The Devil is in the Details

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Christopher J. Walker, *Legislating in the Shadows*, 165 **U. Pa. L. Rev.** (forthcoming 2016), available at SSRN.

It generally starts with a phone call. A Congressional staffer might ring up a federal agency and request the agency's assistance in thrashing out the details of a new law. Usually, there's already a working draft of the law; more rarely, the staffer just has parameters or specifications in mind for how the final law ultimately ought to look and what it ought to accomplish. Depending on the situation, the agency might send back a redlined mark-up of the draft bill, or else write a draft of the law from scratch. As the bill wends its way through Congress, the agency hovers on the sidelines, red pen in hand, ready and willing to offer additional technical drafting assistance as needed. The entirety of the exchange between staffer and agency—the request, the response, and any follow-ups—remains informal, off-the-record, undocumented, and confidential, hidden from view from the White House, from OMB, and (needless to say) from the public.

This is the zone of "Legislating in the Shadows" that Christopher J. Walker brings into the light in his thought-provoking forthcoming article. This article builds upon Professor Walker's recent empirical study for the Administrative Conference of the United States (ACUS), which generated a list of recommendations that ACUS adopted in December 2015. In "Legislating in the Shadows," Professor Walker moves from description to assessment and critique, deftly distilling from his findings their most pointed—and sometimes disquieting—implications for the doctrines of administrative law and statutory interpretation.

The nub of the issue, as Professor Walker explains, is that Congressional staffers often harness agency officials to draft statutory language, perhaps even quite consequential statutory language, but they do so in a way that is almost entirely non-transparent. Although this type of agency contribution to statutory language is meant to concern only "technical" details, the line between the "technical" and the "substantive" is blurry, poorly understood, and hard to enforce. (P. 14-15.) Ultimately, he notes, an agency will provide technical drafting assistance on "nearly all" of the bills that directly affect the agency. (P. 15.) And the overall tenor of agency drafting assistance is not random in its orientation: "[a] general theme emerged during the interviews that most legislative activity initiated in Congress has the potential to harm the agency's current authority, so in many circumstances the agency's primary objective is to minimize the harm and preserve the agency's existing regulatory authority." (P. 20.)

In the heart of the article, Professor Walker examines the implications of agencies' shadow lawmaking for two aspects of administrative law: agency statutory interpretation and judicial deference to agency interpretation. As to agency statutory interpretation, he notes that his empirical findings lend support to Peter Strauss's observation that agencies have privileged access to Congressional meaning and purpose, and to the mated argument that agencies should, for that reason, be regarded as authorized to lean more heavily upon purposivism in statutory interpretation.

As to judicial deference, the picture is more complicated. One justification for *Chevron* deference, Professor Walker notes, is agency expertise—including agency expertise in the craftsmanship of statutes. This justification for deference is "substantially bolster[ed]" by Professor Walker's finding that agencies do some heavy lifting in the actual legislative drafting process. On the other hand, this very finding might also undercut the case for *Chevron* deference, he explains, because it raises the unappetizing prospect of agency self-dealing or "self-delegation." (P. 38.) When they act as drafters, agencies and Congress might respond quite differently to the interpretive regime of *Chevron*: if it is concerned about preserving its own power, Congress might hesitate before drafting a vague statute, whereas an agency might be incentivized to smudge a statute's lines to empower itself. For the same reasons as one might worry about *Auer*

deference, one might also worry about agencies legislating in the shadows. Drawing again from his empirical findings, Professor Walker suggests reasons to be skeptical of the idea that Congress holds ultimate sway and can rein in agency shadow lawmaking: agency officials report that congressional staffers, who are frequently short-term players, lack knowledge of existing statutes and regulations, let alone knowledge of how to integrate new laws with the existing regime. The net result, he concludes, might be an "excessive delegation of interpretive and policymaking authority in ways that contravene the will of the collective Congress." (P. 43.)

Professor Walker discerns a way to mitigate this morass of perverse incentives in Chief Justice Roberts's approach to *Chevron* deference, which the chief justice articulated in his dissent in *City of Arlington v. FCC* and his opinion for the Court in *King v. Burwell*: a "case-by-case approach" to *Chevron* deference that would turn on an inquiry into whether Congress had meant to delegate interpretive authority over a particular statutory provision. This approach is "context specific" rather than "bright line", or, if you prefer, *retail* rather than *wholesale*. In a similar vein, Professor Walker suggests that instead of treating all ambiguities alike, a reviewing court might instead ask "whether the ambiguity seems like a deliberate delegation by the collective Congress, or whether it seems more like the result of administrative collusion during the legislative process—or even just legislative inadvertence—that the collective Congress would not have intended to result in a delegation of interpretive authority to the agency." (P. 48.)

Given the opacity of agency participation in legislative drafting, this seems like it would be quite a difficult question to answer. As Professor Walker says, "because technical drafting assistance occurs in the shadows, it is difficult if not impossible for a court to ascertain which parts of the statute the agency agreed with, much less actually drafted." (P. 31.) As he also argues, a blanket public disclosure requirement of agency-staffer interactions would extract a significant toll: by chilling the provision of agency input, it would make the laws that get enacted worse. (P. 54-55.) Surely there will be cases in which neither the Congressional drafters nor their agency counterparts have any particular desire to own up in a court to the authorship of unappetizing or problematic bits of statutory language. And lobbyists, not just agencies, toil in the shadows, crafting legislative language for Congressional staffers. Adjusting *Chevron* deference in light of *agency* drafting, but not lobbyist drafting, would surely affect the overall mix of inputs into statutory drafting—but for good or for ill?

Of course, that a question is a difficult one does not mean it is not worth answering. If "the Congress of the United States" is but a well-known *nom de plume* used by an assortment of agency officials, then—as Professor Walker's erudite and stimulating article makes abundantly clear—that poses many pressing challenges to administrative law theory and doctrine. Figuring out how to answer these unsettling questions is the next frontier. Here, as indeed with the process of legislative drafting itself, the devil will be in the details.

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