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CONSTITUTIONAL DEMOCRACY
AND BUREAUCRATIC POWER*Peter Woll*

The administrative branch today stands at the very center of our governmental process; it is the keystone of the structure. And administrative agencies exercise legislative and judicial as well as executive functions—a fact that is often overlooked. . . .

How should we view American bureaucracy? Ultimately, the power of government comes to rest in the administrative branch. Agencies are given the responsibility of making concrete decisions carrying out vague policy initiated in Congress or by the president. The agencies can offer expert advice, closely attuned to the most interested pressure groups, and they often not only determine the policies that the legislature and executive recommend in the first place, but also decisively affect the policy-making process. Usually it is felt that the bureaucracy is politically “neutral,” completely under the domination of the president, Congress, or the courts. We will see that this is not entirely the case, and that the president and Congress have only sporadic control over the administrative process.

The bureaucracy is a semi-autonomous branch of the government, often dominating Congress, exercising strong influence on the president, and only infrequently subject to review by the courts. If our constitutional democracy is to be fully analyzed, we must focus attention upon the administrative branch. What is the nature of public administration? How are administration and politics intertwined? How are administrative constituencies determined? What is the relationship between agencies and their constituencies? What role should the president assume in relation to the administrative branch? How far should Congress go in controlling agencies which in fact tend to dominate the legislative process? Should judicial review be expanded? What are the conditions of judicial review? How do administrative agencies perform judicial functions, and how do these activities affect the ability of courts to oversee their actions? These questions confront us with what is called the problem of administrative responsibility: that is, how can we control the activities of the administrative branch? In order to approach an understanding of this difficult problem, it is necessary to appreciate the nature of the administrative process and how it interacts with other branches of the government and with the

general public. It is also important to understand the nature of our constitutional system, and the political context within which agencies function.

We operate within the framework of a constitutional democracy. This means, first, that the government is to be limited by the separation of powers and Bill of Rights. Another component of the system, federalism, is designed in theory to provide states with a certain amount of authority when it is not implied at the national level. Our separation of powers, the system of checks and balances, and the federal system help to explain some of the differences between administrative organization here and in other countries. But the Constitution does not explicitly provide for the administrative branch, which has become a new fourth branch of government. This raises the question of how to control the bureaucracy when there are no clear constitutional limits upon it. The second aspect of our system, democracy, is of course implied in the Constitution itself, but has expanded greatly since it was adopted. We are confronted, very broadly speaking, first with the problem of constitutional limitation, and secondly with the problem of democratic participation in the activities of the bureaucracy. The bureaucracy must be accommodated within the framework of our system of constitutional democracy. This is the crux of the problem of administrative responsibility.

Even though the Constitution does not explicitly provide for the bureaucracy, it has had a profound impact upon the structure, functions, and general place that the bureaucracy occupies in government. The administrative process was incorporated into the constitutional system under the heading of "The Executive Branch." But the concept of "administration" at the time of the adoption of the Constitution was a very simple one, involving the "mere execution" of "executive details," to use the phrases of Hamilton in *The Federalist*. The idea, at that time, was simply that the president as Chief Executive would be able to control the Executive Branch in carrying out the mandates of Congress. In *Federalist* 72, after defining administration in this very narrow way, Hamilton stated:

... The persons, therefore, to whose immediate management the different administrative matters are committed ought to be considered as Assistants or Deputies of the Chief Magistrate, and on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence.

It was clear that Hamilton felt the president would be responsible for administrative action as long as he was in office. This fact later turned up in what can be called the "presidential supremacy" school of thought, which held and still holds that the president is *constitutionally* responsible for the administrative branch, and that Congress should delegate to him all necessary authority for this purpose. Nevertheless, whatever the framers of the Constitution might have planned if they could have foreseen the nature of bureaucratic development, the fact is that the system they constructed in many ways supported bureaucratic organization and functions independent of the president. The role they assigned to Congress in relation to administration assured this result, as did the general position of Congress in the governmental system as a check or balance to the power of the president. Congress has a great deal of authority over the administrative process.

If we compare the power of Congress and the president over the bureaucracy it becomes clear that they both have important constitutional responsibility. Congress retains primary control over the organization of the bureaucracy. It alone creates and destroys agencies, and determines whether they are to be located within the executive branch or outside it. This has enabled Congress to create a large number of *independent* agencies beyond presidential control. Congress has the authority to control appropriations and may thus exercise a great deal of power over the administrative arm, although increasingly the Bureau of the Budget and the president have the initial, and more often than not the final, say over the budget. Congress also has the authority to define the jurisdiction of agencies. Finally, the Constitution gives to the legislature the power to interfere in high-level presidential appointments, which must be "by and with the advice and consent of the Senate."

Congress may extend the sharing of the appointive power when it sets up new agencies. It may delegate to the president pervasive authority to control the bureaucracy. But one of the most important elements of the separation of power is the electoral system, which gives to Congress a constituency which is different from and even conflicting with that of the president. This means that Congress often decides to set up agencies beyond presidential purview. Only rarely will it grant the president any kind of final authority to structure the bureaucracy. During World War II, on the basis of the War Powers Act, the president had the authority to reorganize the administrative branch. Today he has the same authority, provided that Congress does not veto presidential proposals within a certain time limit. In refusing to give the president permanent reorganization authority, Congress is jealously guarding one of its important prerogatives.

Turning to the constitutional authority of the president over the bureaucracy, it is somewhat puzzling to see that it gives him a relatively small role. He appoints certain officials by and with the advice and consent of the Senate. He has directive power over agencies that are placed within his jurisdiction by Congress. His control over patronage, once so important, has diminished sharply under the merit system. The president is Commander-in-Chief of all military forces, which puts him in a controlling position over the Defense Department and agencies involved in military matters. In the area of international relations, the president is by constitutional authority the "Chief Diplomat," to use [presidential scholar Clinton] Rossiter's phrase. This means that he appoints Ambassadors (by and with the advice and consent of the Senate), and generally directs national activities in the international arena—a crucially important executive function. But regardless of the apparent intentions of some of the framers of the Constitution as expressed by Hamilton in *The Federalist*, and in spite of the predominance of the presidency in military and foreign affairs, the fact remains that we seek in vain for explicit constitutional authorization for the president to be "Chief Administrator."

This is not to say that the president does not have an important responsibility to act as chief of the bureaucracy, merely that there is no constitutional mandate for this. As our system evolved, the president was given more and more responsibility until he became, in practice, Chief Administrator. At the same time the constitutional system has often impeded progress in this direction. The president's Committee on

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Administrative Management in 1937, and later the Hoover Commissions of 1949 and 1955, called upon Congress to initiate a series of reforms increasing presidential authority over the administrative branch. It was felt that this was necessary to make democracy work. The president is the only official elected nationally, and if the administration is to be held democratically accountable, he alone can stand as its representative. But meaningful control from the White House requires that the president have a comprehensive program which encompasses the activities of the bureaucracy. He must be informed as to what they are doing, and be able to control them. He must understand the complex responsibilities of the bureaucracy. Moreover, he must be able to call on sufficient political support to balance the support which the agencies draw from private clientele groups and congressional committees. This has frequently proven a difficult and often impossible task for the president. He may have the authority to control the bureaucracy in many areas, but not enough power.

On the basis of the Constitution, Congress feels it quite proper that when it delegates legislative authority to administrative agencies it can relatively often place these groups outside the control of the president. For example, in the case of the Interstate Commerce Commission . . . Congress has delegated final authority to that agency to control railroad mergers and other aspects of transportation activity, without giving the president the right to veto. The president may feel that a particular merger is undesirable because it is in violation of the antitrust laws, but the Interstate Commerce Commission is likely to feel differently. In such a situation, the president can do nothing because he does not have the *legal authority* to take any action. If he could muster enough political support to exercise influence over the ICC, he would be able to control it, but the absence of legal authority is an important factor in such cases and diminishes presidential power. Moreover, the ICC draws strong support from the railroad industry, which has been able to counterbalance the political support possessed by the president and other groups that have wished to control it. Analogous situations exist with respect to other regulatory agencies.

Besides the problem of congressional and presidential control over the bureaucracy, there is the question of judicial review of administrative decisions. The rule of law is a central element in our Constitution. The rule of law means that decisions judicial in nature should be handled by common law courts, because of their expertise in rendering due process of law. When administrative agencies engage in adjudication their decisions should be subject to judicial review—at least, they should if one supports the idea of the supremacy of law. Judicial decisions are supposed to be rendered on an independent and impartial basis, through the use of tested procedures, in order to arrive at the accurate determination of the truth. Administrative adjudication should not be subject to presidential or congressional control, which would mean political determination of decisions that should be rendered in an objective manner. The idea of the rule of law, derived from the common law and adopted within the framework of our constitutional system, in theory limits legislative and executive control over the bureaucracy.

The nature of our constitutional system poses very serious difficulties to the development of a system of administrative responsibility. The Constitution postulates that the functions of government must be separated into different branches with differing constituencies and separate authority. The idea is that the departments should oppose

each other, thereby preventing the arbitrary exercise of political power. Any combination of functions was considered to lead inevitably to arbitrary government. This is a debatable point, but the result of the Constitution is quite clear. The administrative process, on the other hand, often combines various functions of government in the same hands. Attempts are made, of course, to separate those who exercise the judicial functions from those in the prosecuting arms of the agencies. But the fact remains that there is a far greater combination of functions in the administrative process than can be accommodated by strict adherence to the Constitution.

It has often been proposed, as a means of alleviating what may be considered the bad effects of combined powers in administrative agencies, to draw a line of control from the original branches of the government to those parts of the bureaucracy exercising similar functions. Congress would control the legislative activities of the agencies, the president the executive aspects, and the courts the judicial functions. This would maintain the symmetry of the constitutional system. But this solution is not feasible, because other parts of the Constitution, giving different authority to these three branches, make symmetrical control of this kind almost impossible. The three branches of the government are not willing to give up whatever powers they may have over administrative agencies. For example, Congress is not willing to give the president complete control over all executive functions, nor to give the courts the authority to review all the decisions of the agencies. At present, judicial review takes place only if Congress authorizes it, except in those rare instances where constitutional issues are involved.

Another aspect of the problem of control is reflected in the apparent paradox that the three branches do not always use to the fullest extent their authority to regulate the bureaucracy, even though they wish to retain their power to do so. The courts, for example, have exercised considerable self-restraint in their review of administrative decisions. They are not willing to use all their power over the bureaucracy. Similarly, both Congress and the president will often limit their dealings with the administrative branch for political and practical reasons.

In the final analysis, we are left with a bureaucratic system that has been fragmented by the Constitution, and in which administrative discretion is inevitable. The bureaucracy reflects the general fragmentation of our political system. It is often the battleground for the three branches of government, and for outside pressure groups which seek to control it for their own purposes.



THE POLITICAL ROOTS AND CONSEQUENCES OF BUREAUCRACY

With the exception of those bureaucratic executive departments that all governments need, such as State, Treasury, and Defense departments, American bureaucracy has been created largely by *private*-sector political demands. In response to those demands,