CHAPTER ONE

INTRODUCTION

The late Clark Clifford, advisor to US Presidents and legendary Washington attorney, was famed for warning new clients interested in legal representation before the executive branch and its agencies that he had no "influence."[1] Clifford claimed only to possess the expertise of someone intimately familiar with the workings of the US government, which allowed him to instruct clients on how best to place their views and needs before administrative agencies and executive branch departments. Clifford's caveat has struck many as implausible, even ridiculous, because he clearly offered more than sound legal argumentation: a wealth of "insider" contacts with government officials at all levels, and a reputation that preceded him.

Whatever the real source of his influence – perhaps *sui generis* – Clifford's legacy still clouds our understanding of how lawyers conduct the practice of law before administrative agencies. Indeed, both academics and journalists in search of Clifford's contemporary equivalents seem to hold the notion that if regulatory lawyers are not the equivalent of lobbyists "moving and shaking" the government on behalf of corporate interests, then they are merely technicians of the law without an appreciable impact on administrative politics. The simplicity of these visions is understandable, not least because if the advocacy made by lawyers is not presented with the color and force of a lobbyist, then it is made in arcane legalisms typically understood and appreciated only by lawyers.

Regulatory systems are pervasive in modern society. They are tools with which political systems have found mechanisms, both of

convenience and of necessity, for the propagation and implementation of rules. Like the portrait of regulatory lawyers, the contemporary administrative state rests on foundations in tension, between ideals of a free-ranging policy process and a process encumbered by mechanisms of accountability. The most distinguishing feature of regulatory systems is the necessity of discretion – political choice – infused throughout the administrative state.[2] The expansion of bureaucratic processes, perhaps the most profound alteration to the political landscape in the twentieth century, has generated awareness of both the importance and potential problems of discretion. While administrative policymaking often supplements or even supplants legislative decisionmaking, a democratic "deficit" results from weaker mechanisms of accountability in practice. As faith in the expertise of administrators waned in the twentieth century, the emphasis on processes sometimes stood in as one solution to this deficit. In the United States, in particular, the drive to proceduralize the administrative state only generated new concerns about the effects of legalization and judicialization in a system with interest representation at its heart.

Because of the particular foundations, evolution, and culture in the American context, lawyers are basic ingredients in the contemporary regulatory soup as representatives of private interests. Given concerns about the influence of private power on public administration, a general accounting of how bureaucracy translates legislative goals into concrete results simply cannot ignore what lawyers provide as intermediaries. Still, despite substantial attention to the process of governance from both lawyer and nonlawyer commentators, very little systematic attention has been paid to the behavior of lawyers in regulatory settings. The unexamined questions at the juncture between lawyers and regulation are many and basic: What do attorneys do for their clients? How do attorneys perceive their role in administrative settings and how do these perceptions affect their dialogues with clients? In what ways do the activities of lawyers shape – and how are they shaped by – the agencies they encounter? Perhaps most fundamentally, how do the contributions of lawyers *qua* lawyers, with everything that implies for the role of law, construct the politics of the administrative process?

These questions lie at the intersection of two key themes featured in debates about contemporary administrative governance: how regulatory agencies bargain and dispute with private interests over the creation and application of general rules; and, more centrally, the roles representatives of interests, specifically lawyers, play in these processes.

Enormous variation across and within national systems of social and economic regulation fractures our understanding of interest representation, but from this kaleidoscope emerges a pattern of concern regarding the influence and power of private interests. Individuals who represent public and private interests are positioned to shape the distribution of wealth and welfare, and through their actions, to give rise to wider structures of political advantage. Of course, the position of lawyers in America may be unrivaled and uniquely placed in popular discourse.[3] Elsewhere, various professional groups or non-professional representatives may dominate regulatory politics. Nevertheless, at the heart of this book are questions about how a state journeys from legislative mandates to applications of law in practice, with a fundamental tension, every step of the way, between choices of interest and values, on the one hand, and the desire for process on the other.

This study brings together concern for the administrative process and the role of lawyers by focusing on the roles, strategies, and attitudes of attorneys practicing before the US Occupational Safety and Health Administration (OSHA). Established in 1970 and charged with improving and maintaining the safety and health of workplaces in the United States, OSHA's history contains all the hopes, controversies, successes, and failures one could ever wish on a regulatory bureaucracy. As a leading example of a "social regulatory" agency created in a wave during the 1960s and 1970s, its organization contains the two distinct processes – administrative rulemaking and enforcement – that are often considered separately but less commonly are considered together. Though different agencies, even different processes within an agency, might be seen as unique occasions for legal work, the shared endeavor across the OSHA policy process applies beyond the US as well: how should the state, both produced by and interacting with the private sphere, transform abstract policy goals into specific commands and incentives? This is not to limit administration to a "top-down" process. Rather, in the gap between the text of a statute and the behavior of an individual regulated entity, every step of the regulatory process can become a site for interpretation and contestation of what the law means. Selection and design of administrative processes shapes resulting politics and policy, but viewed from a distance, rulemaking and enforcement unite in the common goal of putting flesh on skeletal policy and giving life to law, though they remain important guideposts to where lawyers may become involved. This frame of reference begins to highlight the complex setting for a regulatory bar, defined simply as

those lawyers whose work brings them into contact with a regulatory agency and its body of law. After recognizing a group of attorneys who practice occupational safety and health law, are identified as "OSHA practitioners," and collectively form the "OSHA bar," the goal is to lodge an understanding of their practices into wider accounts of public–private interaction in the administrative system.

The tasks of this chapter are, first, to discuss the main themes woven through this book and, second, to provide a brief account of occupational safety and health regulation in the United States as background to the chapters that follow. Alternative perspectives on regulatory lawyers demand our initial attention, but in order to understand their work, I suggest a general understanding of how public and private interests interact. My larger goal in examining network approaches is two-fold: first, to orient the discussion of legal work around the complexities in broader regulatory environments, now a ubiquitous part of political life; and second, with a social science toolbox for analyzing contemporary relationships, to consider the importance of law and "legal" interaction in political activities typically described in "purely" political and social terms.

THE SETTING FOR REGULATORY LAWYERS

Looking at the complex mass of acronym-laden organizations and processes that make up administrative governance, one needs a set of simplifying ideas to give it order. How can one begin to describe in general terms the organizational complexity, multiple loyalties, and diverse constituencies of administrative agencies? Through many attempts at generalization, the notion of "networks" has become a fixture. The catchword resonates with the entangled relationships and labyrinthine processes that, like a sausage-maker, press interests, ideas, and values into law. If nothing else, "the term 'network' merely denotes, in a suggestive manner, the fact that policy making involves a large number and wide variety of public and private actors from the different levels and functional areas of government and society."[4] Like actors on a stage, participants in regulatory affairs relate to each other in almost choreographed style – patterns that we can begin to describe from the repeated actions of the players.

The most important implication of describing regulation as a network is that the administrative agency is not the director or producer of the play, but an actor on the same stage, not necessarily the star of

the show. In approaching regulatory agencies today, we cannot assume they sit as central, unchallengeable authorities over private interests, although neither must we assume that they operate in a free market.[5] An agency of the state, such as OSHA, receives delegated authority and power to exercise over individuals and organizations in the private sector, but it comes with explicit and implicit limits, some of which are in the hands of private actors. Three consequences flow from and fill out the understanding of regulatory relationships as networks as they frame the setting for lawyers' work: interdependence, enduring relations, and strategic action.

A basic feature of policy processes is the interdependence of government and private actors in pursuit of their respective goals. Simply, no single individual, group, or organization "gets its way" repeatedly without enlisting the explicit or tacit support of others. This stricture includes government organizations, which are no more "central" to understanding public policy than are private interests. Legislative delegation and decentralization produces administrative bodies with prescribed authority. Public bodies struggle to balance effective governance with their need to retain legitimacy,[6] and so seek cooperation and political support from private actors, particularly to the extent that constituencies (such as regulated entities or the interested public) could otherwise threaten agency authority with appeals to legislatures, courts, or other higher authority. Staff members in government bureaucracies also need other resources that private interests can provide, including information and substantive expertise. Similarly, private actors pursuing goals in the public sphere will encounter gaps in information, capital, personnel, or political power which they must overcome through collective action. Mutual need begets resource exchanges, making cooperation between parties a common occurrence.

Interdependence both encourages and takes place against a backdrop of more-or-less enduring relationships between government bodies and private organizations. Relationships, in turn, set the stage for decision-making in networks, particularly in routine affairs. Critics of American politics, in particular, have long argued that "iron triangles" or "subgovernments" develop around administrative agencies, which restrict the access of outside groups to key stages of decisionmaking.[7] Explicit or tight controls on membership are not necessary; narrow and complex issues before many regulatory agencies discourage occasional involvement in administrative processes by individuals and generalist interest groups, leaving a limited set of recurring participants. As individual

and institutional relationships develop among these parties, they gain advantages of expertise and access, which in turn solidifies the collective advantage of those inside the circle. The slippery quality of individual interactions does not diminish the significance of enduring relationships among the leading public and private participants, which shape the incentives for participants, contribute to subcultures and norms, and alter the dynamics of lawmaking.

Interdependence and continuing relations combine to produce a third significant feature of regulatory policymaking that is particularly important for the study of lawyers: the prominence of strategic interaction. Strategies and competition flow inexorably from the recognition that political actors have diverging and conflicting interests in the direction of public policies. Governments share with private parties the need to devise strategies for networked political environments.[8] Of course, we would expect any individual to act within formal and informal rules, assess possible courses of action, and use results of those actions to inform future strategies. What is vital is that we recognize regulatory interactions as more than the simple consequence of political ambitions, but also as a constitutive part of political structures, doubly so in that lawyers work within legal structures. "Winning" means achieving desirable outcomes, but also setting the stage for the future. Government strategies for "winning" inspire careful design of political processes and attempts to influence numerous aspects of networks, including membership, terms of exchange, access, or coordination.[9] In so doing, agencies set the context for strategic decisions made by private parties, whose own repeated participation fosters development and evolution of informal rules.[10] Plenty of evidence already points to the factors influencing how such rules and processes evolve, including the size of a regulatory policy area, disparities of resources between parties, goals of the parties, perceptions and beliefs, and cultural and ideological commitments.[11] The fact that most interest groups and agencies themselves are complex organizations makes full explanations very challenging indeed.[12]

The underlying appeal of these concepts partly explains why equivalents are found in multiple disciplines, including organizational sciences, policy studies, political science, and sociology. As applied to the world of regulation, the fundamental concepts associated with networks of public and private interests have spawned many labels attempting to capture different aspects of the phenomenon – among them, "issue networks,"[13] "principled issue networks,"[14] and "professional

networks."[15] One deficiency of empirical research in this vein has been the failure to treat "the law" as little more than a background variable when examining regulation as a political and social phenomenon. Administrative politics, especially in the United States – and increasingly outside of it, as discussed later – rarely occurs far from the influence of the law and legal concepts. That is, the basic steps of the regulatory process, such as setting an agenda, deciding the form and content of public participation, making substantive decisions about outcomes, and negotiating policy outcomes, are framed as they are because parties attend to wider legal debates or know that courts may intrude on the "political" decisionmaking among interested parties. Vitally, one cannot underplay the degree to which the law is open to debate and creativity. The process of finding and resolving gaps in the law in both rulemaking and enforcement involves recreating the regulatory process for the future, with the law as the medium.

Taking legal interactions seriously, then, adds another dimension to the richness of regulatory politics. Empirical research about regulatory politics and research about lawyers share a common interest in linking the behavior of public and private actors to wider structures of power in seemingly hierarchical governmental systems. The enduring qualities of regulatory politics aid the effort to generalize about legal work in a context that lawyers themselves often claim lacks routine and evades generalization. For the former, the conceptual framework described in this section may aid the effort to generalize about legal work in a context that lawyers themselves often claim lacks routine and evades generalization, while accounts of lawyers and legal work force social scientists to confront how law and legal norms affect behavior. Ultimately, notions of law and legal interpretation can become a focal point for attempts to bridge the gap between the micro-level interactions of interests and the middle-range attempts to understand how the administrative state "works." In order to probe further into the overlap of lawyers and regulatory politics, the next section begins by dissecting past approaches to understanding the role of lawyers before the administrative state.

LAWYERS IN THE MACHINERY OF LAW

Universal conclusions about regulatory systems are few, but one might be: that legal mandates for regulation never work entirely as planned or expected. Between the intentions of the law's creators – whether envisioned legislatively, judicially, or through some other hand of

government – and the targets of the law, translations change its meaning. Law in the twenty-first century no longer appears as a monolithic presence, but as a tool that is created and used by individual actors in a larger process. Given the inevitability of discretion, those involved in the *practice* of law reinterpret, redefine, recreate, and reconstitute the meaning of law in its particulars.[16] Underlying description and explanation is the orientation of social critics, journalists, and scholars, who imbue their dissections from one side of a cliché: whether the glass is half full or half empty. That is, an available perspective explaining how authoritative law applies in particular contexts in turn has generated hypotheses about the role of lawyers. If regulations are born of the aspiration to the public good, then lawyers are a dangerous political force. If regulatory policy and law is fraught with risks, then lawyers help shepherd the law to efficient outcomes.[17] Consider each of the two outlooks.

Making the law work/lawyers as grease

As the prospect of bright-line distinctions between politics and administration grew dim in President Roosevelt's New Deal, administrators of the 1930s confronted key issues concerning the constitutionality of delegation to executive agencies. The politics of delegation generates continuing cross-national discussion owing to the recognition that bureaucratic decisions are authoritative rules of general applicability with the character of legislative enactments, despite being promulgated by unelected regulatory bodies.[18] For many, especially in national traditions that view delegation as unproblematic exercises in expertise under legislative sovereignty, the only remarkable thing is that this debate persists today when delegated authority should be regarded as a necessary evil. The generalities of formal law, by their nature, require the discretion of human actors in order to make sense in different factual circumstances.[19] The possibility of a neutral application of laws is now commonly regarded as a legitimizing myth, and *prima facie* impossible. Further, some argue, the complexity of modern society prevents intelligent legislative discussion of narrow issues. If we accept that laws will address complex social and economic relationships, we must recognize that any government (short of a totalitarian regime) must adapt its regulations to accommodate diverse conditions. Agencies and regulated companies negotiate the application of general norms to particular conflicts.

In his classic work, *The Washington Lawyer*, Charles Horsky portrayed lawyers as the most likely candidates for the role of facilitator, particularly in administrative politics.[20] Congress delegates discretion to administrative agencies precisely because of the complexity of issues mired in scientific, technical, social, and economic details. The quality of information available to agency staff members limits decisionmaking in administrative agencies, so the practical experience of attorneys "can do much to improve the formal rules, increase the utility and availability of informal procedures, and clarify the ethical problems."[21] As in traditional legal settings, lawyers are essential to the construction of agency rules developed through formal procedures, because the quality of decisionmaking depends on the vigorous advocacy of parties to bring all issues to light. By representing clients in nonadversarial administrative proceedings, too, lawyers are the *sine qua non* of the governmental process, for "government is not automotive."[22] Lawyers' expertise in structuring information to a useful form is an integral part of the process through which general rules become private action; without it, agencies would grind to a halt, Horsky thought.

The Washington lawyer, Horsky continued, is essential to the implementation of laws as received by clients. The complexity of government regulations prevents regulated parties from understanding their meaning and keeping current with changes. The presence of the attorney in the process makes compliance possible; businesses and individuals cannot comply with rules they cannot understand. Lawyers communicate the many *informal* elements that government officials intended, but could not encapsulate, in the rules. Lawyers are such an integral part of transforming general rules into private action, Horsky thought, that "without this assistance . . . the government simply could not operate."[23] Horsky did not shy away from lawyers' role as advocates, but saw lawyers as complementing the operation of law by influencing government, declaring that the lawyer's function "broadly, is that of principal interpreter between government and private person, explaining to each the needs, desires and demands of the other. His corollary function is that of seeking to adjust the conflicts that inevitably arise."[24] Lawyers do not create disputes, in this view, even if they advise clients to seek resolution through adversarial processes, because the disputes were latent within the regulator–regulated relationship. Like graphite, lawyers are at worst an inert quantity, and at best a lubricant in the process of accommodating interests.

Horsky's analysis of Washington lawyering received acclaim from legal professionals, even as the social atmosphere changed.[25] Perhaps he struck a resonant chord because the fundamentals of federal agency practice seemed to resemble fundamental "practical lawyering" skills. A former commissioner of the Federal Communications Commission (FCC) commented that the regulatory lawyer "learns the rules, customs and personal idiosyncrasies of the officials in his special field, as the county seat lawyer learns his way around the local courthouse."[26] This claim connects the regulatory lawyer to Herbert Kritzer's empirical findings that lawyers can serve as brokers of interests within informal networks, not only as vigorous advocates as suggested by their professional model.[27] Similarly, a study of Silicon Valley attorneys found legal counsel to be important facilitators for the flow of venture capital to high-technology start-up companies, a role which included helping to shape national regulation around the needs of clients.[28] No attorney filled the broker image as well as Clark Clifford, whose career as a Washington attorney ended in the BCCI banking scandal of the early 1990s, because his reputation, credibility, and persuasive skills enabled him to bargain with government officials at all levels.[29] Whether or not attorneys self-consciously approach the task as Clifford did, Horsky and others regard these power brokers as necessary parts of healthy administrative, political, and judicial systems.

Substantive expertise complements procedural expertise in influencing administrative discretion, because discretion in an activist state cannot be controlled solely through judicial mechanisms. Attorneys must engage agencies on the agencies' turf via informal mechanisms that place a premium on substance, *ceteris paribus*. Such lawyers play a part in a new, important calling – "mediating between a technocratic, activist state and individuals' claims of right."[30] Lawyers in the US are matched functionally in other countries by elites who construct areas of bureaucratic policy through expertise.

In sum, from one perspective, the gap between law on the books and law in action results from popular disappointment about the translation of goals into concrete action. Lawyers, it has been argued, assist the process of translation through their efforts as advocates, consultants, brokers, and negotiators on behalf of interests to whom the laws apply. By bringing the state closer to their clients and the clients' interests closer to the government, they provide an essential service.