

could have chosen otherwise. They could have—and in some ways did—act out of something other than self-interest. To see the document as an expression of logic is both to let the framers off the hook and to sell them short. As Friedrich Nietzsche once observed:

When the inquirer, having pushed to the circumference, realizes how logic in that place curls about itself and bites its own tail, he is struck with a new kind of perception: a tragic perception, which requires, to make it tolerable, the remedy of art (1956, p. 59).

Storing's assessment makes a further observation that Spicer and Terry mention but should have explored more deeply: that the most fundamental problem with the founding arguments is that they put too much emphasis on individual rights, thereby "cutting each man off from his fellows and from God" (1979, p. 232). He suggests that making individual rights to life, liberty, and pursuit of happiness the preeminent moral rule leaves a "large opening toward slavery" by making the rights of others prudential constraints instead of moral ones. Storing argues that the founders tended to reduce justice to self-preservation, self-preservation to self-interest, and self-interest to "what is convenient and achievable" (1979, 226). Spicer and Terry have fallen into a similar trap, equating legitimacy with logic, and logic with self-interest. In so doing, they have obscured the deepest concern raised by their essay: the extent to which it is possible for politicians (including administrators) to "live in truth" (Ash, 1990; Havel, 1986)—that is, to attain moral excellence.

As Vaclav Havel has reminded us, the greatest threat to human freedom is not the classic dictator but the phenomenon of impersonal power: power that is rooted in apparently neutral and objective logic. If so, then the responsibility facing public administrators today is to counterpose impersonal power with personal responsibility, conscience, and a politics growing from the heart rather than from a thesis. Havel urges us to renounce the vision of a rationally calculable and technologically achievable "welfare" in favor of "practical morality...service to the truth, [and] essentially human and humanly measured care for our fellow humans" (Havel, 1986, p. 155).

Havel's words warn public administrators of the risks attached to a practice that grounds itself in "pure" rationality. It may be the case that the terms of public life (indeed, life itself) ensure that the vast majority of us will live in half-truth. But we should not delude ourselves that we can eliminate the question of truth altogether. Nor should we want to.



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References

- Adams, Guy B., Priscilla Bowerman, Kenneth Dolbeare, and Camilla Stivers, 1990. "Joining Purpose to Practice: A Democratic Identity for the Public Service." In Henry D. Kass and Bayard L. Catron, eds., *Image and Identity in Public Administration*. Newbury Park, CA: Sage Publications.
- Ash, Timothy Garton, 1990. "Eastern Europe: Apres le deluge, nous." *New York Review of Books*, August 16, pp. 51-57.

- Beard, Charles A., 1941 [1913]. *An Economic Interpretation of the Constitution of the United States*. New York: Free Press.
- Bell, Derrick, 1987. *And We Are Not Saved: The Elusive Quest for Racial Justice*. New York: Basic Books.
- Cooke, Jacob E., ed., 1961. *The Federalist*. Middletown, CT: Wesleyan University Press.
- Gerth, H. H. and C. Wright Mills, 1946. *From Max Weber*. New York: Oxford University Press.
- Harmon, Michael M., 1981. *Action Theory for Public Administration*. New York and London: Longman.
- Havel, Vaclav, 1986. *Living in Truth*. London: Faber and Faber.
- Kelman, Steven, 1987. "Public Choice' and Public Spirit." *The Public Interest*, Spring, pp. 80-94.
- Kerber, Linda K., 1980. *Women of the Republic: Intellect and Ideology in Revolutionary America*. New York: W. W. Norton.
- Nietzsche, Friedrich, 1956. *The Birth of Tragedy out of the Spirit of Music*. Trans. Francis Golffing. Garden City, NY: Doubleday Anchor Books.
- Rossi, Alice S., ed., 1973. *The Feminist Papers: From Adams to de Beauvoir*. New York: Columbia University Press.
- Storing, Herbert J., 1979. "Slavery and the Moral Foundations of the American Republic." In Robert H. Horwitz, ed., *The Moral Foundations of the American Republic*, 2d ed. Charlottesville, VA: University of Virginia Press.

Public Administration Is Constitutional and Legitimate

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American government may be one of the few for which the legitimacy of its administrative component is so continuously an issue. Other nations seem to have less preoccupation with this matter, but it is an issue in the United States nonetheless. It is appropriate to examine our constitutional structure for what it can reveal about the issue and the role of public administration in our government. Our constitutional system may not be the ending place for such an examination, but, given the central place of the Constitution in the minds of both citizens and those in government, it is an essential starting place. Spicer and Terry stake out one position of what the Constitution can mean for the legitimacy of public administration.

The argument by Spicer and Terry in its essentials is:

1. Public administration can not be legitimated in terms of the idealized vision of the American founders of the American Constitution in that their conduct and character were in part suspect.
2. The legitimacy of public administration is to be found within the "logic" of a constitution and not in the constitutional argument of the American founders.
3. Rational individuals would agree to a constitution in order to protect themselves against exploitative gov-

ernment by limiting the discretionary power available to government officials and, thus, limit the costs which government can impose on them as individuals.

4. The central logic of a constitution in general and the American Constitution in particular is thus about restraining power.
5. The legitimate constitutional role of public administrators is to be found in helping limit the discretion of political leaders in imposing costs on citizens.

The basic problem with this thesis is that it provides an inadequate conception of constitutional government. In addition, the implications for the democratic legitimacy of public agencies and public administrators based on such a conception could be most unfortunate.

Legitimizing Power

The first issue to be confronted is whether the central logic of a constitution is about restraining power. The purpose of a constitution is to do that, but not only that. As Schochet put it, "It seems self-evidently true that a society's constitution (taking the term in its traditional sense) should define its political institutions and processes and establish standards for their evaluation.... Modern constitutionalism, with the emerging liberalism whose ideology it shares, predicates naturally free, apolitical, and rights-bearing individuals who *need* and therefore establish governments that they can, may, and should control (emphasis in original)" (1979, p. 4). In short, constitutions establish the institutions of government as well as establish their limits. Further, that such institutions have enforcement powers vis-à-vis citizens is well understood. That constitutions are about establishing arrangements that will be enforced with respect to citizens is even explicitly recognized by contractarian economists. As James Buchanan states, "Along with the limits on behavior and the rights of ownership, the inclusive constitutional contract must also make explicit the terms and conditions of enforcement. This set of terms will specify in detail the operation and limits of the protective state that is established as the enforcing agent" (1975, p. 72).

In short, constitutions are about establishing governments before placing limitations on them. It is not romanticizing the founders to recognize that they understood and intended that a government should be created to control those governed and the citizens should be able to control the government. They also understood the difficulty of reconciling those objectives and the role of the Constitution in establishing institutions to regulate the tension between them. As Madison's famous explanation in *Federalist* 51 states:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself (Rossiter, 1961, p. 322).

While they were decidedly concerned about limiting the possible uses of governmental power, the founders were nonetheless fully cognizant of the fact that a responsibility of government is to use power, and they made no attempt to hide this from the people. It would be a government of laws, but a government nonetheless, not just laws. In *Federalist* 15, Publius explains that a law is not a law without a sanction and concludes that people have a choice between coercion by the "courts and the ministers of justice" and coercion by the military. Therefore, Publius implies that since coercion is necessary in government, the people should be glad to choose civil rather than "military execution" (Mansfield, 1987).

The legitimacy of executive and administrative power understood in terms of the founding does not rest as Spicer and Terry suggest on the idealized vision or presumed moral superiority of the founders, but on the relevancy of their experience as applied to real governing. The constitutional design which has persevered for our entire history was based on their blend of experience and theory which fit the circumstances of government and governing, and which has proved adaptable to the change and growth of the nation. The constitutional separation and specification of powers may have permitted cross-purposed action and bureaucratic obstructiveness, but Americans have been largely spared swift and unforeseen changes in law and policy causing instability, and have enjoyed multiple routes of access rather than being confined to a consolidated hierarchy (Caldwell, 1976, p. 486).

The express need for a strong executive originated in our constitutional historical experience. It should be remembered that what led to the calling of the convention in Philadelphia were real problems of governing under the Articles of Confederation, problems so severe that the attendees quickly abandoned the task of amending the Articles in favor of adopting a whole new Constitution. As Corwin has discussed, the powers theoretically available to Congress under the Articles were practically unenforceable, because they depended on the actions of disparate state legislatures, which at the time were busy not only denying obedience to Congress but also trampling on the prerogatives of each other and their own citizens. An excess of legislative power and an absence of executive power was the chief defect (Corwin, 1973, p.29). The experience under the Articles of Confederation of the national government lacking a sufficient executive power to enforce the will of Congress was so pervasive that there can be little doubt that one of the major objectives of those attending the convention was to repair this deficiency. This objective was borne not only out of experience with the national government under the Articles, but in state experiences as well. As Thatch and Wood have shown, the experiences of citizens in the states created at the time of the war proved to them that the state executives were too weak (Thatch, 1969; Wood, 1969).

Designing the Executive

The supporters of the Constitution did not hide from the task of explaining the necessity of a stronger executive to a people who suffered under a monarchy and were suspicious of the misuse of executive and administrative power. They knew their opponents would charge that the executive would recreate the evils of monarchy as a principle line of attack.

They asserted the necessity of a strong executive for republican government. Publius explained in *Federalist 72* that both the capability to respond in emergencies and the duration in administration that makes possible “extensive and arduous enterprises” demanded an “energetic” executive. Mansfield points out the critical meaning for a republican government:

The *Federalist*, then, constitutionalizes the republican tradition. By finding a place for the necessities of government within the constitution of government it corrects the foolish optimism of republicanism which thinks, in essence, that men can live by the laws they choose and never have to bow to the necessities they do not choose or learn from their experience of such necessities (Mansfield, 1987, pp. 173-174).

In *Federalist 70*, Hamilton wrote the well-known explanation:

Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks, it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy (Rossiter, 1961, p. 423).

It serves to remind us of the logic of the executive that Hamilton presented, not to support the acceptance of the primacy of the executive in protecting republican government that Hamilton favored, but for what it says about the constitutional legitimacy of the executive and administrative function. Again in *Federalist 70* Hamilton wrote: “A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government” (Rossiter, 1961, p. 423).

The consideration and deliberation given to the executive at the constitutional convention was most deliberate and proceeded over several weeks with many different decisions and modifications as the participants came to develop their practical idea of a constitutional executive. The notion of the separation of powers was, of course, key, in that what would there be to check and balance an over-ambitious Congress if not the executive. However, the deliberations over what powers to give the executive further developed the presidency and the notion of what was required for adequate execution of policy. The executive presented in the Virginia plan with which the delegates began was very weak, with Congress even retaining the power to appoint the Secretary of the Treasury. However, as the convention proceeded through a series of proposals and modifications, the action of the delegates was to substantially strengthen the executive. The delegates added the role of the president as the Commander in Chief, and gave the president the power to appoint justices of the Supreme Court, ambassadors, ministers, as well as other officers already provided for—with the advise and consent of the Senate as well as the power to make treaties. What was perhaps surprising about the debate was the consensus that developed around strengthening the powers of the executive and how little com-

The executive power was not intended even by its most ardent supporters to be an unbridled one, however. The popular election of the chief executive and the separation of powers would see to that.

plaint was voiced that the additions made the president much too strong (Collier and Collier, 1986, p. 231). Both the experience of the delegates and the theory of the separation of powers that they worked out at the convention convinced them that they needed to explicitly provide for a significant executive power, and they did just that.

The executive power was not intended even by its most ardent supporters to be an unbridled one, however, the popular election of the chief executive and the separation of powers would see to that. The popular election of the president as a control on overreaching or unwise executive power was not and still should not be minimized. Alexander Hamilton was perhaps the most explicit about the conception of the executive (Caldwell, 1944). In *Federalist 72*, Hamilton spoke directly about administration or “executive details” and the position of administrators (assistants or deputies) as being subject to the superintendence of the president. In supporting the position that the president ought to be eligible for reelection, Hamilton argued that this would both encourage the president to “act his part well” and the community to observe his “measures” and form an “estimate of their merits” (Rossiter, 1961, p. 436). He concluded, “This last is necessary to enable the people when they see reason to approve of his conduct, to continue him in his station in order to prolong the utility of his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration” (Rossiter, 1961, p. 436). In short, it is the electorate who is the ultimate arbiter of good administration and its judgment and action are a central part of the control on executive power.

Further, Hamilton argued in *Federalist 27* that the more people experienced the actual operation of government on the common occurrences of their lives, “the more it will conciliate the respect and attachment of the community” (Rossiter, 1961, p. 176). He argued with respect to the people “confidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration” (Rossiter, 1961, p. 174). In short, the legitimacy of the federal government ultimately would be proven by the experience citizens had with it as it affected them. To be sure not even Hamilton conceived this to be merely the result of the impact of administration in terms of the “executive details” but in terms of administration in the larger sense of comprehending all the operations of the body politic. Nonetheless, he clearly expected that administration of the “executive details” which included such details as the conduct of foreign negotiations and the application and disbursement of public moneys in conformity to the general appropriations of the legislature, to be key parts of the measures that the people would judge.

It may be argued that this establishes the legitimacy of the executive, but not necessarily that of subordinate administra-

tors or agencies, that is, public administrators doing public administration. To a certain extent, this is hair splitting in that neither the founders nor contemporary Americans expect the president to carry out the executive power alone. In addition, to some extent the position of administration has to be taken as a basic assumption of government. As Waldo put it, "But all states are administrative else they are not states" (Waldo, 1990, p. 77). Nonetheless, the touchstone for legitimacy of public administration within our particular constitutional scheme derives in the main from its role in participating with three specified branches of government to provide for the furtherance of the public health, safety, and welfare. As Rabkin discusses, the constitutional system embraces public administration within its political design (Rabkin, 1987, pp. 196-197), which makes public administration fully engaged in the development of public policy and in the acts of governing. Whether one conceives of the role of government in society as either leading a strong society or supplementing other institutions, such as the private market and nongovernmental associations, public administration must play its primary role in complementing the actions of the institutions specified in the first three articles of the Constitution. It is governing that public administrators are doing right along with the president, congressional representatives, and judges. The role is to participate with them in the full range of the development of public policy and governance, not merely to serve as watchdogs over their transgressions.

The Separation of Powers

The other key limitation permeating the constitutional plan of government as well as the deliberations at the convention itself was the separation of powers. It is true enough that the drafters did not explicitly specify the position of subordinate administrators in the struggle among the branches out of which would come public policy. They did not specify the position and roles of the congressional committees either, which certainly have as significant an impact on public policy as public bureaucracies and are accepted as fully legitimate elements of our constitutional system, even though they are not majoritarian in character (Freedman, 1978, p. 129). Nonetheless, by the very structure of the government that the Constitution created, while the roles of subordinate administrators begin from their position in the executive, the allocation of powers to the other branches, which impact and control administration as well, literally put them in the middle, subject to the pulling and hauling of the actions by the various branches and, in turn, participants in the pulling and hauling themselves. As Rohr (1986) has discussed, this does not make public administration a fourth branch of government, but it does mean that in exercising all three powers of government, it does so in a subordinate capacity and makes its contribution in conformity with that subordination to the institutions of government created in the first three articles of the Constitution. Rohr argues that public administration (and by extension public administrators) does this by choosing which of its constitutional masters to favor in the struggle. He sees the position as balance wheel (Rohr, 1986, p. 182). The balance wheel metaphor may place more preeminence on the position of public administration than experience would support, but the notion that decisions have to be made on which

branch to favor in the context of particular policy disputes between the branches is clearly accurate. Those decisions may not win the day or even be very key to the final outcome in particular disputes, but over time they make a significant difference in how the constitutional system operates and fares in a democratic society.

The Constitution may not have made public administrators players in the separation of powers in an explicit sense, but it certainly did so in an operational sense. Does this in itself confer constitutional legitimacy on public administration? I would argue that it does. A number of institutions and practices within the American governmental system are not explicitly referred to in the Constitution, including perhaps most prominently the Supreme Court's power of judicial review, which it first operationalized unto itself in *Marbury v. Madison* (1803). In addition, the first Congress of the United States, in which many of those who drafted the Constitution participated, created the nation's original administrative agencies. Further, the constitutional legitimacy of public administration in American government rests upon those early understandings and practices that have been reinforced by the decisions of later Congresses, which created the agencies and added powers to them (Freedman, 1978, p. 127).

Individual Rights

Legitimacy rests only partly on governmental processes and structure because the constitutional guarantee of individual rights also comes into play. In order to be constitutionally legitimate, the institutions of American government must also operate in conformance with the rights of individuals guaranteed by the Constitution. Nonetheless, there is no *a priori* principle that would place public administration on a more unfavorable footing vis-à-vis the other institutions of government.

Little basis exists, however, to argue that they are on a more favorable footing either. Indeed a position which argues that public administrators are in a position to limit the discretion of political leaders in imposing costs on citizens presupposes a constitutional preeminence for the guarantee of citizens rights that the Constitution neither contemplates nor assigns, and runs the risk of subverting the interplay of the separation of powers that constitutes a real constitutional safeguard. Once public administrators renounce their subordinate position in favor of an independent position of interpreting the Constitution, they forfeit the legitimacy that the actual constitutional scheme confers. It is hard to contest that public administrators can sometimes "modify, delay, or resist the directives of political leaders in a lawful manner," when they perceive potential violations of citizens rights. Some questions, though, are, who is to ensure it is in a "lawful manner", and what does that mean when policy issues are in dispute among the three branches? There is little doubt that to be legitimate, public administration and public administrators must respect the constitutional rights of citizens (Rosenbloom and Carroll, 1990), but there is much room for debate on exactly what that requires and what for a public administrator constitutes acting lawfully in a specific situation (Wise, 1985; O'Leary and Wise, 1991).

The larger issue, however, is what such a conception does to the position of public administration when such resistance

is elevated as the central claim of legitimacy of public administrators. This bypasses or overlooks both the principles of separation of powers and popular control.

The administrative system works within a structure of separated but blended powers and is not one that is solely dependent on virtuous presidential direction or virtuous administrators. As Rabkin points out "it does display the logic which the *Federalist* itself made famous, the logic of a system where power is widely distributed, where 'ambition' is 'made to check ambition' so there is less need to rely on 'enlightened statesmen' and 'higher motives'" (Rabkin, 1987, p. 199).

Summing Up

In the final analysis, the constitutional legitimacy of public administration is not to be found in a claimed "logic" of constitutionalism. As Stillman has discussed, issues surrounding the legitimacy of public bureaucracies are not so much issues of logic but issues of values and tradeoffs among competing values (Stillman, 1987, pp. 265-294). Our constitutional design was created to establish a continuing framework for making those value tradeoffs. It requires that tradeoffs be constantly made between popular demands filtered through representative processes, effective executive power, and the protection of civil rights. Public administration, of necessity, is actively engaged in fulfilling its purpose through participating in the making of these tradeoffs.

It should be recognized that the American constitutional system and the role of public administration within it is a continually developing one. Thus, it is fruitless to look for the final answer to the question of legitimacy of public administration. If public administration and public administrators respect the fundamental constitutional principles of popular control, separation of powers, and constitutional rights and also emphasize the right mix of the value traditions within our constitutional system at a given time, both will be accorded the legitimacy they deserve.



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References

- Buchanan, James M., 1975. *The Limits of Liberty: Between Anarchy and Leviathan*. Chicago: University of Chicago Press.
- Caldwell, Lynton K., 1944. "Alexander Hamilton: Advocate of Executive Leadership." *Public Administration Review*, vol. 4, pp. 113-126.
- , 1976. "Novus Ordo Seclorum: The Heritage of American Public Administration." *Public Administration Review*, vol. 36, pp. 476-488.
- Collier, Christopher and James Lincoln Collier, 1986. *Decision in Philadelphia: The Constitutional Convention of 1787*. New York: Random House.
- Corwin, Edward S., 1973. "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention." In Gordon S. Wood, ed., *The Confederation and the Constitution: Critical Issues*. Boston: Little Brown.
- Freedman, James, 1978. *Crisis and Legitimacy: The Administrative Process and American Government*. New York: Cambridge University Press.
- Mansfield, Harvey C., 1987. "Republicanism of the Executive." In Charles R.

Kesler, ed., *The Federalist Papers and the American Founding*. New York: Free Press.

- O'Leary, Rosemary and Charles R. Wise, 1991. "Public Managers, Judges, and Legislators: Redefining the 'New Partnership'." *Public Administration Review*, vol. 51, pp. 316-327.
- Rabkin, Jeremy, 1987. "Bureaucratic Idealism and Executive Power: A Perspective on *The Federalist's* View of Public Administration." In Charles R. Kesler, ed., *The Federalist Papers and the American Founding*. New York: Free Press.
- Rohr, John A., 1986. *To Run a Constitution: The Legitimacy of the Administrative State*. Lawrence, KS: University of Kansas Press.
- Rosenbloom, David H. and James D. Carroll, 1990. *Toward Constitutional Competence*. Englewood Cliffs, NJ: Prentice-Hall.
- Rossiter, Clinton, ed., 1961. *The Federalist Papers*. New York: The New American Library.
- Schochet, Gordon J., 1979. "Introduction: Constitutionalism, Liberalism, and the Study of Politics." In J. Roland Pennock and John W. Chapman, eds., *Constitutionalism*. New York: New York University Press.
- Stillman, Richard J., 1987. *The American Bureaucracy*. Chicago: Nelson-Hall.
- Thatch, Charles C., Jr., 1969. *The Creation of the Presidency, 1775-1789*. Baltimore: Johns Hopkins University Press.
- Wood, Gordon S., 1969. *The Creation of the American Republic, 1776-1787*. Chapel Hill, NC: University of North Carolina Press.
- Waldo, Dwight, 1990. "Theory of Public Administration Means in Our Time a Theory of Politics Also." In Naomi B. Lynn and Aaron Wildavsky, *Public Administration: The State of the Discipline*. Chatham, NJ: Chatham House, pp. 73-83.
- Wise, Charles R., 1985. "Suits Against Federal Employees for Constitutional Violations: A Search for Reasonableness." *Public Administration Review*, vol. 45, pp. 845-856.

Legitimizing Public Administration: A Disturbed Dissent

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Efforts to legitimize public administration go back a long way. In the past decade or so, these efforts have turned toward legitimizing public administration as a separately constituted institution of government.

Legitimizing public administration is something every regime has to do. The Federalists probably saw administration legitimized as long as "a few good men" were in place to make a few good decisions. The Jacksonians had a theory of legitimate administration that was, in fact, a general theory of government within which administration was legitimized. In effect, government should not only be small within a strict construction of the Constitution, it should never be involved in any activity that is beyond the ability of the common person to administer. What the critics eventually called the "spoils system" was actually a quite sustainable and logical argument that administration was legitimate as long as it was consistent with democracy, and it was consistent with democracy as long as it was accessible to the common person. Rotation of officials in public office according to which political party was