LAWMAKING WITHIN FEDERAL AGENCIES AND WITHOUT JUDICIAL REVIEW

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I. INTRODUCTION

Last year at the Florida State University College of Law's *Environmental Law Without Court*s Symposium, we explored a number of fascinating aspects of how federal agencies regulate in ways that are insulated from judicial review. These explorations ranged from the broad discretion agencies have to manage public lands[1] and federal fisheries,[2] to how a "military-environmental complex" has developed to advance national environmental objectives with little judicial involvement,[3] to how agencies can navigate in ways that are not judicially reviewable on judicial remand[4] or with respect to designing their own internal procedures.[5]

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1. Eric Biber, *Looking Toward the Future of Judicial Review for the Public Lands*, 32 J. LAND USE & ENVTL. L. 359 (2017); Shi-Ling Hsu, *Judicial Review for the Public Lands: Comment to Eric Biber*, 32 J. LAND USE & ENVTL. L. 375 (2017).

2. Robin Kundis Craig & Catherine Danley, *Federal Fisheries Management: A Quantitative Assessment of Federal Fisheries Litigation Since 1976*, 32 J. LAND USE & ENVTL. L. 381 (2017); Donna Christie, *Comments on Fisheries Management Without Courts,* 32 J. LAND USE & ENVTL. L. 423 (2017); Erin Ryan, *Fisheries Management Without Courts*, 32 J. LAND USE & ENVTL. L. 431 (2017).

3. Sarah E. Light, *The Military-Environmental Complex and the Courts*, 32 J. LAND USE & ENVTL. L. 455 (2017); Shi-Ling Hsu, *The Military-Environmental Complex and the Courts: Comment to Sarah Light*, 32 J. LAND USE & ENVTL. L. 477 (2017).

4. Robert L. Glicksman & Emily Hammond, *Agency Behavior and Discretion on Remand*, 32 J. LAND USE & ENVTL. L. 483 (2017); David L. Markell, *Agency Motivations in Exercising Discretion*, 32 J. LAND USE & ENVTL. L. 513 (2017).

5. Emily S. Bremer & Sharon Jacobs, *Agency Innovation in* Vermont Yankee*'s White Space*, 32 J. LAND USE & ENVTL. L. 523 (2017); Hannah J. Wiseman, *Expanding the Boundaries of Administrative Constitutionalism: Understanding and Assessing Agencies' Experimentation with Procedures*, 32 J. LAND USE & ENVTL. L. 543 (2017). For additional commentary on the Symposium see Arden Rowell, *Environmental Lawmaking Within Federal*

This Essay examines two other ways administrative law operates with little, if any, judicial oversight: federal agencies play a substantial role in drafting the legislation that empowers them to regulate, and agencies then typically have broad discretion within that congressionally delegated authority to choose how to regulate. The former legislative-drafting activity fully escapes judicial review, and the agency choices made in the latter rulemaking activity are usually only reviewed by courts for reasonableness.[6] In other words, a vast amount of agency lawmaking escapes judicial review, which suggests that it is all the more important to understand the key players *within* the agency that engage in these legislative and regulatory activities.

Drawing on a study I conducted for the Administrative Conference of the United States (ACUS),[7] this Essay aims to shed some light on these issues by describing the processes and agency officials involved in drafting regulations and in providing technical assistance in legislative drafting. It turns out that agency general counsel offices—made up primarily of civil-servant lawyers—play a critical role in both activities. Yet not all agency general counsel offices are structured the same to coordinate these activities. In particular, the Department of Energy is one outlier in that its general counsel office combines the legislative and regulatory counsel in one division, where agency lawyers cross-train and work on drafting both regulations and legislation. Most agencies, by contrast, have separate legal divisions for regulatory and legislative matters, and these divisions have little direct interaction in carrying out their responsibilities. As this Essay illustrates, these institutional design decisions may have important implications for agency lawmaking, especially in a world with little to no judicial review.

This Essay proceeds in two Parts. Part II briefly outlines these two types of agency lawmaking activity—rulemaking and legislative drafting—and how they are insulated from judicial review. Part III explores how agency design may matter in both lawmaking activities—with a particular emphasis on the agency general counsel office—by discussing the various agency organizational models

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Agencies and Without Judicial Review, 32 J. LAND USE & ENVTL. L. 567 (2017), and Mark Seidenfeld, *The Long Shadow of Judicial Review*, 32 J. LAND USE & ENVTL. L. 579 (2017).

6. *See, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (instructing courts to defer to reasonable agency interpretations of ambiguous provisions in statutes the agency administers).

7. CHRISTOPHER J. WALKER, FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING (Admin. Conference of U.S. ed., 2015); *see also* Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,161–63 (Dec. 16, 2015) [hereinafter ACUS Recommendations] (summarizing findings and adopting various recommendations from my ACUS report).

identified in the ACUS study. In particular, the combined legislation and regulation legal office has the virtue of ensuring that those agency lawyers who help draft the legislation can fully leverage the agency's experience and expertise in implementing the legislation, and vice versa. Part III also flags a number of best practices for agency general counsel offices to consider short of consolidating legislative and regulatory counsel in one office.

This Essay is by no means a comprehensive take on how agency design choices can affect agency lawmaking. Instead, the objective here is to call attention to the topic and sketch out potential avenues for further research and discussion. Such further exploration is particularly important with respect to agency lawmaking that is insulated from judicial review.

II. AGENCY LAWMAKING WITHOUT JUDICIAL REVIEW

This Part focuses on two main ways in which federal agencies make, or at least help make, law that is insulated from judicial review: drafting regulations and providing technical assistance in legislative drafting. I have explored both of these types of agency lawmaking in prior work.[8] Accordingly, this Essay provides just a brief overview of the findings from those prior studies.

A. Rulemaking and Chevron *Deference*

First, federal agencies draft rules that are then subject to public notice and comment.[9] To be sure, the final versions of those rules are also subject to judicial review under the Administrative Procedure Act.[10] But, due to *Chevron* deference, when the underlying statute is ambiguous judicial review is limited to the reasonableness of the agency's interpretation.[11] As the *Chevron* Court explained, the reviewing "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[12] Thus,

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8. *See* WALKER, *supra* note 7 (documenting how agencies provide technical assistance in legislative drafting); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015) (reporting findings of survey of agency rule drafters).

9. *See* 5 U.S.C. § 553 (2012) (detailing notice-and-comment rulemaking procedures).

10. *See id.* § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

11. *Chevron*, 467 U.S. at 843–44.

12. *Id.* at 843 n.11; *accord* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's

agencies are provided with "*Chevron* space" to regulate without judicial interference.[13] To provide some additional context, Kent Barnett and I just concluded our review of every published circuit court decision that cites *Chevron* deference from 2003 through 2013, and we found that the agency won 77.4 percent of the time when courts applied the *Chevron* framework and 93.8 percent of the time when courts found the statute ambiguous and thus assessed the agency's interpretation for reasonableness.[14]

To better understand how federal agencies approach these rule-making activities, in 2013 I surveyed federal agency rule drafters at seven executive departments (Agriculture, Commerce, Energy, Homeland Security, Health and Human Services, Housing and Urban Development, and Transportation) and two independent agencies (Federal Communications Commission and Federal Reserve).[15] The survey consisted of 195 questions and covered a

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construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." (citing *Chevron*, 467 U.S. at 843–44, 843 n.11)).

13. Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012) (Under *Chevron* space, "the natural role of courts, like that of referees in a sports match, is to see that the ball stays within the bounds of the playing field and that the game is played according to its rules. It is not for courts themselves to play the game."); *see also* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (explaining that *Chevron* "create[s] a space, so to speak, for the exercise of continuing agency discretion"); *accord Brand X*, 545 U.S. at 980 (noting that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion").

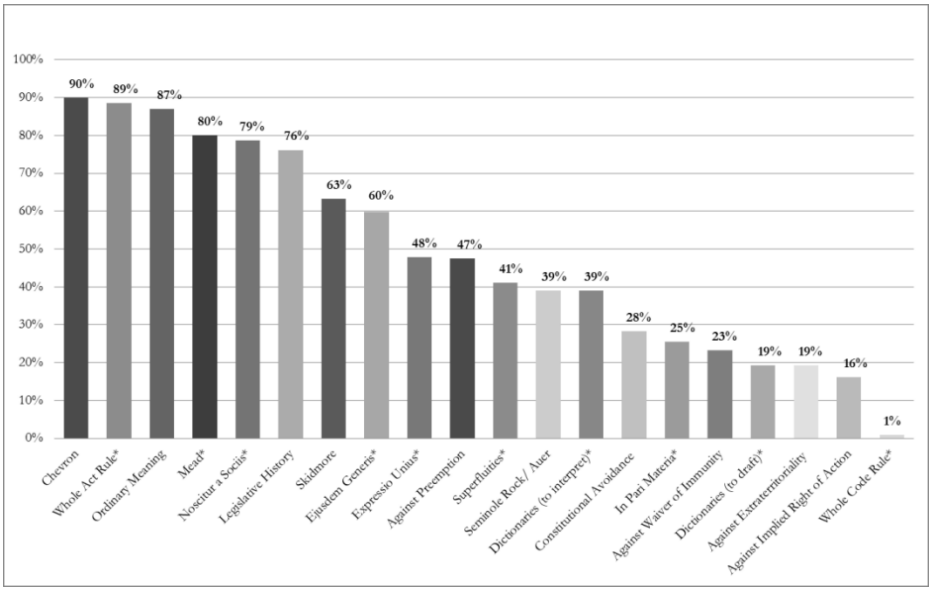
To be sure, an empirical study by Bill Eskridge and Lauren Baer cast doubt on whether *Chevron* deference really creates such policy space at the Supreme Court. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1123–25 (2008); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982 (1992) ("[I]t is clear that *Chevron* is often ignored by the Supreme Court. . . . [T]he two-step framework has been used in only about one-third of the total post-*Chevron* cases . . . . "). My own, more recent coauthored study of *Chevron* deference in the federal courts of appeals, however, suggests that *Chevron* deference retains such policy space at the circuit court level. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017) (finding, *inter alia*, nearly a twenty-five percentage point difference in agency win rates when the circuit courts applied *Chevron* deference than when they refused to apply it); *see also* Christopher J. Walker, Chevron *Deference and Patent Exceptionalism*, 65 DUKE L.J. ONLINE 149, 156–58, 161–62 (2016) (arguing in the context of the Federal Circuit and agency interpretations of substantive patent law that *Chevron* deference may serve to control lower courts and provide greater nationwide uniformity).

14. Barnett & Walker, *supra* note 13 (manuscript at 34 fig.3).

15. The full findings are reported in Walker, *supra* note 8; *see also* Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703 (2014) [hereinafter Walker, Chevron *Inside the Regulatory State*] (further exploring findings related to administrative law's deference doctrines); Christopher J. Walker, *Inside Regulatory Interpretation: A Research Note*, 114 MICH. L. REV. FIRST IMPRESSIONS 61 (2015) (exploring findings related to regulatory interpretation). The survey was modeled on Lisa Bressman and Abbe Gluck's pioneering study on congressional drafting. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An*

variety of topics related to agency statutory interpretation and rule drafting. Ultimately, 128 agency rule drafters responded for a 31 percent response rate. Although confidentiality concerns (among other things) limit the generalizability of the study's findings,[16] the rule drafters surveyed provided critical insights into what they consider when determining whether they have *Chevron* space and, if so, how to utilize such space when regulating. Figure 1 presents the findings with respect to the rule drafters' use of all interpretive tools explored in the study—reported as the percentage of rule drafters who indicated that they use these tools when interpreting statutes or drafting rules.[17]

Figure 1. Agency Rule Drafters' Use of Interpretive Tools



Perhaps unsurprisingly *Chevron* deference was the clear winner of the entire survey. Among all twenty-two interpretive tools included in the survey, *Chevron* was the most known by name (94%) and most reported as playing a role in rule drafting (90%). The next most recognized tools were: the ordinary meaning canon (92%),

Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II, 66 STAN. L. REV. 725 (2014).

16. For more on the study methodology and its accompanying limitations, *see* Walker, *supra* note 8, at 1013–18.

17. Figure 1 is reproduced from *id.* at 1020 fig.2 and reports the rule drafters' indication of use of the interpretive principle by name—except where indicated with an asterisk, in which case the use is reported by concept. For canons reported by concept, use is calculated by including those who responded that those concepts were always or often true. The *Mead* doctrine is calculated by concept by taking the lower percentage reported of the two conditions. *See id.* at 1020 n.83.

Skidmore deference (81%), and the presumption against preemption of state law (78%).[18] As Figure 1 depicts, after *Chevron*, the tools most reported as playing a role in rule drafting were: the whole act rule (89%), the ordinary meaning canon (87%), *Mead* doctrine (80%), *noscitur a sociis* (associated-words canon) (79%), and legislative history (76%).

Chevron's supremacy is important for understanding how federal agencies approach rulemaking. The agency rule drafters surveyed appreciated that if a statutory provision is ambiguous, the agency—not the court—will be the primary interpreter of the statute, and that the agency's interpretation of the statutory ambiguity will likely prevail on judicial review so long as it is reasonable.[19] This observation, however, has some limitations. The agency respondents noted that not all ambiguities create such *Chevron* space, as ambiguities related to major questions, preemption of state law, and constitutional questions may not do so.[20] Conversely, virtually all agency respondents agreed that ambiguities relating to implementation details or relating to the agency's area of expertise indicated congressional intent to create *Chevron* space for the agency.[21]

The agency rule drafters surveyed, moreover, seemed to suggest that federal agencies act differently when they believe they are entitled to *Chevron* space. Nearly nine in ten rule drafters surveyed strongly agreed (46%) or agreed (41%)—and another 11% somewhat agreed—that "[w]hen drafting rules and interpreting statutes, agency drafters such as yourself think about subsequent judicial review."[22] The rule drafters surveyed understood quite well how different deference doctrines affect agency win rates on judicial review: four in five strongly agreed (38%) or agreed (45%)—and another 17% somewhat agreed—that "[i]f *Chevron* deference (as opposed to *Skidmore* deference or no deference) applies to an agency's interpretation of an ambiguous statute it administers, the agency is more likely to prevail in court."[23] Indeed, two in five rule drafters surveyed agreed (31%–33%) or strongly agreed (7%–10%)—and another two in five somewhat agreed (40%–45%)—that a federal agency is more aggressive in its interpretive efforts if it is confident

18. *See id.* at 1019 fig.1 (depicting knowledge of interpretive tools by name).

19. *See id.* at 1049–52.

20. *See* Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095, 1109–16 (2016) (exploring in greater detail these findings regarding delegation by ambiguity).

21. Walker, *supra* note 8, at 1053–55, 1053 fig.10.

22. Walker, Chevron *Inside the Regulatory State*, *supra* note 15, at 722 (quoting survey question).

23. *Id.* at 723 (quoting survey question).

that *Chevron* deference applies—as opposed to *Skidmore* deference or *de novo* review.[24]

In sum, the federal agency rule drafters surveyed embraced the idea that *Chevron* deference creates a space for agency lawmaking that is insulated from searching judicial review and provided some support for the idea that agencies regulate differently—more aggressively—when they believe their interpretive efforts fall within this *Chevron* space.

B. Agency Legislative Drafting Assistance

Agencies also help make law in a judicially unreviewable manner by assisting Congress in drafting statutes. Federal agencies play a substantial role in the legislative process by submitting substantive legislation to Congress and by providing confidential technical drafting assistance on legislation drafted by congressional staffers.[25] Although federal agencies are often influential in the drafting of the legislation that delegates lawmaking authority to those agencies, the role of agencies in the legislative process is fully insulated from judicial review. Of course, courts review statutory text to determine its meaning and its constitutionality. But courts do not review how agencies participated in its drafting. In particular, courts do not assess whether agencies self-delegate lawmaking authority by leaving statutory mandates broad and ambiguous, much less the role agencies may play in drafting statutes that eliminate judicial review of agency action altogether.[26]

As detailed in my ACUS report, federal agencies play a substantial role in drafting statutes that they subsequently administer. In addition to federal agencies' substantive legislative activities,[27] federal agencies routinely respond to congressional requests to provide technical assistance in statutory drafting. In its recommendations to improve the technical drafting assistance process, ACUS provided a helpful summary of the process:

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24. *Id.* at 722–24, 722 fig.3. These findings are presented in percentage ranges because the survey explored this issue with two questions that were worded in slightly different ways. *See id.* at 723–24.

25. *See* WALKER, *supra* note 7, at 5–11 (providing background on how federal agencies participate in the legislative process).

26. *See* 5 U.S.C. § 701(a) (2012) (noting that judicial review under the Administrative Procedure Act is available "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law").

27. An agency's substantive legislative activities, which are not the subject of this Essay, go through White House review and preclearance. *See* OFFICE OF MGMT. & BUDGET, CIRCULAR A-19: LEGISLATIVE COORDINATION AND CLEARANCE (revised Sept. 20, 1979); *see also* WALKER, *supra* note 7, at 6–9 (discussing federal agency substantive legislative activities in greater detail).

> Congress frequently requests technical assistance from agencies on proposed legislation. Congressional requests for technical assistance in statutory drafting can range from review of draft legislation to requests for the agency to draft legislation based on specifications provided by the Congressional requester. Despite the fact that technical assistance does not require OMB preclearance, there is some consistency in the assistance process across agencies. Agencies often provide technical drafting assistance on legislation that directly affects those agencies and respond to Congressional requests regardless of factors such as the likelihood of the legislation being enacted, its effect on the agency, or the party affiliation of the requesting Member. Agency actors involved in the process include the agency's legislative affairs office, program and policy experts, and legislative counsel. In some agencies, regulatory counsel also participate routinely. Moreover, agency responses range from oral discussions of general feedback to written memoranda to suggested legislative language or redlined suggestions on the draft legislation.[28]

Elsewhere I have described this process as "legislating in the shadows,"[29] as the congressional requester generally expects the technical drafting assistance request and response to remain confidential—not to be disclosed to the other party in Congress, not to the public, and oftentimes not even to the White House. It turns out that the vast majority of legislative drafting conducted by federal agencies today is not agency-initiated substantive legislation, but confidential agency responses to congressional requests for technical drafting assistance.[30] Moreover, agencies report that they provide technical drafting assistance on the vast majority of proposed legislation that directly affects them and on most such legislation that gets enacted.[31]

This legislating in the shadows, as I have explored elsewhere, has important implications for administrative law doctrine and theory. On the one hand, it may support the growing scholarly call that agencies should be allowed to engage in more purposivist

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28. ACUS Recommendations, *supra* note 7, at 78,162 (footnote omitted). My ACUS report delves into this process in much greater detail, reporting the findings from interviews at some twenty federal agencies, a follow-up anonymous survey at ten agencies, and detailed case studies on those ten agencies. *See* WALKER, *supra* note 7, at 11–28, 43–47 app. A (survey instrument), 48–90 apps. B–K (agency case studies).

29. Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. (forthcoming 2017).

30. ACUS Recommendations, *supra* note 7, at 78,161.

31. *See* WALKER, *supra* note 7, at 13–16.

statutory interpretation (than their judicial counterparts) because of their expertise in legislative history and their substantial role in statutory drafting.[32] Conversely, legislating in the shadows may cast some doubt on the foundations for judicial deference of agency statutory interpretations. Because "agencies are intimately involved in drafting the legislation that ultimately delegates to those agencies the authority to interpret the legislation," I have argued, "many of the agency self-delegation criticisms raised against *Auer* deference could apply with some force to agency statutory interpretation and *Chevron* deference as well."[33]

For the purposes of this Essay, it is sufficient to appreciate that federal agencies often play a substantial role in drafting the statutes that empower the agencies to regulate and that these legislative activities are not subject to judicial oversight.

III. AGENCY STRUCTURE AND AGENCY LAWMAKING

Because these agency lawmaking activities are largely insulated from judicial review, it may be particularly important to understand the actors within the agency who influence these processes. As Jennifer Nou has recently observed, "[o]rganizational design choices can determine who controls the levers of influence, both formal and informal, within an administrative agency."[34] Nou is not the first to make such an observation.[35] But she is certainly right that administrative law scholars are still not examining "internal administrative law" as much as we should when thinking about agency lawmaking and judicial review thereof.[36]

This Part seeks to contribute in a modest fashion to the literature on internal administrative law by sketching out how agency structure differs in the provision of technical assistance in

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32. Walker, *supra* note 29 (manuscript at 24–32).

33. *Id.* (manuscript at 4–5); *see also id.* (manuscript at 32–53) (outlining the cases for and against *Chevron* deference in light of the role of federal agencies in the legislative process).

34. Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 422 (2015); *see also* Daniel Carpenter, *Internal Governance of Agencies: The Sieve, the Shove, the Show*, 129 HARV. L. REV. F. 189, 192 (2016) ("Nou's typology of intra-agency coordination mechanisms offers a helpful place to start for lawyers and scholars studying this question in the future. These conceptual guides would be as useful in a public management, public policy, or political science class as they would be in an administrative law course.").

35. *See, e.g.*, ROBERT A. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY 7 (Martha Weinberg & Benjamin Page eds., 1980) ("Organizational arrangements have much to do with determining how power is distributed among participants in the decision-making process, the manner in which information is gathered, the types of data that are collected, the kinds of policy issues that are discussed, the choices that are made, and the ways in which decisions are implemented.").

36. Nou, *supra* note 34, at 427 (quoting, *inter alia*, Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1470 (2010)).

legislative drafting. Part III.A details the three main structural models for the agency as a whole, whereas Part III.B focuses on the varying structures of the agency general counsel office.

A. Agency Organizational Models

Each agency profiled in my ACUS report has a distinct organizational model for providing technical drafting assistance.[37] Despite the important differences among agencies, three general models emerge from the ten agency case studies in the report: (1) a centralized legislative counsel model; (2) a decentralized agency experts model; and (3) a centralized legislative affairs model. Each model will be addressed in turn, including a brief discussion of the advantages and disadvantages of each model.

1. Centralized Legislative Counsel Model

The predominant model among the agencies profiled in the report is one where the legislative counsel within the agency general counsel office is the primary drafter and coordinator of all technical assistance responses.[38] To be sure, the legislative affairs office remains the official liaison to Congress and generally the first agency contact for a technical drafting assistance request. But once the request is received, the legislative affairs staff turns over the drafting coordination to the agency's legislative counsel. These agency lawyers reach out to the agency's policy and program experts and other officials where appropriate. When the technical assistance request is complete, the legislative counsel send it back to the legislative affairs staff to officially communicate back to the congressional requester. At times, however, informal communications have already taken place between the legislative counsel (and other agency experts that have been involved in the process) before the legislative affairs staff receives the technical assistance response. Other times, the legislative affairs staff facilitates the communications between the congressional requester and the relevant agency personnel, including the legislative counsel.

This model has several advantages that are particularly relevant to executive agencies. First, legislative counsel often have

37. WALKER, *supra* note 7, at 48–86 apps. B–K (exploring those differences in detail in the ten agency case studies). Part III.A draws substantially from *id.* at 28–30.

38. This model, with some substantial variations, has been adopted by the Departments of Agriculture, Education, Energy, Homeland Security, Housing and Urban Development, and Labor. *See also id.* at 67–71 app. G (detailing that the Department of Health and Human Services has a hybrid organizational structure somewhere between the centralized legislative counsel model and the centralized legislative affairs model).

more expertise in legislative drafting than legislative affairs staffers. After all, legislative counsel have law degrees and training in statutory interpretation, whereas that is not always the case with legislative affairs staffers. At many agencies, there also tends to be less turnover—and thus more institutional knowledge retained—among legislative counsel. But perhaps more importantly, legislative counsel are career civil servants, whereas legislative affairs staffers often are political appointees (or at least the office heads and deputies are political appointees).

During the interviews many agencies officials emphasized the important career–political division between legislative counsel and legislative affairs for maintaining the agency's status with Congress as an expert, nonpartisan provider of technical drafting assistance. For instance, officials at the Department of Health and Human Services—among others—listed this as one of the agency's best practices: "Having [legislative affairs] deal directly with Congress—and the politics that may be implicated when dealing with Congress—allows the [Office of General Counsel] Legislation Division (and the rest of the Department) to maintain its role as an expert, nonpolitical counselor on legislative drafting."[39] Indeed, ACUS appears to have embraced this best practice, recommending that "[a]gencies should maintain the distinct roles of, and strong working relationships among, their legislative affairs personnel, policy and program experts, and legislative counsel."[40]

2. Decentralized Agency Experts Model

One agency profiled in my ACUS report—the Department of Commerce—has adopted a more decentralized agency experts model.[41] This model also seems to have been adopted by (at least) the Department of Treasury and to some extent the Federal Communications Commission.[42] Under this model, the legislative affairs office serves as the gatekeeper and official congressional liaison. But instead of sending technical drafting assistance requests to a centralized legislative counsel office, the requests are typically handled by the bureau-level policy and program experts (and agency legal counsel, where applicable). The agency general

39. *Id.* at 29.

40. ACUS Recommendations, *supra* note 7, at 78,163.

41. WALKER, *supra* note 7, at 52–55 app. C (providing an overview of the technical drafting assistance process at the Department of Commerce).

42. Neither agency was profiled in my ACUS report, but this finding emerged during interviews at a number of agencies. *See id.* at 29.

counsel office only gets involved with cross-agency legislation or where otherwise determined helpful or necessary.[43]

This decentralized model perhaps better leverages the bureau-level agency experts and gets the requests more quickly before the agency officials best situated to substantively and technically review the proposed legislation. But it may do so at the cost of not involving the lawyers who are experts in legislative drafting and who may be more aware of common drafting problems and cross-cutting agency issues. Under this model, moreover, the legislative affairs staff may have to play a more involved role in developing the agency's response, which could frustrate the political–career division in executive agencies discussed in Part III.A.1.

3. Centralized Legislative Affairs Model

The final model centralizes the technical drafting assistance process within the legislative affairs office, as opposed to within the legislative counsel's office. This model has developed at independent agencies—among the agencies profiled in my ACUS report, the Federal Reserve System[44]—where the legislative affairs staff consists of career civil servants, not political appointees. In this model, the legislative affairs staff coordinates the process with the agency's program and policy experts and relies on the agency general counsel office when appropriate.[45]

B. General Counsel Office Organizational Models

There are also important differences in how agency general counsel offices are organized that could affect how agencies provide technical drafting assistance (as well as how they draft regulations). In most agencies, the legislative counsel and regulatory counsel are not housed in the same office, and they do not assist each other in legislative drafting and rule drafting, respectively. Indeed, seven of the ten agencies profiled in my ACUS report indicated that their regulatory counsel are rarely (six agencies) or never (one agency) involved in responding to technical drafting assistance requests,

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43. *Id.*

44. *Id.* at 64–66 app. F (providing an overview of the technical drafting assistance process at the Board of Governors of the Federal Reserve System).

45. The Pension Benefit Guaranty Corporation has a variant of this model. There, the agency general counsel office is the primary coordinator for technical drafting responses. The majority of technical requests from Congress, however, deal with requests for economic modeling for proposed legislation and not requests for legislative language review. Those requests are handled by the legislative affairs staff (there, the Office of Policy and External Affairs). *Id.* at 86–90 app. K (providing an overview of the technical drafting assistance process at the Pension Benefit Guaranty Corporation).

with another agency indicating sometimes and the remaining two indicating usually.[46] In other words, at most agencies the lawyers who draft the regulations and the lawyers who help draft the legislation do not directly interact.

At the Department of Energy and the Department of Housing and Urban Development, by contrast, those lawyers are housed in the same division; indeed, they work on both legislative and rule drafting.[47] At both of these agencies, a consistent theme from the agency interviews was that this consolidated structure helped the agency leverage its legislative experience in providing technical drafting assistance in the rulemaking process and vice versa. Because the legislative and rule drafters are one and the same, the agency is better positioned to utilize its expertise from helping to draft the statute when it drafts the rules that implement the statute. Similarly, because the legislative drafters at the agency also drafted the agency's implementing regulations, those lawyers can more easily share the agency's extensive expertise with Congress regarding the agency's experience in implementing the statutory and regulatory scheme.

This does not mean that those agencies with separate legislative and regulatory counsel offices do not leverage the agency expertise gained from both drafting activities. The agency's expertise in the legislative history and process that resulted in the legislation is likely indirectly transmitted to the lawyers who actually interpret that statute. After all, seven of the ten agencies surveyed indicated that agency program/policy experts always (two agencies) or usually (five agencies) participate in the technical assistance process, with the remainder indicating sometimes (two agencies) or rarely (one agency).[48] This is consistent with the findings of another study, in which about nine in ten (89%) agency officials surveyed indicated that they "always notify affected parties within their agency of potential legislation."[49] As one agency respondent in that study observed, "We are the technical drafters, but the program clients drive the policy. They are the ones carrying out the policy so they know it much better than we do."[50]

In sum, although there may not be a direct link between the legislative and regulatory lawyers at the vast majority of agencies profiled in my ACUS report, the program/policy experts likely help

46. *Id.* at 22 fig.3.

47. *Id.* at 60–63 app. E, 77–80 app. I (providing an overview of the technical drafting assistance process at the Department of Energy and the Department of Housing and Urban Development, respectively).

48. *Id.* at 22 fig.3.

49. Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 483 (2017).

50. *Id.* at 484.

bridge that gap, at least to some extent, by consulting with both sets of lawyers during their drafting processes. And these agencies may pursue other means of bridging the regulatory/legislative gap. Indeed, ACUS expressly recommended that agencies better leverage expertise along these lines:

> [A]gencies should consider ways to better identify and involve the appropriate agency experts—in particular, the relevant agency policy and program personnel in addition to the legislative drafting experts—in the technical drafting assistance process. These efforts may involve, for example, establishing an internal agency distribution list for technical drafting assistance requests and maintaining an internal list of appropriate agency policy and program contacts.[51]

Notwithstanding, much more work needs to be done to better understand how agency general counsel offices—and federal agencies more generally—can structure their organizations and processes to better leverage agency expertise when assisting Congress in drafting statutes and when drafting rules that aim to capture statutory purpose and congressional wishes.

IV. CONCLUSION

The study of administrative law fixates on judicial review, with inquiries into internal administrative law often neglected. One virtue of examining agency action that is insulated from judicial review is that we are forced to consider other actors and factors that enable and constrain agency action. Congress and the President—the political branches—obviously play an important role, as do interest groups, regulated entities, and the public more generally. Jon Michaels's work on administrative separation of powers becomes all the more important in a world without judicial review, as we must consider "subconstitutional separation of powers that triangulates administrative power among politically appointed agency leaders, an independent civil service, and a vibrant civil society."[52]

We must also, as this Essay has endeavored to do, look inside the agency to understand how agency structures and processes may affect the substance of agency lawmaking activities. Among the various agency officials involved in agency lawmaking activities,

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51. ACUS Recommendations, *supra* note 7, at 78,163. My ACUS report provides additional guidance on this front. *See* WALKER, *supra* note 7, at 35–36.

52. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 520 (2015).

civil-servant lawyers play a critical role—both in drafting regulations and in assisting Congress in statutory drafting. These agency lawyers survive changes in presidential administration, and they often outlast their congressional counterparts. Not only do agency lawyers have the technical expertise in drafting legal texts, but they also often have extensive experience in the statutory and regulatory scheme and in the drafting history that resulted in those laws and regulations.

Because of agency lawyers' staying power in the modern administrative state, it is particularly important to understand how the agency general counsel office fits within an agency's overall organization and how the agency general counsel office is structured to leverage the expertise of their regulatory and legislative counsel. We must better understand how decisions regarding institutional design may shape an agency's substantive lawmaking. This Essay only begins to scratch the surface of this important inquiry; much more work needs to be done.