX and campus sexual harassment: Understanding the past and addressing the future*. 75 minute session presentation at the Association for Student Conduct Administration Annual Conference in St. Petersburg, Florida. February 2012.

Wilgus, J., Giacomini, N., & **Block, J.A.** (2012) *Did the OCR get \_\_\_\_\_ right?* 60 minute facilitated roundtable discussion at the Association for Student Conduct Administration Annual Conference in St. Petersburg, Florida. February 2012.

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