THE ROLE OF GOVERNMENT ATTORNEYS IN REGULATORY AGENCY RULEMAKING

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I

INTRODUCTION

Every time a federal regulatory agency exercises its power to write rules to govern private conduct, it must be prepared to resolve a wide variety of technical, economic, political, and legal issues. To assist them in these efforts, the agencies have invented a variety of internal decisionmaking models to bring different kinds of expertise to bear on regulatory problems. Legal expertise is nearly always required at some stage of the internal decisionmaking process because regulatory agencies are created by statute, agency powers are vested and limited by statute, and virtually all agency rules are subject to judicial review for substantive rationality, procedural correctness, and fidelity to those statutes and the Constitution. Agency lawyers from the Office of General Counsel (sometimes called the Office of the Solicitor) therefore play important roles in internal agency decisionmaking. Not surprisingly, the roles that agency lawyers play in many ways mirror the roles that reviewing courts play in reviewing agency rules under the Constitution, agency statutes, and general statutes like the Administrative Procedure Act ("APA").[1]

This essay will explore the many roles that agency lawyers can play in the internal processes of developing proposed rules and responding to public comments on those rules. After briefly describing the two predominant models of the internal decisionmaking process from the lawyer's perspective, the essay will examine how the agency lawyer functions within those models. In virtually all rulemaking contexts, agency lawyers have the power to determine external

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1. 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 511-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1994)). This essay focuses exclusively on the role of lawyers in the office of an agency that is assigned the role of providing general legal advice to the agency head or heads. In many federal agencies, attorneys are employed by several offices that might need legal expertise of one form or another. For example, the enforcement office typically employs attorneys to assist in enforcing the agency's regulations after they are written. To give the agency an understanding of how its rules will play out in the real world where they have to be enforced, the enforcement office usually plays a role in the original rulemaking exercise. That office, however, does not typically provide general legal advice about procedural correctness or the proper interpretation of the agency's statute. The latter role is ordinarily filled by a lawyer from the less specialized Office of General Counsel.

procedures, to veto aspects of proposed rules that they find to be unlawful, and to demand that the technical and economic staffs come up with more persuasive rationales for their resolution of controversial issues. In many rulemaking contexts, lawyers also have the power to mold the substance of agency rules to fit their own policy preferences or what they deem to be the policy preferences of the reviewing judges. In the final analysis, however, agency lawyers are only as influential as politically accountable upper-level decisionmakers allow them to be, and this usually depends upon the degree to which upper-level decisionmakers trust the judgment of the particular lawyers with whom they deal on a daily basis.

II

DECISIONMAKING MODELS

Federal regulatory agencies have invented many decisionmaking models for bringing different sorts of expertise to bear on important issues that the agencies must resolve as they promulgate rules.[2] From the lawyer's perspective, however, only two models are relevant—the team model and the assembly line model.

A. The Team Model

The team model is the predominant model for internal agency decisionmaking in the context of informal rulemaking.[3] In agencies employing this model, the tasks of drafting the proposed rule, responding to public comments, and coming up with a defensible rationale for the final rule are delegated to a "team" or "work group" composed of representatives from all of the agency subunits that have an interest in the outcome of the rulemaking process. Ordi-

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2. In describing the role that regulatory analysis plays in federal agency rulemaking, I have suggested four distinct models for bringing economic expertise to bear on issues that arise in the rulemaking process: the team model, the hierarchical model, the adversarial model, and the outside adviser model. *See* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991). The adversarial and outside adviser models, however, rarely describe the role that lawyers play in the internal rulemaking process. Although agency lawyers frequently develop antagonistic relationships with other programs in an agency, I know of no agency that has consciously designed the decisionmaking process to pit legal expertise against technical or economic expertise in the way that the National Highway Traffic Administration of the 1980s pitted its engineers in the Rulemaking Office against the economists in the Office of Plans and Programs. *See id*. at ch. 15. I am also unaware of any agency that relegates its lawyers to the very modest role of an outside adviser who is called upon only when legal expertise is deemed necessary. *See id*. at ch. 13. While it is entirely possible that some agencies relegate their lawyers to a speak-when-spoken-to status in the rulemaking process, legal expertise is usually so important to yielding a rule and accompanying analysis that will survive judicial review that lawyers in the Office of the General Counsel are at the very least given veto power over issues involving procedural correctness and statutory interpretation. Thus, the team and the hierarchical models best describe the lawyer's role in the rulemaking process. Instead of the term "hierarchical," however, I employ the "assembly line" metaphor in this essay to avoid the misleading impression that agency lawyers occupy any particular position in an agency's decisionmaking hierarchy.

3. For more a more detailed description of the team model, see *id.* at ch. 14; Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57 (Autumn 1991).

narily, a single "program office" within the agency bears the ultimate responsibility for the rule, and a representative from that office chairs the team. In addition to the chairperson, the team typically includes representatives from the policy office (the office responsible for preparing regulatory impact assessments), the enforcement office, one of the agency's regional or field offices, and the Office of General Counsel.

The team meets regularly to discuss regulatory options, address newly arising issues, respond to informational demands of upper-level decisionmakers, and resolve disputes among team members. Individual team members or small subcommittees often take responsibility for particular tasks. Ordinarily, a member of the team with expertise in a particular area is given the primary responsibility for addressing issues that arise in that area. Copies of memoranda, rulemaking and regulatory analysis documents, and other decisionmaking documents are circulated to team members for review and comment. All team members are regarded as co-equal participants in the decisionmaking process, and there is usually strong pressure, deriving from both the group psychology of the effort and from upper-level decisionmakers, to reach consensus on important questions.

When consensus proves illusive, disputes are resolved in various ways. If a member of the team feels strongly enough about the issue, he or she may elevate the dispute to higher levels within his or her office. If the higher-ups cannot resolve the matter, it can be left open in the team's closure memorandum for resolution by the agency head. However, team members can only elevate disputes on a limited number of occasions or risk fracturing the overall consensus necessary for the effective operation of the team model.

B. The Assembly Line Model

Under the assembly line model, the program office takes complete responsibility for drafting the regulation and supporting documentation, including the all-important *Federal Register* notices. The office may consult other offices during the drafting process on issues for which it needs their expertise. For example, if it believes that resolution of a particular issue requires legal analysis, the program office asks the Office of General Counsel to draft a memorandum addressing that narrow question. Similarly, the program office may ask regulatory analysts in the policy office to prepare the relevant regulatory analyses; in many large agencies, however, the program office employs its own analysts for this task.

Once the program office has come up with a relatively complete draft of the rule and supporting analysis, it circulates the package to other relevant offices for "sign-off" prior to sending it to the agency head for consideration. If one of the other offices has a problem with the program office's work product, the internal decisionmaking process comes to a halt while the two offices attempt to iron out their differences. While minor changes are usually accomplished through memoranda and telephone calls, disagreements on major issues may

result in a meeting of high-level officials from several offices. The power to hold up the process pending "sign-off" provides leverage in cases in which the program office is under pressure to produce a rule by a particular deadline. At some point, however, the program office can take the matter directly to the agency head for resolution.

III

ROLES FOR AGENCY LAWYERS

Agency lawyers play different roles in different agencies, and, even within the same agency they may play different roles in different rulemaking contexts. Within an agency, the lawyer's role is determined to some degree by the politically appointed official or officials at the top of the agency. But the leadership's desires are by no means the only determinant of the lawyer's role. The Office of General Counsel is a critical agency participant in the internal rulemaking process whose function outlasts the tenure of any single agency head. More importantly, since nearly every rule of any consequence is subject to judicial review by aggrieved parties, the agency lawyer has an important function to play in advising the relevant agency decisionmakers on the many aspects of the rule that might be challenged in court. To an even greater degree than the desires of the agency leadership, the judicial decisions that set aside agency rules for procedural incorrectness, erroneous interpretations of agency statutes, and substantive irrationality determine the role that agency lawyers play in the rulemaking process. The discussion below focuses on six prominent roles that agency lawyers play in agency rulemaking.

A. Interpreter

The primary measure of the legitimacy of an agency's exercise of rulemaking power is the statute under which the agency acts. As every administrative lawyer knows, however, Congress does not always speak with precision when it writes the statutes that empower the regulatory agencies. In virtually all agencies, the Office of General Counsel performs the role of statutory interpreter. In the assembly line context, the program offices frequently request written opinions from the agency's legal office on critical questions of statutory interpretation that arise as the program office struggles to implement a new statute or as novel questions arise under older statutes during the rulemaking process. Rulemaking initiatives employing the team model involve one or more agency lawyers from the outset to flag any important interpretational questions that might not be immediately apparent to nonlawyers in the program office. Minor legal questions are often resolved on an *ad hoc* basis at team meetings, but important or recurrent issues are typically addressed in formal legal memoranda signed by the General Counsel or a senior agency lawyer.

The Supreme Court's landmark *Chevron*[4] decision greatly enhanced the importance of the agency lawyer's role as interpreter in the rulemaking process. The *Chevron* Court held that, in cases of statutory ambiguity, courts must defer in varying degrees to agency interpretations of the statutes that they administer.[5] Although the correctness and significance of the *Chevron* holding has been much debated among administrative law scholars,[6] its significance for agency lawyers is clear. The interpretation that a junior agency lawyer places on critical statutory language may be the final word on what that language means, even though three or more highly credentialed judges are also asked to opine on that meaning. When the Court speaks in grandiose constitutional terms of proper judicial deference to the Executive Branch in the context of agency rulemaking, it is really speaking of deference to the interpretational ability of agency lawyers.

Ironically, continued judicial deference to agency interpretations under the *Chevron* doctrine could ultimately reduce the power of agency lawyers in the internal decisionmaking context. As officials in the program and policy offices become convinced that reviewing courts will in fact defer to agency interpretations of ambiguous statutory terms, the ability of the agency lawyer to predict how the reviewing judges will interpret those terms becomes less vital. Frequent references in the *Chevron* opinion to agency technical expertise and deference to agency policymaking suggest that the program office's experience or the policy office's policy preferences are just as important in determining the meaning of statutory terms as the General Counsel's legal expertise.[7] In short,

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4. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

5. In the words of the *Chevron* Court,

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

6. *See, e.g.*, Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Michael L. Post, *A "Hard Look" at* Chevron *Step One: Statutory Construction of the Clean Air Act and Limitations on Agency Authority*, 64 GEO. WASH. L. REV. 1223 (1996).

7. The Court in *Chevron* quoted approvingly from its prior opinion in *Morton v. Ruiz* for the proposition that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." 467 U.S. at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)). The Court further stated that

> the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

to the extent that the courts applying the *Chevron* analysis are in fact deferring to agency expertise and policymaking, rather than to the interpretational skills of agency lawyers, the power of agency lawyers to determine agency policy may ultimately diminish. The frequency with which the reviewing courts find the statutory meaning clear and consequently decline to move to the deferential second stage of the *Chevron* analysis, however, suggests that agency lawyers will continue to play a dominant role in resolving questions of statutory interpretation, if only to predict whether the reviewing court is likely to move past stage one of the *Chevron* analysis.[8]

B. Proceduralist

The United States Constitution demands that the government pay attention to procedure when it takes action that affects the life, liberty, and property of its citizens.[9] In addition, Congress has prescribed procedures for agency rulemaking in the Administrative Procedure Act[10] and, to a lesser degree, in individual agency statutes.[11] Regulatory agencies must therefore turn square procedural corners when they exercise their regulatory powers over private sector entities. Agency lawyers are usually the institutional experts on procedure because their legal training makes them sensitive to process and because they are the experts in interpreting statutory procedural directives. The lawyers therefore play a very large role in drafting the agency regulations establishing the formal procedures that govern the agency and outside participants in various regulatory contexts. Indeed, the Office of General Counsel is typically the lead office in rulemaking initiatives involving agency procedures, and an agency lawyer typically presides at any informal public hearings that the agency conducts in connection with rulemaking initiatives.

Agency lawyers also play a role in monitoring everyday regulatory activities for procedural correctness. One might expect that this monitoring role would be rather limited in the informal rulemaking context, because informal rulemaking was designed to reduce formal procedural barriers to agency action. However, that relatively limited role has grown in recent years, as Congress, the President, and the reviewing courts have added additional procedural and analytical steps to the original informal rulemaking model.

Id. at 844.

8. *Compare, e.g.*, MCI v. AT&T, 512 U.S. 218 (1994) (holding that the meaning of the phrase "modify any requirement" is plain and no deference required); Brown v. Gardner, 513 U.S. 115 (1994) (refusing to give deference to Department of Veterans' Affairs interpretation of statute that represented 60 years of administrative practice, to which Congress had not objected); *with* Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995) (holding that the Comptroller of the Currency's interpretation of the phrase "the business of banking" in the National Bank Act was entitled to deference under *Chevron*).

9. *See* U.S. CONST. amend V; *id.* amend. XIV, § 1.

10. *See* 5 U.S.C. §§ 553 (1994).

11. *See, e.g.*, 42 U.S.C. § 7607(d) (prescribing additional procedures for EPA rulemaking under certain provisions of the Clean Air Act).

The unadorned APA model for informal rulemaking begins with the agency's publication of a general notice setting forth the nature of the rulemaking proceedings, the legal authority under which the rule is promulgated, and "either the terms or substance of the proposed rule or a description of the subjects and issues discussed." The courts have by-and-large read these minimal requirements flexibly, but agency rulemaking efforts have occasionally been remanded (sometimes years after the rule has gone into effect) because the agency's notice of proposed rulemaking did not provide adequate notice of some aspect of the final rule.[12] Therefore, before promulgating a final rule, an agency's lawyers must be prepared to advise the agency whether the terms and substance of the rule are a "logical outgrowth" of the original notice.[13] When, as frequently happens in lengthy rulemaking efforts, the agency adopts an option that was not clearly spelled out in the notice of proposed rulemaking, the agency lawyer may have the unpleasant task of insisting that the agency issue a second notice and consider additional comments.

Agency lawyers must also offer procedural advice concerning the content of the administrative record upon which the agency must base its defense of the rule on appeal. Agency lawyers must exercise a good deal of prescience in defining the record that the agency sends to the reviewing court to ensure that no document is omitted that may be critical to a judicial assessment of the adequacy of the record under the arbitrary and capricious standard of review. For rules that constitute "major federal action[s] significantly affecting the quality of the human environment," the record must also include an environmental impact statement, and less significant actions must contain a "finding of no significant impact" and sufficient supporting documentation to sustain that finding if challenged.[14] In addition, recent amendments to the Regulatory Flexibility Act[15] require the agency to prepare a regulatory flexibility analysis for rules having a significant impact upon a substantial number of small entities or to explain why the rules will not have such an impact.[16] Because this threshold determination, like the environmental impact determination, is now subject to judicial review, agency lawyers must monitor agency compliance with both of these analytical requirements.

Because the agency lawyer's proceduralist role may arise at any time after the agency publishes its notice of proposed rulemaking, it often makes sense for a lawyer to be involved throughout the process. One disadvantage of the assembly line model is that it generally allows the lawyer to perform this proceduralist role only after the procedural error has already been committed. At this point, the agency's options are limited to backtracking to the extent neces-

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12. *See, e.g.*, Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991).

13. *See generally* KENNETH C. DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW § 7.3 (3d ed. 1994).

14. 42 U.S.C. § 4332(C) (1994); 40 C.F.R. § 1505.2 (1997).

15. Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-612 (1994 & Supp. II 1996)).

16. *See* 5 U.S.C. §§ 603-604 (1994 & Supp. II 1996).

sary to remedy the procedural error or attempting to gloss over or defend as harmless the procedural error on judicial review. The team model reduces the likelihood that the agency will have to go back to square zero for procedural reasons, because the agency lawyer should be monitoring the procedures as they evolve and suggesting ways to avoid judicial reversal on procedural grounds.

C. Scrivener

Both the text of agency rules and the preambles to the proposed and final versions of the rules are legal documents that will normally be scrutinized carefully by lawyers for the affected parties and by the judges of any reviewing court. The agency must therefore take great care during the drafting process to achieve clarity in the wording of the rule, to provide adequate references to the record in support of the agency's resolution of major issues, and to maintain a consistent line of reasoning throughout. Lawyers are supposed to be wordsmiths, and agency lawyers typically provide critical input in drafting the text of agency rules, preambles, and even support documents.

Although agency lawyers are occasionally assigned the task of writing a portion of a rulemaking document (for example, the boilerplate language explaining the agency's determination to decline to prepare an environmental impact statement or regulatory impact assessment), the scrivener role more frequently resembles that of an editor who helps clarify the meaning of existing text. The lawyer can play this role equally well as the member of a team or as a reviewer in the assembly line. Because few seasoned program office officials take any pride of authorship in the text of a rule or preamble, the lawyer's rather unglamorous scrivener role is generally uncontroversial and is usually greatly appreciated.

D. Rational Analyst

Agency lawyers would no doubt have to play their statutory interpretation, proceduralist, and scrivener roles in the absence of the strong judicial reaction to the rulemaking revolution of the 1970s. The evolution of the "hard look" doctrine of judicial review in the mid-1970s, however, demanded that agency lawyers perform the more controversial function of ensuring that the rule at least appear to be rational to the minds of the three (and sometimes more) lawyers who could be asked by disappointed participants to review the agency rule for substantive rationality under the arbitrary-and-capricious test or, in some odd statutory contexts, under the substantial evidence test.[17]

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17. *See, e.g.*, RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS § 7.5 (2d ed. 1992); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997).

Since regulatory agencies first began to rely heavily upon informal rulemaking in the early 1970s, agency lawyers have struggled with the task of ensuring that the rulemaking record and the agency's accompanying explanations adequately support the agency's rulemaking exercise. In the early years, agency lawyers lacked guidance from the courts as to what would be required by way of documentation of agency factual determinations and rebuttal to comments attacking agency interpretations, inferences, and factual conclusions. As the courts began to remand rulemaking initiatives for additional documentation and explanation, agency lawyers could rely to some extent on the language of the judicial opinions for guidance.[18] That guidance, however, has rarely been precise, and the actual conduct of the reviewing courts occasionally left observers with the impression that whether a court would remand a rule depended as much on the reviewing judge's confidence in the substantive content of the rule as on any general principles of administrative law.[19] The line between setting aside an agency rule as an arbitrary and capricious exercise of an agency's rulemaking power, on the one hand, and remanding an agency rule for a better explanation, on the other, is a fine one, and a court that is unconvinced of the soundness of an agency rule can usually find some defect in the agency's explanation that warrants remand for further clarification.

As the reviewing courts have aggressively insisted under the hard look doctrine that agencies explain themselves, agency lawyers have played a prominent role in the process of drafting and compiling the agency's contribution to the rulemaking record. Just as a reviewing court may insist that the agency provide more information and explanation, the conscientious agency lawyer may insist that the program office come up with more data or a better explanation before moving forward with a final rule. However, because the judicial guidelines on the adequacy of the administrative record are vague, the line between sound legal advice and policy advocacy is somewhat blurry. Just as a reviewing court can steer an agency toward a particular substantive outcome by remanding for further explanation, the agency lawyer can push the agency toward a substantive result by insisting upon more data or a better rationale for a determination that the lawyer finds substantively disagreeable. This power to affect substantive agency output is not greatly affected by the decisionmaking model that the agency uses. Whether in the team or the assembly line context, the lawyer's power to insist that the program office come up with better data, analysis, and explanations in order to meet the requirements of hard look review can be used to steer the agency in particular substantive directions.

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18. The Supreme Court offered the best judicial guidance in the *State Farm* case when it stated that a regulation is arbitrary and capricious if

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983).

19. *See* Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); McGarity, *supra* note 17, at 541-56.

Seasoned EPA lawyer William F. Pedersen observed in one of the first comprehensive examinations of the hard look doctrine that

> it is a great tonic to a program to discover that even if a regulation can be slipped or wrestled through various layers of internal or external review without significant change, the final and most prestigious reviewing forum of all—a circuit court of appeals—will inquire into the minute details of methodology, data sufficiency and test procedure and will send the regulations back if these are lacking."[20]

The same discovery also greatly enhanced the power of agency lawyers to affect substantive outcomes in informal rulemaking.

E. Policy Partisan

Agency lawyers are professionals with an obligation to represent the interests of the agency, but they are also individuals with views about the role that regulation should play in society. Many very highly qualified lawyers who could be practicing in top-drawer law firms take low paying and low prestige jobs in regulatory agencies not because they cannot take the stress of private practice, but because they believe that the agency has an important mission, and they want to advance the agency's regulatory goals. Lawyers can attempt to rein in their agencies or they can urge the agencies to exercise power to the greatest extent consistent with their statutes. The lawyer can be a cautious killjoy or a radical interventionist. Once aboard, agency lawyers have ample opportunities to attempt to advance their policy preferences.

Although the cautious killjoy may more accurately describe the role that lawyers typically play in the private corporate context, it is not necessarily the most appropriate role for the agency lawyer. In the private context, companies are generally free to pursue their economic ends within the constraints of the law. The lawyer's role is to advise against activities that violate the law; it is not to encourage the company to choose any one of the available options that do not violate the law. Lawyers acting as outside counsel are understandably especially reluctant to provide advice on how the officers of the client corporation should exercise their business judgment in pursuit of a business goal.

Agency lawyers occupy a somewhat different position in the scheme of things. An agency lawyer has not been selected by the program office to advise it on particular matters. The agency lawyer has been employed by the agency as a public official with a responsibility both to the agency and the public at large. The agency lawyer's "client" is the agency as a whole, not a particular office within the agency, and the Office of General Counsel is itself a part of the agency. On legal questions that arise during the internal rulemaking process, agency lawyers normally have the final word until the reviewing courts say otherwise. Not even the agency head, who may be a lawyer, is likely to second-guess the General Counsel on a question of law. Thus, agencies frequently publish General Counsel opinions to provide guidance to the private sector without circulating them for review or approval by other offices or the agency

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20. William F. Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 60 (1975).

head. On contentious policy questions that arise in rulemaking, however, the agency lawyer need not defer to other offices unless told to do so by upper-level decisionmakers. Agency lawyers may have views on how the agency should exercise its policy judgment, and they are generally free to express those views in team meetings or when rulemaking packages are circulated for their review.

Unlike outside counsel in the corporate world, agency lawyers must address at least two aspects of the statute that empowers the regulatory agency. Both private sector and government lawyers must be concerned with the aspects of regulatory statutes and the Constitution that limit the exercise of regulatory power, but agency lawyers must also concern themselves with those aspects of the regulatory statutes that demand that regulatory power be exercised to protect the beneficiaries of regulatory programs. Agency lawyers cannot ordinarily commit themselves to the cautious killjoy approach; the agency's statute may demand action. In some regulatory contexts (involving mandatory statutory language and deadlines), it may even be unlawful for the agency not to act.[21] In such cases, agency lawyers would be shirking their obligations to their client agencies if they adopted an overly conservative posture. In the more typical situation in which the statute does not clearly demand particular action, there is still room for the agency lawyer to advise the agency to adopt a proactive stance to advance the agency's overall statutory goals. In these contexts, however, other offices within the agency may legitimately disagree with the lawyers, and upper-level decisionmakers are free to accept or reject the lawyers' policy advice.

When agency lawyers adopt the role of policy partisan, it is important that they carefully distinguish between legal advice and policy advice. If the agency's statute demands that the agency take a particular action or adopt a specific "policy lean" in resolving close questions, the lawyer should make that clear and should caution agency officials that the agency risks reversal if it takes a different action or adopts a different policy perspective. If, however, the statute leaves the resolution of a particular question up to the agency's discretion, the lawyer may urge agency officials to adopt a particular policy perspective, but he or she should clearly indicate that the agency is free to adopt a different policy. Agency lawyers should, in other words, resist the temptation to cloak their policy advice as legal advice. Otherwise, the lawyers are in a very real sense usurping the constitutional power of Congress and politically accountable executive branch officials to make their own public policy.

Drawing the line between policy advice and legal advice is perhaps most difficult when the lawyer is attempting to predict how a reviewing court will view the agency's resolution of complex technical questions under the arbitrary and capricious or substantial evidence test. Lawyers know that reviewing judges are sometimes guided by their own policy preferences when they engage

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21. *See, e.g.*, Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1974); Illinois v. Gorsuch, 530 F. Supp. 340 (D.D.C. 1981).

in this highly discretionary substantive review function. Thus, to some extent, the lawyers' legal advice becomes a matter of advising agency officials as to the content of the reviewing judges' policy preferences. Since agency lawyers cannot know who the reviewing judges will be until after the rule has been promulgated, advice of this sort is necessarily quite general and speculative in nature. In this context, it is tempting for the agency lawyer to conclude that the reviewing court's policy perspectives are more-or-less the same as the lawyer's policy preferences and advise agency officials accordingly. In contexts in which this is clearly not the case (for example, where an activist agency lawyer provides advice with respect to a rule likely to be reviewed by conservative judges), it is tempting for the lawyer to ignore the policy proclivities of the reviewing judges and thereby provide bad advice to agency officials. Both temptations should be resisted.

Because the team model allows the agency lawyer to provide policy input as the rule evolves and because it values consensus so highly, it more easily facilitates the lawyer's role as a policy partisan. The assembly line model allows the agency lawyer to express policy views, but only after the program office has made its presumptively determinative policy preferences known and only at the risk of slowing down the entire rulemaking process to resolve an explicit policy dispute. Thus, an agency that wants to minimize the lawyer's policy partisan role may be well advised to adopt the assembly line model.

F. Trusted Confidante

A high level agency lawyer who consistently provides sound legal and policy advice can become a trusted confidante of the agency head, or the agency head may appoint a trusted confidante to the position of General Counsel. In this role, the lawyer is available for consultation on the whole universe of problems that the agency head encounters, ranging from narrow questions of statutory interpretation to interactions with the White House and Congress on sensitive political questions. The trusted confidante role has an analog in the private sector. In many companies, the General Counsel is a trusted confidante of the Chief Executive Officer and provides advice on business matters ranging far beyond strictly legal questions. Outside lawyers also occasionally play a trusted confidante role.[22]

Obviously, not every high level agency lawyer becomes a trusted confidante, and, in many agencies, no lawyer ever plays that role. However, when a lawyer does assume that role, it is important that he or she attempt to distinguish policy (and political) advice from legal advice. Just as in the case of the policy partisan role, a lawyer who is a trusted confidante must carefully distinguish between what must or may be done legally and what should be done from a particular policy perspective.

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22. *See, e.g.*, WILLIAM GOULDEN, THE SUPERLAWYERS (1971); EVAN THOMAS, THE MAN TO SEE (1991).

The trusted confidante is a fairly dangerous role for the agency's General Counsel. The suspicion that the confidante is mixing policy with legal advice may spur deep resentment among other high-level officials that do not share the General Counsel's insider status. Perhaps more importantly, the trusted confidante may be so anxious to retain that exalted status that he or she feels pressure to tell the agency head what the leader wants to hear, rather than provide neutral advice as to what the law allows or requires. An agency's General Counsel is appointed by the President and confirmed by the Senate to provide sound legal advice to the agency as a whole. In cases where the trusted confidante cannot easily fulfill that obligation, it may be preferable for him or her to seek reassignment to the agency head's personal staff.

G. Advocate for the Agency

As previously discussed, the agency lawyer's client is the agency as a whole, not any particular office within the agency. When the agency finally resolves a policy dispute, the agency lawyer must serve as an advocate for the agency in its interactions with other agencies, the reviewing courts, and the general public. Even though the lawyer strongly disagrees with the agency's resolution of a particular internal policy battle, he or she must diligently defend that resolution in disputes with outsiders. Lawyers generally have a professional obligation to use their skills to represent their clients, even when they strongly disagree with those clients.[23] John Adams certainly had no great love for the Redcoats that he defended in the Boston Massacre trial, but he used his best efforts on their behalf.

The role of agency advocate may be an especially difficult one for a lawyer who has played a strong policy partisan role in the internal agency deliberations and has lost the policy battle. When agency arguments are challenged in the Office of Management and Budget, congressional committees, and the courts, the agency lawyer must portray in the best light arguments with which he or she may strongly disagree. Knowing full well the weaknesses of the agency's position, the lawyer may not reveal those weaknesses to outsiders or in any way use them against the agency. Only in the (one hopes) very rare cases in which that agency proposes to commit a crime or attempts to deceive a court may the lawyer abandon his or her advocate role and take action that is contrary to the best interests of the agency. Defending a decision with which the lawyer violently disagrees may be exceedingly difficult, but it goes with the territory.

IV

CONCLUSION

In advising students about career choices, I frequently encounter idealistic policy partisans who look to government employment as a way to avoid representing polluters and otherwise work to protect the environment. I normally

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23. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1980).

urge such students to consider employment with a federal environmental agency as an exciting and rewarding way to practice law, but I also caution them that employment as a government lawyer is very different from practice with a private law firm or corporation.

First, when one works for a bureaucracy, one must continually deal with bureaucratic thinking and internal bureaucratic procedures. This means that the lawyer must learn to think like a bureaucrat and, if he or she is to survive for any length of time, must also learn to *act* like a bureaucrat. Like the other professionals in the agency, the lawyers must learn how to fight and win the internal turf wars that consume far too much of the attention of the agency's staff.

Second, government lawyers must live with the reality of very limited resources and maximize the attendant benefits. On the one hand, the offices will not be as large, the secretaries will not be as adept, the computers will not work as well, and the pay will not be as high as in private law firms. On the other hand, the fact of limited resources means that young government lawyers are given far more responsibility than their counterparts in private law firms, and they have a correspondingly greater opportunity to gain valuable professional experience at an early stage of their careers.

Third, government lawyers get to play a wider variety of roles than most private practitioners. The policy partisan's role in particular is uncommon in private practice.[24] Government lawyers have a real opportunity to change the world to fit their own views of how it should work. I always caution these students, however, that as agency lawyers, they will almost certainly be called upon at one time or another to defend an agency position with which they strongly disagree. However, this, too, is not unique to the government lawyer. It is a rare lawyer indeed who has the luxury of representing only agreeable clients.

24. Lawyers who work for public interest groups play a strong policy advocate role, but those positions are in far shorter supply than positions with government agencies.