

Breaking Free from the Chains of the Organizational Chart: A Proposal for the Effective Integration of Government Lawyers and Policymakers

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The structure and practice of administrative agencies establish a rigid separation between government lawyers and policymakers. Underlying this division is an assumption that the two professions are fundamentally different. Indeed, both utilize dissimilar skills, value preferences, and even languages. However, as the regulatory environment increases in legal complexity, lawyers inevitably become involved in policymaking. This involvement is causing the pre-existing rift between lawyers and their non-lawyer colleagues to expand. However, government agencies can avert this division and strengthen public policy through more effective integration of lawyers and policymakers.

Although the two professions have their differences, this paper contends that agency lawyers and agency policymakers can and should work together effectively. Rather than offer divine pronouncements on the law from on high, government lawyers should emerge from their isolation in the agency and work

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directly with their policymaking colleagues throughout the decisionmaking process. In so doing, the lawyer would join policy analysts, economists, and program staff in forming more effective, balanced, and legally sound policy.

A discussion of government lawyers and policymakers requires further definition. This paper focuses primarily on the federal agency "general attorney:" lawyers who are usually located within each agency's Office of General Counsel (OGC). These lawyers are not political appointees, and primarily act in a counseling, rather than litigating, function. "Policymaker" refers broadly to an agency's non-legal professional staff, a category that includes policy analysts, economists, program managers, and scientific and technical staff. In analyzing the relationship between lawyers and policymakers, examples are drawn from the Environmental Protection Agency (EPA); the former Department of Health, Education, and Welfare (HEW); the Federal Trade Commission (FTC); the Office of Management and Budget (OMB); and the Department of Education (ED).

This examination of the sources of conflict and commonality between lawyers and policymakers leads to the conclusion that despite differences in skills, values and languages, the professions are more alike than different. This paper then challenges the notion that lawyers' professional role as objective interpreters of law mandates their exclusion from the policy-making process. An exploration of the best method for including lawyers in agency decision-making provides support for a team-based

approach, which holds the greatest potential to avoid conflict, increase communication, build shared values, and most importantly, strengthen public policy. Finally, this paper proposes that government agencies reevaluate their organizational structures to integrate lawyers and policymakers as equals in policy formulation, execution and analysis.

The Rise of Government Lawyers

The United States government employs more than 23,000 lawyers in its administrative agencies.¹ Each of the executive departments and the agencies created by Congress has its own staff of lawyers, usually housed in an OGC. Government lawyers are advisors, counselors, and litigators in every legal specialty.² They perform various legal functions including litigating, preparing legal memoranda, providing legal advice to agency heads and the affected public, and drafting statutes, rules, and regulations.³ Government lawyers assume various roles such as interpreter, rational analyst, policy partisan, and agency advocate.⁴

The number of government lawyers is steadily rising. Between 1954 and 1970, the number of lawyers employed by the federal government increased by 108 percent.⁵ The Reagan administration attempted, with limited success, to curtail the number of government lawyers.⁶ Despite this effort, the number of federal government lawyers increased by 11 percent between 1978 and 1991.⁷ Today, this trend continues. According to the Office of Personnel Management (OPM), between September 1992 and June 1998,

the number of employees increased in only three of the twenty largest white-collar occupations within the federal government: General Attorneys (+3.3 percent), Tax Examiners (+4.6 percent), and Management & Program Analysts (+2.4 percent).⁸ This slight increase in the number of General Attorneys occurred while the remaining seventeen largest white-collar occupations decreased 18.8 percent.⁹

The reason for this rise in the number of government lawyers may be a result of the increased complexity of law, and the inability of agency staff to make decisions without a staff of lawyers to interpret long statutes written in legalese. Professor Michael Herz recognizes that the regulatory state's domination by statutes and court rulings provides lawyers with an increasingly powerful role in agency decision-making.¹⁰ He notes, "statutes can be enormously complex and the judicial interventions can be frequent . . . Anyone who is not a lawyer will be dismayed by the lawyer's influence...."¹¹ Consequently, government lawyers often become involved in policy issues, going beyond legal interpretations and into technical and program areas, thereby causing friction with policymakers.

Professor Cornell W. Clayton agrees that "control over a growing number of policy areas—consumer protection, environmental and antitrust regulations, civil rights, welfare and entitlement programs, to name only a few—is shifting out of the legislative arena and into the ambit of courts and the administrative state."¹² Lawyers have the power to determine agency procedures, to veto as-

pects of proposed rules they deem unlawful, and to require that technical and economic staffs provide more persuasive rationales for their solutions to controversial issues.¹³ Lawyers also possess "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 judge."¹⁴ For example, an agency's OGC may insist that the program office provide better data or a more detailed analysis and explanation of its decisions in order to withstand judicial scrutiny.¹⁵ The threat of judicial review, combined with the agency's dependence on lawyers for an interpretation of agency authority under a particular statute, often draws government attorneys into scientific and technical issues beyond the range of pure questions of law.¹⁶

As a result of this expanded involvement, government lawyers can have a make-or-break influence over policy development and implementation. For example, if a lawyer advises that a proposed action is within the agency's authority, the program staff may rely on the lawyer's advice to justify its decision to take action. Conversely, if the attorney advises that a policymaker's legal authority to act is uncertain, program staff may decide to take no action by citing the caution of counsel.¹⁷

A congenial relationship between agency lawyers and policymakers relies on the assumption that lawyers will provide the answer policymakers want. In reality, a government lawyer can be the subject of scorn and resentment when she does not allow the policymaker to carry out a selected policy choice. At the

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OMB, for example, lawyers are the targets of "snickers" from policymakers, and there is a perception among policymakers that it is frustrating to work with OGC.¹⁸

Although an OGC opinion does not restrict the agency to a course of action, such advice can be effectively binding for both political and legal reasons.¹⁹ Politically, Congress can challenge the agency for not following OGC advice. Legally, the agency may be less likely to win in court if its own lawyers advised against the action that resulted in litigation.

A Contrast Between Lawyers and Policymakers

As the complexity of the regulatory state increases, the tension between lawyers and policymakers grows. This discord results from the differing professional languages and value preferences of the professions. The traditional agency structure—which places agency lawyers in OGC and policymakers in the program divisions—maintains and accentuates these differences.

Language

Throughout law school, students of the law learn terms such as *assumpsit*, *consideration*, *licensee*, and *nonmutual offensive collateral estoppel*. The use of Latin phrases such as *res ipsa loquitur* and *expressio unius est exclusio alterius* and study numerous doctrines, rules, acts and case names. Legal terms such as *ex parte* contacts, nondelegation, informal adjudication, hardlook doctrine, *Chevron*,²⁰ zone-of-interests, *di minimis*, and nonacquiescence are staples of the

administrative law curriculum. For a person studying public policy, a conversation with a law student can be frustrating, intimidating, and seemingly nonsensical. The lack of communication intensifies as students graduate and take professional jobs.

Soon after arriving as chairman of the Civil Aeronautics Board (CAB) and faced with the daunting task of airline deregulation, Alfred Kahn proposed a "campaign for clarity:"

One of my peculiarities, which I must beg you to indulge if I am to retain my sanity (possibly at the expense of yours!) is an abhorrence of the artificial and hyper-legal language that is sometimes known as bureaucratese or gobbledygook...

*May I ask you, please, to try very hard to write Board orders and, even more so, drafts of letters for my signature, in straightforward, quasi-conversational, humane prose - as though you are talking or communicating with real people...*²¹

Kahn attributed the "cloud of pompous verbiage which creates a gulf between [agency officials] and the people" to lawyers' domination of the regulatory process. "One cannot hope overnight to wipe out the effects of three years of law school," he stated.²²

Professor Peter Schuck also takes issue with the lawyer's inability to intelligibly communicate in the policy environment, while acknowledging that policymakers have their own language as well.²³ Schuck argues that the government lawyer "must be able to converse knowledgeably with others in the policy environment—legislative liaisons in the agency, program managers, congress-

sional staff, OMB staff, interest group members, and the like—who often speak the language (or jargon) of policy analysis, which of course includes a good deal of economics. This language, after all, is increasingly part of the *lingua franca* in which technocrats conduct their discourses both in and outside of government.”²⁴ Professor McGarity suggests government lawyers 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.”²⁵

Value Orientation of Lawyers

Socialization plays a major part in defining the lawyer's values. Regardless of public or private status, size, reputation, or location, law schools provide their students with a nearly uniform curriculum. Students are immediately informed, either during orientation or their first classes that the goal of a legal education is to teach students to “think like a lawyer.”²⁶ It is during this period that law students develop the ability to absorb large quantities of information, distinguish legal from non-legal issues, state rules, and apply this knowledge to hypothetical situations.²⁷ Thinking like a lawyer requires an acceptance of professional ideology.²⁸ Lawyers favor stability and predictability, avoid massive social change, have a concern for process over substance, and seek continuity, harmony, and consistency.²⁹ Translated into a government agency, lawyers are primarily concerned with ensuring that agency action is within its statutory power, will pass judicial review, and emphasizes procedural fairness.³⁰

Professor Jonathan R. Macey identifies several additional reasons for a lawyer's approach.³¹ According to Macey, risk takers are not likely to be attracted to the legal profession, as the core of the work is interpretation and prediction—not innovation.³² Lawyers are likely to take a reactive, rather than proactive, orientation since their duty is to respond to clients' problems.³³ Macey also argues that lawyers are not mathematically adept because such skills are not required for law school. Furthermore, Macey believes that lawyers are unusually idealistic because they believe law is the best mechanism for social change.³⁴ Finally, a lawyer's reliance on the adversarial system, where both sides of a dispute present their case zealously and the court determines justice, creates indifference to objective truth and scientific rigor, as lawyers believe truth is revealed through process.³⁵

Value Orientation of Policymakers

“Policymakers,” referring to policy analysts and economists, among other non-legal professional staff, have a notably different orientation than the lawyers with whom they work. Economic and policy analysts employ a “comprehensive analytic rationality” model in which a problem is defined, broken down into its constituent parts, and assessed for alternative resolutions. These alternatives are then evaluated against a ranking of agency objectives, and the option that optimizes the agency's goals is advocated.³⁶

By and large, policy analysts are concerned with the effectiveness of policy in achieving the agency's stated policy ob-

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jectives. Policy analysts particularly value efficiency, effectiveness, and equity.³⁷ Economists are socialized to believe in the "value of market forces, the fragility of cartels, and the social utility of entrepreneurship."³⁸ Furthermore, economists have certain biases. They are generally opposed to government intervention in market processes and favor market solutions to problems of scarcity and rationing.³⁹ Economists are most concerned with the impact of policies, including compliance costs, bureaucratic inflexibility, distortions in economic decisionmaking, and inefficiencies of particular implementation strategies. This disparity in value preferences can cause conflict during the decision making process and can be a source of tension between the professions.

Effect of Value Preferences on Policy-making

Lawyers are often criticized for the effect their value system has on policy-making. Law educators have stated that a legal education sharpens the mind by narrowing it. Accordingly, "thinking like a lawyer" may encourage lawyers to take a narrow rights-focused approach to broad social problems while ignoring broader alternatives. Some believe that a legal orientation "creates a more cumbersome, complicated, and inefficient policy process—one in which vital issues are only partially resolved through interminable haggling over incomprehensible and arcane points of law."⁴⁰

According to a survey conducted by the EPA that asked program staff to rank ten rule-making goals in order of importance, OGC lawyers were most concerned that the rules survive judicial

review and secondly, that the rules reflect the statute, but were relatively unconcerned about factors such as timeliness, allocative or administrative efficiency, and enforceability.⁴¹ Policy analysts, on the other hand, were most concerned with allocative efficiency, political feasibility, and the effect of the decision on other public policies. In addition, policy analysts, had a much greater concern for timeliness, scientific and technical credibility, and administrative efficiency than their legal colleagues did.

Since most lawyers lack mathematical, analytical, and economic training, they may fail to understand the nature of policy analysis and evaluation, as well as the complexity of the political and social institutions that constitute and constrain the policy environment.⁴² Moreover, the isolation of lawyers in OGC makes them unlikely to learn such skills on the job. Jason Orlando, a policy analyst at OMB, notes that policymakers may become frustrated over the need to explain budgetary principles to lawyers.⁴³ Consequently, lawyers may resist being drawn across disciplinary boundaries, feel uncomfortable dealing with policy analysis, and suggest that policy recommendations are not their job.⁴⁴ Given the increased need for lawyers in policy-making, this reluctance results in increased tension.

Lawyers vs. Policy Analysts: The Rulemaking Context at HEW

At the former HEW, Professor Schuck notes that lawyers were "profoundly uncomfortable" when dealing with policy analysis.⁴⁵ The narrowness of the legal curriculum, Shuck argues, accentuated by the conventional functional divisions

of the department structure, led lawyers to feel that policy analysis was not within their purview.

Shuck provides an example of this phenomenon in HEW's obligation to comply with a court order in *Adams v. Califano*.⁴⁶ In *Adams*, the court ruled that HEW's provision of federal funds to public institutions of higher education in southern and border states violated Title VI of the Civil Rights Act of 1964. The court made its ruling based on the fact that these institutions retained dual systems of public higher education segregated by race.⁴⁷ The court ordered HEW to provide these states with "final guidelines or criteria specifying the ingredients of an acceptable higher education desegregation plan."⁴⁸

Implementation of the court order, which left broad administrative discretion to the agency in defining a remedy, led to disagreement between HEW policy analysts and lawyers. The Secretary requested that the Office of Civil Rights, which had primary responsibility of ensuring state compliance with Title VI and was composed of both lawyers and investigators, design the agency's response to the court order. The office was to carry out this request in close consultation with education policy analysts in the office of the Assistant Secretary of Policy Evaluation (ASPE) and OGC.⁴⁹

OGC's response to the order amply demonstrated its predisposition toward precedent, unwillingness to delve into market based concerns, and rigid adherence to the purely legal aspect of the problem—how to desegregate a dual education system so as to satisfy the court. In so doing, OGC narrowed HEW's alter-

natives by focusing on traditional civil rights law. In the tradition of the Supreme Court's landmark decision in *Brown v. Board of Education*, which involved desegregation of elementary and secondary schools, OGC advocated a similar approach for higher education and opted for racial balance.⁵⁰

However, the lawyers' adherence to precedent was not necessarily the best approach. Students are generally assigned to local elementary schools, but have many choices in institutions of higher education, which made the design of racial integration in this market more complex. For example, students are able to choose what college to attend through consideration of location, curriculum, financial resources, student body, and other factors important to the individual student. Lawyers resisted recognition of this educational market because they did not understand its implications. When challenged to explain their resistance by policy analysts, lawyers sought cover under the shelter of the court order.

ASPE's policy analysts, while concerned with implementation of the court order, focused their analysis on the uniqueness of the higher education market and the underlying purpose of the order. They feared that elimination of the dual system could wreck historically black institutions by folding their best programs into larger white institutions or by closing them down completely. ASPE also determined that a significant share of young blacks who could not afford to go out of state for college would rather attend black institutions. In addition, black students who attended inferior elementary and secondary schools might be

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denied admission to white schools and, thus, lose the opportunity to get a college education. Finally, ASPE worried that elimination of the dual system would result in the loss of jobs or the demotion of black professors in predominantly white institutions.⁵¹

This case study does not serve to show which profession was right or wrong but rather demonstrates the conflicting values and thought processes of the two groups. At HEW, lawyers and policy analysts were located in separate divisions — as is generally the case in today's federal agencies. If lawyers and policy analysts had worked together, rather than within their own enclaves, it is likely that the mix of considerations and values would have resulted in better policy-making.

Lawyers vs. Economists in the Federal Trade Commission's Antitrust Policy

Perhaps nowhere has the division between lawyers and policymakers been more distinct than at the FTC in the 1970s. Lawyers and economists were not only located in separate departments, but also placed in separate buildings “and that's the way we want it,” remarked one economist.⁵² Although the FTC lawyers are primarily involved in criminal litigation (unlike the civil advising attorneys to which this article specifically applies), the relationship between FTC's lawyers and policymakers is equally applicable to agencies lacking prosecutorial power. FTC's two hundred lawyers were housed in the Bureau of Competition, the unit responsible for antitrust investigations.⁵³ Economists were located in the Bureau of Economics, the unit responsible for advising the

Commission on broad policy questions pertaining to “suspect business practices and relationships, the evaluation of proposed remedies, and the formulation of legislative recommendations.”⁵⁴ In theory, these two groups were to work together to determine whether to initiate an investigation into anti-competitive business practices and then jointly bring cases against companies for antitrust violations. In practice, these groups operated separately and often provided opposite recommendations to the Commission.

Economists had a strong sense of autonomy and refused to be subordinated to the interests of lawyers. They viewed their role as that of free-market watchdogs. For example, if lawyers brought a case, economists would examine it in terms of economic benefit to the consumer and, if necessary, “apply the brakes.”⁵⁵ Economists were unsympathetic to using law as a method of solving social problems. Instead, they placed their faith in market mechanisms, putting their values in direct conflict with lawyers. Because of the tension between offices, economists sometimes refused to examine evidence pertaining to economic matters, as lawyers gathered it.

Even when economists and lawyers came together to examine collected data, they often arrived at opposite conclusions. Economists consistently interpreted data in a manner opposed to government intervention, while lawyers favored prosecution as a solution. An example of this division arose in a case against a large baking company that attempted to monopolize the wholesale baking industry through predatory pricing practices. In this case, lawyers inter-

preted the market narrowly so as to create a presumption that the market lacked competition. Lawyers limited the relevant market to "the baking, sale and distribution by wholesale bakers."⁵⁶ Economists, on the other hand, tended to include a wide range of substitutes in defining the relevant market; their broader interpretation made initiation of a complaint less compelling.⁵⁷

Lawyers and Policymakers: Commonalities and Communication

Although different in training, language, and value orientation, lawyers share an important set of cultural norms with other agency policymakers. Government lawyers have chosen a career within a particular government agency, and one can assume they are dedicated to the agency's mission and goals. Lawyers share this commitment with agency colleagues of all professional backgrounds. Additionally, lawyers and policymakers, while each is educated in a specific area of expertise, can each add to the policymaking process. This commonality provides a medium of communication between lawyers and non-lawyers in forming public policy.

Professionals, whether they are lawyers or other career administrators, enter public service to participate in government—not merely to follow precise orders and provide a heartless, neutral evaluation of "the law." Indeed, this goal of public service is often the motivating factor that makes a lawyer accept the lower pay, smaller office, and greater public scrutiny that a government position offers. Lawyers, like other public ad-

ministrators, enter government agencies so that they can contribute to the policy-making process and shape government programs to best serve society.⁵⁸

Administrators exercise discretion on a daily basis.⁵⁹ For government lawyers, this principle is no less true. An agency lawyer often receives requests from agency "clients" for advice on regulatory or statutory interpretation or an analysis of law as applied to particular factual situations. In crafting her response, an agency attorney will probably not receive guidance from a direct superior, except in situations that are especially politically sensitive. Even in submitting a brief to an administrative tribunal or to a court, chances are that the agency attorney will not receive explicit instructions defining the agency position or what strategy to advance from an agency superior. More common, however, may be the informal advice provided by agency lawyers to agency officials. This counseling may occur over the telephone, through e-mail, in the hallway, the cafeteria, or on the street. Every legal recommendation has an implicit policy-making effect and may reflect a combination of the attorney's values and interpretation of the law.

Rejection of the Politics-Law

Dichotomy: A Barrier to Lawyer

Participation in Policy-making

Historically, scholars of public administration have advanced a politics-administration dichotomy whereby elected and appointed political officers provide the rules and administrators execute the intent of the political officer.⁶⁰ Under this model, it is illegitimate for public administrators to make "political" decisions.

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Although the modern view accepts administrators as employing administrative discretion to participate in political decisionmaking, government lawyers have not yet attained such recognition.⁶¹ The role of a government lawyers continues to be viewed as providing neutral, objective legal advice and carrying out the decisions of policymakers.⁶² If government lawyers are to fully participate in agency policy-making, they must first gain acceptance as political officers. The field of public administration must abandon adherence to the politics-law dichotomy, as it denies the reality of the policy-making process.

Recognition of the government lawyer as a legitimate policymaker requires an acknowledgment that interpreting law is not an entirely objective endeavor, but is subject to multiple interpretations. Likewise, congressional enactments will often leave considerable ambiguity for agency interpretation. This vagueness may be a result of a lack of political consensus, oversight, or congressional deference to an agency's technical expertise.

Rather than seeking to perpetuate the myth of objectivity, lawyers should provide policymakers with a recommendation as to the most effective alternative, based on their independent determination of the law's purpose, along with an assessment of each alternative's legal strengths and weaknesses. Legal ethics do not require the lawyer to exercise policy neutrality, but rather, the government lawyer should "conscientiously further the policy of the statute he aids in administering."⁶³ The lawyer may advise policymakers by employing a "personal disinterestedness" in which

"the public, and not the personal interest is the touchstone of his obligation as a practicing lawyer."⁶⁴ In short, government lawyers may interpret law to serve policy objectives that they believe are in the public interest.

Lawyers who interpret law to serve policy objectives must use both skill and caution since the government lawyer's political role may conflict with her professional obligation to give neutral legal advice. In such a conflict, "Each lawyer . . . serves as an advocate for an agency or a department that has its own organizational objectives, as well as for a partisan administration that expects the individual to fit the law to its political agenda. At the same time, however, each lawyer belongs to a profession that has trained and exhorted its members to maintain a detached and neutral adherence to the law."⁶⁵

Both Clayton and McGarity urge caution in mixing the government lawyer's roles, political and professional.⁶⁶ McGarity warns that lawyers, when acting as "policy partisans," should distinguish between legal advice and policy advice. Clayton argues, "The rule of law requires faith in the notion that law can be objectively interpreted; and at some point, the exercise of discretion ceases to enjoy the color of law."⁶⁷ For Clayton, this line is overstepped when legal actions either intend to, or have the effect of, violating clear understandings. But when is there a clear understanding as to the purpose or policy of the law? The Supreme Court has placed a generous degree of discretion within an agency (though not exclusively with agency lawyers) to interpret often ambiguous law.⁶⁸ A lawyer's training in legal inter-

pretation does not make her interpretation of the law controlling, as other agency members may also legitimately interpret the purpose or policy of a statute, rule, or program. This is another reason supporting the need for communication between lawyers and policymakers in order to avoid conflict and build clear understandings.

Integration of Lawyers and Non-Lawyers in Agency Decision-making

Remedying conflict between lawyers and other agency policymakers requires greater communication and understanding between the professions. Agencies must begin by breaking down the traditional barriers between policymakers and lawyers. Lawyers, most of whom are housed within an OGC,⁶⁹ must be accepted as legitimate policymakers and integrated into the decision-making process. As Mary Parker Follett recognized, integration and cooperation in the process can yield creative solutions.⁷⁰ Conflict emerges when levels of administration fail to engage in the ongoing discussion and collaboration that form policy.⁷¹

Not only will integration and an acceptance of lawyers into the policy-making process decrease conflict, it will result in better policy. As events at HEW and FTC have demonstrated, a division of perspectives can be fatal to policy-making. McGarity observes, "The success of a rule-making initiative depends to a substantial degree upon the capacity of the institution to integrate the contributions of widely varying professional perspectives into a single coherent prod-

uct . . . Each participant brings to the process more than just pure expertise on the limited issues to which that person's expertise is relevant. Along with the expertise comes an entire professional *Weltanschauung* that incorporates attitudes and biases ranging far beyond specialized knowledge of particular facts." Therefore, agency decision-making should allow for a mix of scientific, engineering, management, enforcement, economic, political, and legal perspectives.⁷²

This article has established that government lawyers are both legitimate political decision-makers and that the inclusion of their skills in the decision-making process is advantageous to policy-making. The question that remains is how government lawyers can be best included in the decision-making process. McGarity describes a series of decision-making models, used in agency rule-making,⁷³ that illustrate ways in which lawyers can be integrated into the policy-making process.

The team model is the predominant decision-making approach used for rule-making.⁷⁴ Under this structure, a team, often referred to as a "workgroup," is composed of representatives from all interested agency sub-units. The team members meet periodically as equal partners and bring multiple perspectives to the process. The team model is designed to lessen the adversarial edge between departments and can help avoid conflict and delay. However, this method of decision-making has several disadvantages.⁷⁵ The team model is resource intensive and time consuming. Each member of the team needs to be educated and the need for consultation can

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slow the process. Furthermore, the team model lacks a structure of accountability, as members do not report to a team leader.

Use of the team approach shifts policy-making influence from upper level political appointees to career staff⁷⁶ who can limit the options presented to upper-level appointed decision-makers. Additionally, when scientific data can be interpreted in multiple ways, teams can disguise policy-making as scientific consensus.⁷⁷ However, the team model, with its emphasis on partnerships and consensus, allows the lawyer to provide input as the policy evolves and facilitates the lawyer's role as a partisan.⁷⁸

The second model is the hierarchical or "assembly-line" model.⁷⁹ In this decisionmaking structure, a single office, usually the program office, is responsible for all aspects of rule-making. This office initiates rule-making, gathers information and policy alternatives, narrows the alternatives, and prepares supporting and technical information. Agencies, such as EPA, use this method when they are under severe political pressure or time constraints.⁸⁰ Such a method has the advantages of conserving resources, avoiding delays, containing clear and direct lines of authority, and allowing for easier planning and scheduling.

This model places policy-making in the hands of the most knowledgeable people in the substantive area.⁸¹ It is especially useful for resolution of technical issues or where science or agency statutory directives are so clear that there is little policy discretion.⁸² The obvious disadvantage is the model's limited ability to bring multiple perspectives to complex problems or to obtain innovative

solutions. Sometimes a single office does not have the expertise to accomplish its task. When an interdisciplinary approach is required, quality may be lowered resulting in a lower success rate on judicial review. Offices may become frustrated and resentful, as they cannot contribute to the process, and the lack of intra-agency debate may limit the action's effectiveness.

The lawyers' role in this model is to provide opinions on narrow questions of law at the request of the program office.⁸³ OGC then "signs off" on the completed project. In this model, lawyers can only veto decisions if they determine that the agency has acted in excess of statutory authority. Consequently, lawyers cannot intervene for other pertinent reasons such as pointing out the lack of supporting data for judicial review. Lawyers can only express their views after program office has determined its preferences.⁸⁴ At this point, the lawyers' policy advice can only slow the process and lead to conflict. While the lawyer can obtain leverage through delay, this model minimizes the lawyers' policy partisan role.

The third model for the placement of lawyers in the decision-making process is that of the outside advisor.⁸⁵ In this model, offices other than the program office are not official participants in the process. Instead, the program office seeks advice from other areas as needed. This model can be labeled the "speak when spoken to" approach. The advantages of this model are similar to those of the assembly line model; the additional benefit is the program office's ability to obtain expertise without accepting biases that come with the outside profession-

al perspectives. However, there are several drawbacks to this model. First, is the high potential for misinterpretation or for the program office to simply hear what it wants to hear. In addition, other offices cannot participate in identification of policy alternatives and may become resentful if the outsider's advice is used to justify unfavorable ends. Furthermore, the lack of broad participation in decision-making can result in poorly reasoned results.

McGarity's decision-making models provide a useful framework for a discussion of the optimum position for lawyers in the policymaking process. However, his concentration on the rule-making context is inadequate, as the majority of agency lawyers may not be directly involved in rule-making. Generally, OGC provides legal advice on a wide-range of issues including application and enforcement of existing rules, program administration, ethics and administrative operations, and representation of the agency in administrative adjudication.

The Department of Education (ED) OGC structure may be representative of other federal agencies. At ED, OGC's 77 attorneys are divided between seven divisions, leaving only 5 percent of OGC's lawyers directly involved in the rule-making process.⁸⁶

In capacities other than rule-making, it is more probable that OGC lawyers are consulted on an as needed basis. At OMB, for example, policy analysts may consult with agency lawyers only a few times a year when a specific legal question arises.⁸⁷ Although there is a formal decision-making structure that includes OGC, as well as every other department within the

agency, such as signing off on decisions and recommendations, lawyers are not normally included in the less formal policy-making process.⁸⁸ Generally at OMB, formal decisions follow the assembly-line method, and less formal advice occurs through the outside advisor model. At ED, when a policymaker has a legal concern, she consults a "User's Guide to the Office of the General Counsel" (hereinafter User's Guide) to determine which OGC division or specific attorney within the division, deals with the issue. A program manager within ED's Office of Elementary and Secondary Education that seeks advice regarding charter schools would call a specific attorney within OGC's Division of Elementary, Adult, and Vocational Education.

It appears likely that the decision-making process at OMB and ED is similar to most federal agencies. This process involves the use of the outside advisor model applied for day-to-day questions, the assembly-line model for formal decision-making, and the team model employed predominantly in the rule-making context. Hence, lawyers cannot contribute in the early stages of policy formation. Their advice, if it interferes with the wishes of policymakers, can only delay the process or be viewed as meddling. This perception is perhaps justified because a lawyer cannot possibly fully understand the intricacies of policy when she becomes involved so late in the process. A methodological change in how OGC attorneys interact with their non-lawyer colleagues is required to mend the current disjunctive system of policy-making.

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Releasing the
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A Proposal for Change: an End to OGC as we know it

ED's *User's Guide* begins with the statement, "More often than not, you're over there with a legal problem and we're over here with an organization chart. How do we meet?" What sounds like a bad intra-agency personal ad actually summarizes the difficulty created by segregating lawyers and policymakers within the agency structure. This paper demonstrates that the lack of interaction between government lawyers and policymakers exacerbates the disparity between them in language, value preferences, and knowledge. More importantly, a lack of partnership may result in problematic policy-making. Releasing the potential of multiple professions and creating shared values within the agency requires a re-evaluation of the predominant agency structure and rigid role definition.

McGarity's team model provides a starting point for building an interdisciplinary agency structure. Communication between lawyers and policymakers throughout the decision-making process will avoid misunderstanding, conflict, and delay, while building a platform of shared values. Furthermore, there is no valid justification for maintaining a separation between lawyers and their agency "clients" because both lawyers and non-lawyers are legitimate policymakers. As McGarity recognized, the team model is most conducive to the lawyer's role as a "party partisan."

There are some obvious first steps that an agency must take toward improving the relationship between the professions.⁸⁹ As a policymaker at OMB

recognized, "There is something to be said for [physical] proximity [between lawyers and policymakers] both on a personal and professional level."⁹⁰ At a minimum, government lawyers should not be segregated from policymakers in separate buildings or different floors. Daily interaction, however informal, can begin a dialogue between the professions.

The hard work taken in these initial steps must be followed by a willingness to question past practice. In order to bridge the gap between lawyers and policymakers, agencies should consider either redistributing lawyers throughout the agency to work directly on policy-making teams, or, less drastically, forming a matrix structure in which lawyers are assigned to both OGC and a program or policy division. A lawyer might receive day-to-day assignments from a program head, yet receive guidance from the agency General Counsel on legal matters of broad importance. Through a matrix structure, lawyers might retain the benefits of OGC, such as administrative convenience and close association with their lawyer colleagues. As members of a program or policy division, lawyers would increase their interaction with policymakers and contribute their skills at the inception of policy development. Precisely how to accomplish this restructuring requires on a fit tailored to each individual agency, based on its programs and needs. ♦

Notes

¹ Office of Personnel Management (OPM) statistics indicate there were 23,829 "General Attorneys" as of June 1998 (Office of Personnel Management, "The Twenty Largest White-Collar Occupations: September 1992 and June 1998." In *Office of Workforce Information Central Personnel Data File*. [Washington, D.C.: GPO, 1998]). These numbers are smaller than the total number of lawyers in the federal government because the specific category excludes lawyers in the military services, Administrative Law Judges, political appointees, and possibly others. The total number of lawyers employed by the federal government has been estimated at nearly 40,000. Cornell W. Clayton, *Government Lawyers* (Lawrence, KS: University Press of Kansas, 1995), 1.

² Roger C. Cramton, "The Lawyer as Whistleblower: Confidentiality and the Government Lawyer," *Georgetown Journal of Legal Ethics* 5 (1991): 291, 292.

³ Griffin B. Bell, "The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?", *Fordham Law Review* 46 (1978): 1049.

⁴ Thomas O. McGarity, "Government Lawyering: The Role of Government Attorneys in Regulatory Agency Rulemaking," *Law and Contemporary Problems* 61 (1998): 19.

⁵ Mark C. Miller, *The High Priests of American Politics* (Knoxville, TN: University of Tennessee Press, 1995), 37.

⁶ Richard A. Harris and Sydney M. Milkis, *The Politics of Regulatory Change: A Tale of Two Agencies*, 2d ed. (New York: Oxford University Press, 1996), 244; Miller, 36-37. This response resulted from lawyers' preference for interventionist solutions, and an idealistic faith in the law as a method of solving social problems as opposed to the economists' preference for non-governmental, free market solutions.

⁷ Cramton, 292 and Bell, 1050.

⁸ OPM, "The Twenty Largest White-Collar Occupations."

⁹ *Ibid.*

¹⁰ Michael Herz, "The Attorney Particular: Governmental Role of the Agency General Counsel," in *Government Lawyers*, ed. Cornell W. Clayton (Lawrence, KS: University Press of Kansas, 1995), 157.

¹¹ *Ibid.*

¹² Clayton, 1.

¹³ McGarity, "Government Lawyering," 19-20.

¹⁴ *Ibid.*, 20.

¹⁵ *Ibid.*, 27.

¹⁶ Clayton, 159.

¹⁷ Herz, 157.

¹⁸ Jason Orlando, telephone interview by author, Washington, D.C., 3 March 1999.

¹⁹ Herz, 158.

²⁰ *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

²¹ Thomas C. McCraw, *Prophets of Regulation* (Cambridge: Harvard University Press, 1984), 271.

²² *Ibid.*, 230. It is interesting to note that Kahn, even after establishing himself as a professor and scholar of economics, considered attending law school to increase his understanding of and influence in public policy but ultimately decided to enter government service without a law degree.

²³ Peter H. Schuck, "Government Lawyering: Government Lawyers Shaping Law and Policy," *Law and Contemporary Problems* 61 (1998): 7.

²⁴ *Ibid.*, 11.

²⁵ McGarity, "Government Lawyering," 32.

²⁶ Miller, 19.

²⁷ *Ibid.*

²⁸ *Ibid.*, 24. Professor Debra Schleeff presents four elements of legal ideology taught by law schools: law is a science; legal problems always involve a simple solution with a clear winner and a clear loser; lawyers should be the strongest possible advocates for their clients' interests; and the law has a mysterious nature unavailable to the layperson.

²⁹ Kathleen Kemp, "Lawyers, Politics and Economic Regulation," *Social Science Quarterly* 67 (1986): 267-268. Alexis de Tocqueville recognized over a century ago that lawyers develop "certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude." Alexis de Tocqueville, 1 *Democracy in America* (Phillips Bradley ed., Alfred A. Knopf 1945) (1834), 273.

³⁰ Thomas O. McGarity, "The Internal Structure of EPA Rulemaking," *Law and Contemporary Problems* 54 (1991): 57, 64. For a thoughtful and analytical dissent to the view that lawyers hold a set of values and attitudes differentiating them from policymakers, see John P. Plumlee, "Lawyers as Bureaucrats: The Impact of Legal Training in the Higher Civil Service," *Public Administration Review* 41 (1981): 225-226. Plumlee argues that the perception that lawyers emphasize deduction, tradition, details, precedent, process, and lack an interest in visionary thinking rests on unsupported assumptions. According to his study, however, there is no statistically significant difference between the attitudes of lawyers and policymakers in "liberalism," "efficacy," or "cynicism."

³¹ Jonathan R. Macey, "Lawyers in Agencies: Economics, Social Psychology, and Process," *Law and Contemporary Problems* 61 (1998): 109.

³² *Ibid.*, 110.

³³ *Ibid.*

³⁴ *Ibid.*, 111-112.

³⁵ *Ibid.*, 120.

³⁶ McGarity, "The Internal Structure of EPA Rulemaking," 63.

³⁷ Harris and Milkis, 54; McGarity, "The Internal Structure of EPA Rulemaking," 63; George H. Frederickson, *Toward a New Public Administration: The Minnowbrook Perspective* (Frank E. Marini, ed. Scranton, PA: Chandler Publishing, 1971).

³⁸ Macey, 118.

³⁹ Macey, 113; Robert A. Katzmann, *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy* (Cambridge, MA: MIT Press, 1980), 51.

⁴⁰ Plumlee, "Lawyers as Bureaucrats: The Impact of Legal Training in the Higher Civil Service," 221.

⁴¹ *Ibid.*, 78. McGarity's study defined its goals as follows: (1) Timeliness: producing rules in a timely fashion; (2) Administrative Efficiency: writing rules in an efficient way that conserves agency resources; (3) Scientific and Technical Credibility: producing rules with a scientific and technical basis; (4) Allocative Efficiency: writing rules that are efficient from an overall societal perspective; (5) Fidelity to Statute: implementing policies that are consistent with the agency's statutes; (6) Judicial Review: producing rules capable of surviving judicial review; (7) Political Review: producing rules that are capable of surviving political review; (8) Enforceability: producing rules that can be implemented and enforced; (9) Fairness: producing rules in a manner that fairly considers the views of all affected constituencies; and (10) Multimedia Considerations: producing rules that reflect important multimedia considerations (how decisions made for one program impact another program's effectiveness).

⁴² *Ibid.*, 63 and Schuck, 10.

⁴³ Orlando, interview.

⁴⁴ Schuck, 12.

⁴⁵ *Ibid.*

⁴⁶ 430 F. Supp. 118 (D.D.C. 1977).

⁴⁷ *Ibid.*, 120.

⁴⁸ *Ibid.*, 121.

⁴⁹ Schuck, 14.

⁵⁰ 349 U.S. 294 (1955).

⁵¹ Schuck, 14-15.

⁵² Katzmann, 40; Such a rigid division may be present in other agencies today. For example, at OMB, lawyers are housed in the Old Executive Building with political staff, while the professional policy staff is located in the New Executive Office Building. Orlando, interview.

- 53 Katzmman, 15-54.
- 54 *Ibid*, 37.
- 55 *Ibid*, 41.
- 56 *Ibid*, 45.
- 57 *Ibid*, 46. The economists' definition included regional grocery chains that baked in-house brands of bread.
- 58 McGarity, "Government Lawyering," 19.
- 59 Carl J. Friedrich, "Public Policy and the Nature of Administrative Responsibility," in *Bureaucratic Power in National Politics*, ed. F.E. Rourke (Boston: Little, Brown, 1965), 174.
- 60 Herman Finer, "Administrative Responsibility in Democratic Government," In *Bureaucratic Power in National Politics* (F.E. Rourke ed. Boston: Little, Brown, 1965); Frank G. Goodnow, *Politics and Administration: A Study in Government* (New York: Russell & Russell, 1900); Wilson, Woodrow Wilson, "The Study of Administration," In *Classics of Public Administration* (Jay M. Shafritz and Albert C. Hyde eds. Fort Worth, TX: Harcourt Brace, 1887).
- 61 Dwight Waldo, *Democracy, Bureaucracy, and Hypocrisy* (Berkeley, CA: Institute of Governmental Studies, 1977).
- 62 Clayton, 2 and Herz, 164.
- 63 Charles Fahy, "Special Ethical Problems of Counsel for the Government," *Federal Bar Journal* 33 (1950): 331, 334.
- 64 *Ibid*. Federal Ethical Code 5-1 asserts that the government lawyer "is required to exercise independent professional judgment which transcends his personal interests, giving consideration, however, to the reasoned views of others engaged with him in the conduct of the business of government." *Federal Bar Association's Federal Ethical Considerations (FECs)* published in *Federal Bar Journal* 32 (1973): 71.
- 65 Clayton, 2 and McGarity, "Government Lawyering," 19.
- 66 *Ibid*, x.
- 67 Clayton, 2.
- 68 See generally, *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).
- 69 Herz, 147.
- 70 Mary Parker Follett, *The New State: Group Organization, the Solution of Popular Government* (New York: Longmans, Green, 1918), 112.
- 71 Cynthia McSwain, introduction lecture to public administration and management, Washington D.C., 8 November 1998.
- 72 McGarity, "The Internal Structure of EPA Rulemaking," 61.
- 73 *Ibid*. McGarity originally presented four decisionmaking models: team, hierarchical (later renamed the assembly-line model), outside advisor, and adversarial. In "The Role of Government Attorneys in Regulatory Agency Rulemaking," which specifically applied to the role of lawyers in rulemaking decisions, McGarity eliminated both the outside advisor and adversarial models because they were not used for lawyers in this context. He rejects the outside advisor model because, in the rulemaking context, lawyers, at minimum, retain veto power over statutory questions. I examine the outside advisor approach because it is applicable to agency lawyers in other contexts such as day-to-day decisionmaking or implementation of promulgated rules. McGarity's observation that it would be rare for an agency to pit legal expertise against technical or economic expertise is viable in any context.
- 74 McGarity, "Government Lawyering," 20-21.
- 75 McGarity, "The Internal Structure of EPA Rulemaking," 91-92.
- 76 *Ibid*, 92.
- 77 *Ibid*, 93.
- 78 McGarity, "Government Lawyering," 30.
- 79 *Ibid*, 21.
- 80 McGarity, "The Internal Structure of EPA Rulemaking," 95-96.
- 81 *Ibid*, 96.
- 82 *Ibid*, 97.
- 83 McGarity, "Government Lawyering," 21-22.
- 84 *Ibid*, 30.
- 85 McGarity, "The Internal Structure of EPA Rulemaking," 97-98.

⁸⁶ United States Department of Education, User's Guide to the Office of the General Counsel (May 1998). OGC divisions include Ethics Counsel (5 lawyers), Educational Equity and Research (14 lawyers), Elementary, Secondary, Adult, and Vocational Education (17 lawyers); Business and Administrative Law (14 lawyers), Postsecondary Education (17 lawyers), Legislative Counsel (6 lawyers) and Regulatory Services (4 lawyers).

⁸⁷ Orlando, interview.

⁸⁸ An exception to this separation occurs during budget season when one designated attorney meets with each program examiner to discuss the language of the budget program by program in order to provide a legal perspective on budgetary issues.

⁸⁹ OMB took a first step toward bridging the gap between lawyers and policymakers by hiring staff with legal backgrounds for several of their program offices (Orlando, 1999).

⁹⁰ Orlando, interview.

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