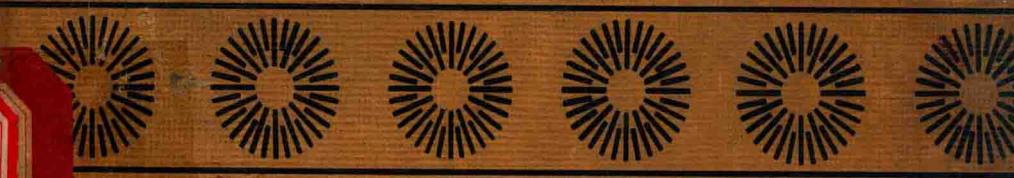
The Jurocracy

Donald L. Horowitz



Lexington Books

The Jurocracy

Government Lawyers, Agency Programs, and Judicial Decisions

Donald L. Horowitz

Lexington Books
D.C. Heath and Company
Lexington, Massachusetts
Toronto

Library of Congress Cataloging in Publication Data
Horowitz, Donald L
The jurocracy.
Includes index.
1. Government attorneys—United States. 2. Administrative agencies—United States. 3. Judicial review of administrative acts—United States. I. Title.
KF299.G6H67 342'.73'066 76-27921
ISBN 0-669-00986-5

Copyright © 1977 by D.C. Heath and Company.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage or retrieval system, without permission in writing from the publisher.

Published simultaneously in Canada.

Printed in the United States of America.

International Standard Book Number: 0-669-00986-5

Library of Congress Catalog Card Number: 76-27921

For My Mother and
the Memory of My Father

Acknowledgments

It is a pleasure to express my gratitude to a number of people who facilitated this study. Among government lawyers, my greatest debt is to William D. Appler, formerly of the Department of Justice, who helped me reconstruct many aspects of the Department's work and fill in gaps in my own recollection. Many other government lawyers obliged me with interviews and discussions of their work, and several provided me with the statistical base for the tables in Chapter 4. Joel Cohen, William Goldman, Herbert Kaufman, Michael H. Levin, Richard Liroff, and Mark L. Wolf all contributed helpful comments on the manuscript. Martha Derthick was generous with her comments on the manuscript and made a number of helpful suggestions. My research assistant, Jane Grissmer, gathered and tabulated the data for the tables in Chapter 3. Daniel J. Fiorino helped with a number of last-minute data-gathering chores. Radmila Nikolić typed the manuscript, and Elise Storck typed the final revisions.

此为试读,需要完整PDF请访问: www.ertongbook.com

Contents

1 Government Lawyers: Advocacy and Advice

The government lawyer is a hybrid species—simultaneously lawyer and bureaucrat. He has a dual role as a member of a profession and a member of an organization. Much has been written about professionals in organizations and the conflicting demands placed on them by their dual status. However, relatively little is known about how lawyers manage these tensions, about the extent to which they act as spokesmen for the legal norms articulated by the courts and by their profession.

The legal business of the federal government is, in fact, handled by more than one organization. The demands placed on lawyers vary accordingly. Virtually every government department and agency has its own stable of lawyers. In addition, the Department of Justice acts as a legal service organization for the other departments and agencies, particularly for litigation. Exactly where a lawyer sits in government may be an important determinant of the accommodation that he reaches between his professional calling and his bureaucratic employment. The lawyer who serves in a substantive department may develop one orientation toward his work; the lawyer who serves in the Department of Justice may develop another. How the lawyer behaves affects not just his role in the organization but also the role of law in the organization.

The fact that different orientations may develop among lawyers situated in different departments raises a more general point. How work is organized and parcelled out has much to do with how it is performed. The organization chart may affect recruitment and tenure, as well as norms and behavior on the job. We shall, therefore, be much concerned with the implications of dividing up legal functions in the federal government—implications for the matters just mentioned and also for the conduct of government litigation and the implementation of court decisions.

Legal services are organized in the federal government in such a way that the various departments and agencies are dependent on the Department of Justice for litigation. What this means is that organizations that are, for many purposes, virtually autonomous must, for this purpose, secure the cooperation of another organization. Studies of organizations have devoted far more attention to relations between superiors and subordinates in a hierarchy than to relations across hierarchies. No doubt this reflects what we noted a moment ago—the considerable autonomy enjoyed by many hierarchical bodies—so much so that it becomes possible,

for analytical purposes, to speak of almost any hierarchy as a complete "organization" and everything outside it as its "environment." Certainly this has been true of segments of the federal bureaucracy, even down to the bureau level. But where some essential resource resides outside the organization, patterns of relationships develop across organizational lines, and it becomes appropriate to speak of "laterarchy" as well as hierarchy.

Sometimes such relationships are labeled "interdepartmental coordination," sometimes "interorganizational conflict." Both, of course, occur. Every so often the outcome of a course of relations between departments is sanctified in a formal agreement between them. These negotiated documents, dividing tasks or territory, have some of the attributes of treaties among sovereign states. This again makes the point that these relations between departments are in many ways independent of one another. Contacts across legal bureaucracies partake of these characteristics and therefore provide a significant instance of the "foreign relations" among organizations of the same government.

The elements mentioned thus far—the role of lawyers in bureaucracy and the conflicting demands placed on them, the organization of legal work, and lateral relations among legal bureaucrats—are all affected by a force located outside the bureaucracy, the courts. In recent years, the courts have become increasingly involved in the business of the executive branch. Vigorous judicial review of administrative decisions affects the conduct of the government's business. The quality and magnitude of these effects, however, remain uncertain. The impact of judicial decisions on the bureaucracy is mediated in the first instance by government lawyers. In the course of litigation, the lawyers help to shape what issues will be decided, how, and by what court. Once decisions have been rendered, lawyers interpret those decisions. Between cases, they counsel government agencies. One ingredient of the advice they render is, presumably, the requirements of court decisions.

The increasing involvement of the judiciary in bureaucratic work affects the role of government lawyers. As litigation becomes more important, anticipating it and handling it also become more important tasks. The lawyer's overall role may become more significant. Judicial involvement increases the chances that a government lawyer will be torn between what his department does and what the courts say it should be doing. It also raises questions about the appropriate way to provide legal services to the federal government, particularly about whether litigation services should be located inside or outside the departments to be served. Finally, as litigation services are now generally outside the departments, the growing importance of litigation multiplies the occasions for interdepartmental contact and potentially for conflict. In fact, a number of these relationships have been fraught with friction in recent years.

There are further questions that the organization of legal services in the federal government raises for the judicial process. Whether divided authority is apt for litigation at all is a difficult and complex question, from the standpoint of securing the best presentation of the government's case and the best explanation of judge-made law within the bureaucracy. As judicial doctrine is interpreted largely by the lawyers, the extent to which that doctrine actually permeates the departments and agencies may depend in part on how legal services are organized. Consequently, at various points we shall find ourselves involved in a discussion of what arrangements might foster bureaucratic conformity to law.

From all this, it should be clear that this analysis of bureaucracy and litigation is focused on policy evaluation, as well as on behavior. The study deals with how government lawyers conduct their business and also how they might be organized to do so, especially if we attach high priority to heightening the responsiveness of the bureaucracy to judicial doctrine. It should be emphasized, however, that to increase responsiveness to judicially enunciated standards of behavior may not always be an unmitigated good. To do so may diminish administrative responsibility for the conduct of affairs entrusted, at least primarily, to bureaucrats. This is merely to say, of course, that there are questions of goals involved, as well as questions of behavior, and we shall have to keep our eye on both.

Most of the material for this study was gathered during a period between 1969 and 1971 when I served as a lawyer in the Civil Division of the Department of Justice. The Civil Division has principal responsibility for representing the various federal departments and agencies in litigation brought against them, and my work involved me heavily in that litigation. What I learned in the course of my own experience and that of many of my colleagues suggested to me the significance and problematic character of some of the matters discussed here. Having left the department, I set about to systematize what I knew and to fill in what I did not. I reviewed all my case files, notes, and memoranda, conducted discussions with former colleagues, and examined some of their memoranda. I gathered quantitative data comparing agency and Justice Department appeal recommendations (these are reported in Chapter 4), and I conducted interviews with a number of lawyers in departments and agencies to clarify some points that were not clear from earlier contacts or from memoranda.

This study, then, rests on participant-observation, supplemented by interviews and a sample of appeal memoranda, as well as the usual documentary and historical sources. Because so much of the material derives from my own participation or from transactions involving other lawyers that I learned about while participating, naturally there are certain inhibitions on disclosure in some cases, on attribution in others. Information imparted in the course of a confidential relationship cannot be disclosed, unless appropriate camouflage can be devised. Without evidence, howev-

er, the basis on which general statements rest will remain concealed. I have tried assiduously to avoid both of these pitfalls, by providing instances of most of the general points that lend themselves to illustrative evidence without breaching any trusts. At the same time, I have tried to compensate for my inability to use certain information by conveying as much of the flavor of attitudes and transactions as possible. I have tested the manuscript on agency and Justice lawyers, former and current. Ultimately, of course, the participant-observer, like the anthropologist who travels to a distant village, may occasionally be forced to support an assertion by simply saying, "I saw the ceremony, and this is how it was." But this appeal to experience should always be only a last resort.

A word should be said about the boundaries of this study. Although the concerns of the study are broad, the material is not equally broad. This is not a study of all government lawyers or all the functions of government lawyers. In particular, it does not deal with the counseling functions of agency lawyers except in connection with litigation. Moreover, the litigation in question is that which tests the authority of a department or agency to conduct its affairs as it has been doing. This by no means exhausts the litigation in which the government participates. Despite these limitations of focus, there is much material here that casts light on all the matters which concern us.

The cases that test the authority of departments and agencies to be doing what they are doing are invariably civil rather than criminal and are almost invariably brought against rather than by a government agency or official. Often they are actions for an injunction, an order that the department or agency should do or refrain from doing something. The suits may be brought by individuals or organizations, and their basis may be an alleged violation of the Constitution, a statute, or an administrative regulation. Such suits may affect programs that run the gamut from veterans' benefits to occupational safety regulations to educational grants to agricultural marketing standards. As we shall see, no sphere of government activity is wholly immune to litigation, although some programs are much more frequently in the courts than others.

It is, as I have suggested, the fact that all programs are candidates for litigation that makes many of the subjects in which we are interested matters of considerable current relevance. Indeed, it is this factor of recurrent litigation that is at the root of a number of interdepartmental disputes over legal services that have arisen in the last few years. It is this, too, that has made some of these disputes matters for policy resolution by Congress. This is, then, a study of government lawyers in the litigation process.

此为试读,需要完整PDF请访问: www.ertongbook.com

2 A Division of Labor and a Divorce of Functions

The Legal Bureaucracies: A "Laterarchy"

It has long been recognized that every complex organization is characterized by certain central features inherent in the nature of complex organizations.[1] Perhaps the most consistent theme is structural differentiation, both hierarchical and functional. Large, formal organizations require both a chain of command and a division of labor. But it is obvious that how one slices up such an organization has an impact on its organizational product and how it is produced—whether that product is breakfast cereal or military violence or welfare benefits—and, indeed, on the character and ethos of the organization itself.

What is true of industrial and military and social service bureaucracies is no less true of legal bureaucracies. Our concern here is with the way in which the legal resources and personnel of the federal government have been differentiated and dispersed. The basic thrust of this is succinctly and yet accurately described: The litigating function has been reserved to the Department of Justice and its minions, including the United States attorneys' offices.[a] The counseling function has been confided to the various operating departments and agencies. To this broad generalization, there are many qualifications.[2] Many of the most significant and interesting interactions occur in these interstices. And yet, despite all the caveats and nuances, so many consequences flow from this divorce of the litigating and counseling functions that it can fairly be called the fountainhead of the federal government's modus operandi in the field of administrative law[3]—with one major set of exceptions. As far as litigating authority is concerned, the independent regulatory commissions—the FCC, the NLRB, and the like—are in a class by themselves. They generally can and do represent themselves in court on a regular basis, and their division of legal labor occurs entirely within the confines of their own agency. For that reason, we shall not be concerned with them here.

Most government agencies, however, do not have such litigating authority. In court, they are the captive client of the Department of Justice.

---

[a] We shall not be much concerned with the role of United States attorneys because, with some exceptions at the district court level, they play a relatively inconsequential part in handling significant administrative agency litigation.

The authority for this divorce of functions is an exceedingly simple statute, as statutes go, which provides as follows:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.[4]

For most agencies, whether of cabinet status or not, exceptions to the general rule are not "authorized by law." Rather, Congress has simply created the office of the general counsel or its equivalent (for example, "Solicitor" for the Departments of Labor and the Interior) in the most general terms, without specifying duties or carving out exceptions in the power of the Department of Justice to conduct their affairs in court.[5]

Of course, particular statutes may grant litigating authority to the agencies charged with administering them, but such limited grants of authority are few and far between.[6] The breadth of their interpretation is sometimes a bone of contention between the Department of Justice, which resists the incursions, and the agencies, which sometimes seek to expand their scope for action in court. Nevertheless, as a matter of discretion, the Department of Justice may permit a given agency to represent itself in a particular case or class of cases, with Justice often preserving a measure of control over the litigation by reviewing the documents before they are filed in court. These arrangements vary from agency to agency and case to case, and they depend heavily on the confidence reposed by Justice Department officials in the competence and intentions of the legal personnel in the client agency. Agency lawyers appear most often in the district court.

There we have one side of the coin. Despite all the rough edges, the Department of Justice is the "barrister" of the United States. On the other side, the general counsels' offices are at once its clients and "solicitors" to their own clients in turn—to those entrusted with program management within the agencies. Their mission is to counsel the "program people" about the legal implications of what they are and ought to be doing or not doing.

This dualism is reflected in the mission orientation and organizational structure of the two sets of legal bureaucracies. Lawyers at the Department of Justice master a law or network of laws when it is necessary to prepare for litigation. Lawyers in the general counsels' offices master the agency's authorizing body of law as a matter of routine; indeed, if and when the time for litigation comes, they will usually participate in a process of "educating" the responsible lawyer at Justice in the relevant substantive and procedural law of the agency.

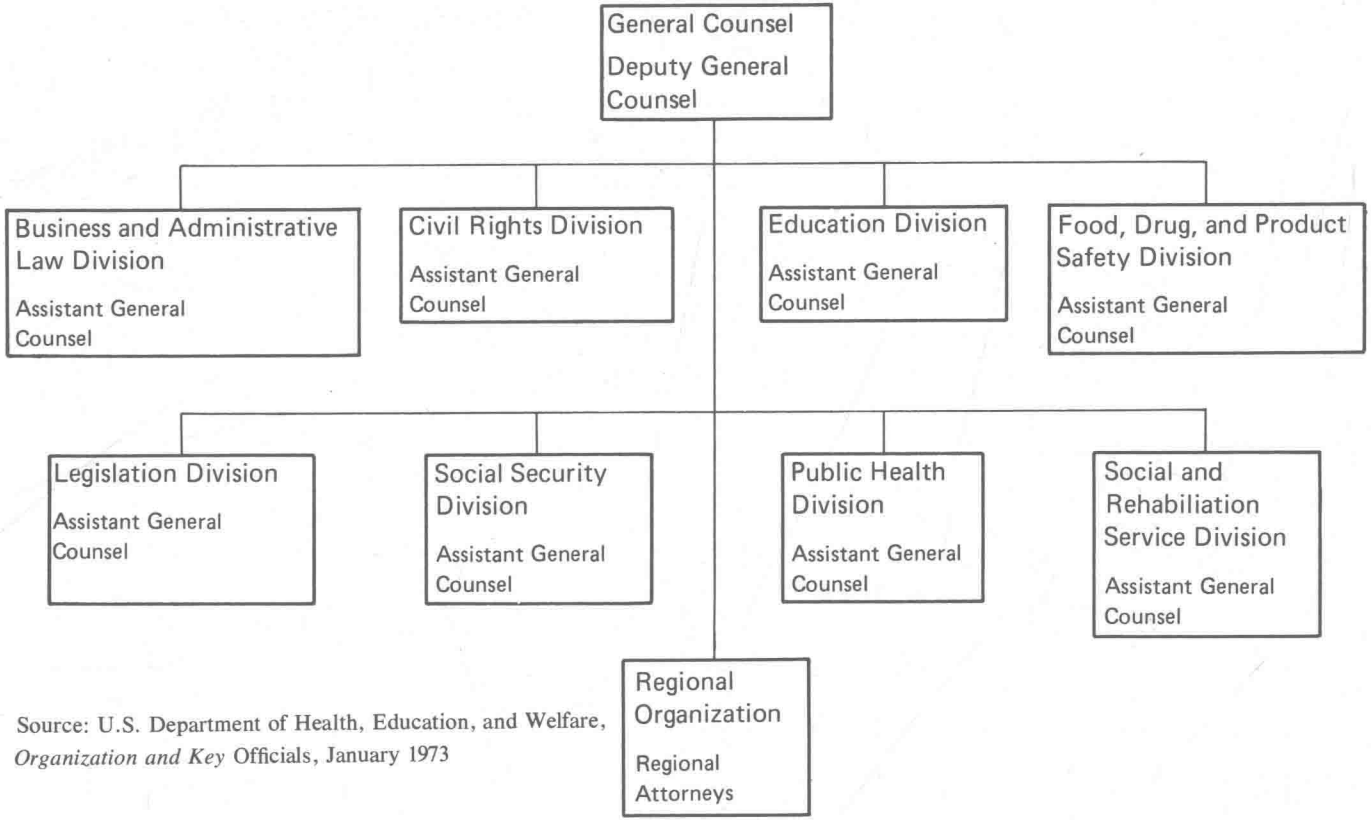
There is, of course, some (comparatively minimal) functional differen-

tiation within the Department of Justice as well, so that individual lawyers do build up pools of expertise and, having once litigated in an area of law, they may find the next such case on their desks as a matter of course. The more important point, however, is that what little functional differentiation exists at Justice is not sliced according to the responsibilities of the client agencies. To the extent that the divisions of the Department of Justice that serve agency clients *are* differentiated, their organizational lines tend to follow the organization chart of the federal judiciary and, to a lesser extent, major statutory areas, such as federal tort claims, that cut across agency lines. The degree to which the Department of Justice is court-oriented is reflected in the important distinction within the Department between trial offices and appellate offices, these two being regarded as quite separate bailiwicks.

Agency lawyers, by contrast, built up areas of substantive expertise revolving around the specific programs of their agency. Their legal knowledge tends to be highly focused and intricate. Many general counsels' offices are, moreover, subdivided by program and subprogram. The General Counsel's Office at the Environmental Protection Agency, for example—though it is a very small office, indeed—is designed to match the agency's statutory programs with exactitude. Hence it consists of four suboffices reminiscent of the Greek elements converted to the industrial age: air, water, pesticides and solid wastes, and grants and contracts. Expertise in such offices tends to become both relatively narrow and rather deep. Often, the narrower the agency's mission, the greater the specialization within its general counsel's office.

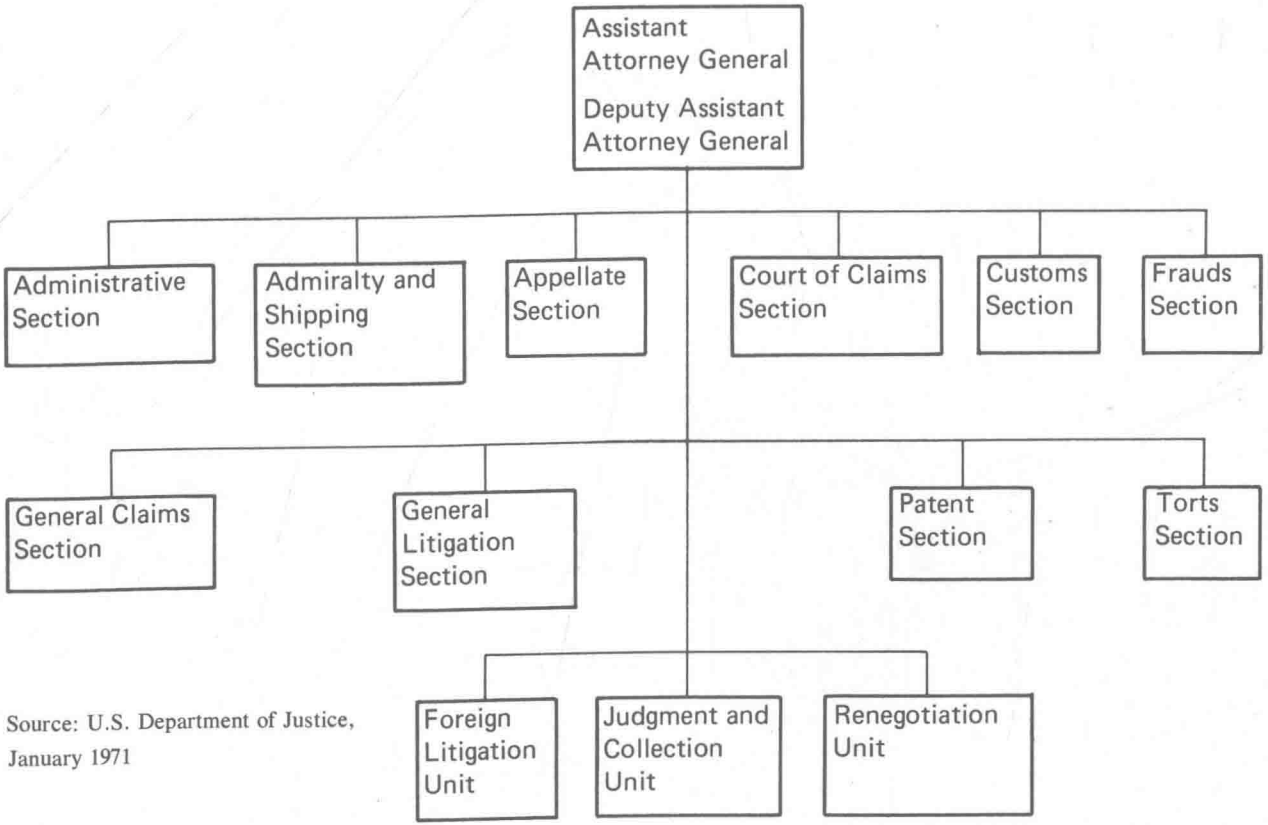
Figures 2–1 and 2–2 reflect these differences between Justice and the agencies. Figures 2–1 illustrates the close relation of an office of the general counsel to the rest of the department it serves. For the most part, the divisions of the HEW General Counsel's Office are keyed to servicing the major program offices that comprise the department (Social Security, Civil Rights, Food and Drug, etc.), though there is, as is often the case, some amalgamation of functions within the fewer divisions of the General Counsel's office. As Figure 2–2 shows, the Department of Justice Civil Division, which handles most agency litigation, is organized by almost every principle *except* that of paralleling the organization of the departments and agencies it serves.

Thus, in addition to the divorce of litigation and counseling, a parallel dichotomy has developed between the generalists at the Justice Department and the specialists at the agencies. The "Title II" functionaries at HEW may have their "Title II" lawyers in their department; they will not have them at Justice. Lawyers at Justice generally claim an arcane specialty of only one sort—litigation and the rules of law that apply to all lawsuits or, at most, to all lawsuits of a recurrent type, most notably injunc-



Source: U.S. Department of Health, Education, and Welfare, *Organization and Key* Officials, January 1973

Figure 2-1. Department of Health, Education, and Welfare, Office of the General Counsel.



Source: U.S. Department of Justice, January 1971

Figure 2-2. Department of Justice, Civil Division.

tions. To put it more accurately, the assumption at the Department of Justice is that if a lawyer does not know the provisions of a statute or the holding of a decision, he can learn them readily enough for his purposes, often with the aid of the agency lawyers. Failure to know the time limits for filing appropriate papers in court is the unpardonable sin. But the agency lawyer who knows by heart the few sections of "his" statute and "his" regulations, and all the subtleties of their legislative background and administrative interpretation, is no rare specimen.

Of course, these are gross overgeneralizations. There are Justice Department lawyers who have spent their whole careers in the depths of civil frauds and agency lawyers who have handled a wide range of legal matters.[7] But the basic point about generalists and specialists holds, in a probabilistic way, and it holds all the more for those who handle—on both sides—the most important and complex legal problems.

Since the general counsels' offices are integrated wholly into the horizontal and vertical structure of their respective agencies, the differentiation between Justice and the general counsels' offices is complete. Formally, they have no common superior, save the President. This means, of course, that they respond to quite different concerns, and if their concerns were to diverge to the point of irreconcilable conflict, which they rarely do, that conflict could, in principle, be resolved in only one of two places. The first is obviously the White House; the second is, less obviously, the courts. The Department of Justice and the general counsels' offices have, on rare occasions, been on different sides of a lawsuit relating to their respect spheres of authority.[8] More often, conflicts have been resolved, in an almost judicial way, in the office of either the Attorney General (or his deputy) or, more commonly, the Solicitor General, who has the authority to establish the litigating position of the United States. More often still, conflicts are resolved by negotiations, even if they are not called that, between Justice and the agencies.

Most of the time serious conflicts do not arise. The division of labor is, for the most part, understood and followed. The division of labor implies that these lateral relationships (as I think they are appropriately called) are intended to be complementary and cooperative rather than competitive. In principle, neither side is expected to impinge on the "territory" of the other; where they touch, each is supposed to facilitate the work of its counterpart.

Yet, the neatness that is intended may not always be achieved. In practice, there may be sufficient ambiguity about boundaries and, perhaps more important, so much interdependence of work that breakdowns of artificially designed spheres of responsibility can be expected in any complex division of labor. Each lateral actor will, from time to time, become embroiled in the work of the other. At times, there may even be attempts to alter the whole structure of responsibility.

此为试读,需要完整PDF请访问: www.ertongbook.com