Bureaucracy in the American Constitutional Order

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The development of national bureaucracy in the United States since the 1930s in what can be called its modern era has been a truly remarkable phenomenon. Many more people now work for the government than did then. Bureaucratic organizations in Washington spend far more money today than was the case fifty years ago. They provide more services and their rules and regulations affect a much wider range of human activities. The impact of the decisions made by government agencies upon the lives of ordinary citizens covers not only the familiar trip from the cradle to the grave, but extends even beyond those traditional limits of the human experience, as survivors of the deceased struggle with the Veterans Administration or the Social Security system over death benefits, or as government officials begin to concern themselves with what happens to the fetus before he or she even becomes a citizen.¹

This growth in the size of bureaucracy and the simultaneous expansion in the scope of its involvement in human affairs has generated a very strong resentment against bureaucrats and the agencies in which they work. There has been a general assumption that what is very big must also be very powerful, the lesson of the dinosaurs to the contrary notwithstanding, and the myth of an all-powerful bureaucracy has become firmly fixed in the American political imagination since


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World War II. It has been increasingly reflected in those television spectaculars through which American society is periodically "born-again," the election of a president every four years. After being nominated as presidential candidates, Richard Nixon and George Wallace in 1968, Jimmy Carter in 1976, and Ronald Reagan in 1980 all ran against the bureaucracy or in Wallace's phrase, "pointy-headed" bureaucrats. Nixon, Carter, and Reagan won election after such a campaign, and Wallace established himself as the strongest third-party candidate in modern American history. In short, opposition to bureaucracy and its power has been a winning strategy in recent national elections in the United States.

The hostility toward bureaucratic power has been bipartisan, and it has been highly visible in all segments of the ideological spectrum. On the right is has been a product of the traditional animosity of conservatives toward government intervention in the domestic economy — whether in the form of extensive and expensive welfare programs to help the needy and the disadvantaged or the enforcement of regulatory statutes that private individuals or business organizations regard as a burdensome infringement upon their inalienable right to make their own decisions. On the left the resentment against bureaucracy is focused on the national security apparatus where invisible bureaucrats in the Pentagon, the CIA and more recently the National Security Council (NSC) ply their trade. Perhaps just because so much secrecy prevails in national security matters, it is possible to believe virtually anything about what bureaucrats are doing in this sector of government. And sometimes, as in the case of the secret arms dealings with Iran during the Reagan administration, reality outruns even the wildest imaginings of bureaucracy's critics.

But what is commonly overlooked in these hostile reactions to the growth of bureaucracy in the American constitutional order is that this development has triggered other changes in the character and operation of the national government, and that many of these changes have worked to limit the extent to which the expanding scope of bureaucratic activity has actually brought about a commensurate increase in the power of bureaucrats themselves. Indeed, it can be argued that the growth of national bureaucracy in the United States since the 1930s has been a far less important phenomenon than the simultaneous emergence of new ways by which the traditional institutions of American national government — the presidency, Congress, and the courts — have been able to meet and contain the challenge of a bureaucracy that many people prior to World War II anticipated would actually become a fourth branch of government in the postwar period.

Hence, the real story of contemporary American bureaucracy is not, as widely expected to be the case, about the emergence of an imperial government of career officials threatening constitutional norms. It is rather the story of how a traditional political system modified itself to cope with the arrival of a new competitor for power — a set of bureaucratic organizations that was created to carry out the

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2 In this regard, see S.N. Eisenstadt, Essays on Comparative Institutions (New York: John Wiley, 1965), 207. Eisenstadt argues that the process of bureaucratization "also creates 'counter-vailing' forces which may impede or control the purposes of bureaucratic organizations and mechanisms."
directives of the president and Congress but which had the promise of becoming a power in its own right. This modification process has resulted in major changes in the ways in which American political institutions now function, and these changes represent the most significant impact that the arrival of a large-scale bureaucracy has had upon the American political system in modern times. The change most often predicted in the aftermath of World War II—that the arrival of a large-scale bureaucracy would derange the American constitutional order in fundamental ways—has not occurred at all.

RESHAPING THE PRESIDENCY

Consider, for example, the case of the presidency. During recent decades there has been constant apprehension in the White House that the bureaucracy will obstruct presidential plans and programs and substitute its own preferences for those of a president chosen in a free election to put into effect the policies and programs for which the people have just voted. Fear of bureaucratic usurpation of power was most pronounced at the White House during the Nixon years, but in one form or another it has been a conspicuous feature of all administrations since World War II.

This fear has endured in spite of the fact that genuine cases of bureaucratic challenge to presidential authority since the war have been a rare occurrence—so much so as to command widespread attention when they become public knowledge. Such cases have commonly been regarded as deviating from the norm—justified, if at all, only by the exceptional circumstances in which they occurred. Witness, for example, General Douglas MacArthur’s defiance of President Harry Truman during the Korean War, or the unauthorized bombing runs conducted by the air force in Vietnam during the Johnson administration. These cases of bureaucrats acting independently or in opposition to presidential orders only drew what limited justification they possessed from the fact that they occurred during controversial wars, when the legitimacy of presidential authority itself came into question in American society.

But regardless of whether the record supports these White House fears of bureaucratic sabotage, what cannot be denied is the fact that many of the ways in which the presidency has changed in recent years represent adaptations designed to cope with the growing presence of bureaucracy within the governmental structure in the United States. Not the least of these changes has been the shift toward a collegial or collective presidency—a White House in which the chief executive’s power to decide and to act is exercised not only by the president, but also by a host of other White House aides and assistants lodged within the White House staff or the executive office of the president. Thus, a power that the framers of the constitution thought they were placing in the hands of a single person has now been parcelled out among a varied set of individuals who serve on the White House staff.

The principal factor forcing this pluralization of the presidency—its transfor-
mation into a collegial office—has been the desire of the White House to maintain the hegemony of the president within the executive branch in the face of what it perceives as a bureaucracy threatening constantly to spin out of control. Hence, a major task of the White House staff, and of the many offices into which this staff is now clustered, is to provide the president with information and advice about how to deal with the wide range of problems that executive institutions now confront. Otherwise the president would be entirely at the mercy of whatever data or policy suggestions the administrative agency most directly involved in a policy operation might choose to supply. During the Nixon administration it became standard practice for White House staff members rather than Cabinet officials to draw up major policy proposals affecting individual executive departments. Nixon and his chief advisers assumed that Cabinet members would be far too much under the influence of their own bureaucrats to be trusted with responsibility for the development of major administration policies.²

So while it may narrow the circle of his advisers in disadvantageous ways, the White House staff can protect the president from becoming the prisoner of any bureaucratic information system in shaping his policy initiatives. The pluralized presidency also provides the chief executive with a cadre of aides whose policy suggestions are sensitive to his own interests, rather than simply reflecting the goals and needs of some administrative agency or of the outside groups in whose behalf that agency generally acts. On occasion—as was true in both the Nixon and Reagan presidencies—his staff may even serve the chief executive as an instrument for taking actions that he does not want the rest of the government or the public to know about. History suggests that this use of the staff may lead a president to glory—as in Nixon’s opening to China—or to catastrophe—as in Nixon’s Watergate caper.

In addition to the assistance it provides in policy development, the White House entourage also plays a major role for the presidency today in monitoring the actions of bureaucratic organizations and officials within the executive branch charged with carrying out policy decisions. This monitoring is designed to insure that the policies that agency bureaucrats are pursuing on a daily basis are those of the president, and that they have not been altered to conform to the preferences of the bureaucracy or its clients. It also enables the White House to identify emerging issues with which they may have to deal in the future, or “big-ticket” items that are being handled in a dilatory way by the bureaucracy when they should be receiving priority attention from the White House.

Such monitoring activity may also have incidental political value for a president. The Office of Public Liaison (OPL) within the White House has the responsibility for cultivating good relations with the various national organizations and groups on which the president depends for political support. From the knowledge

² Richard Nathan has provided us with an invaluable account of the impact that fear of bureaucracy had upon the presidency during the Nixon years. See Richard P. Nathan, The Administrative Presidency (New York: John Wiley, 1983), esp. 28–56.
this White House office gleans about pending bureaucratic decisions through its monitoring role, the OPL can be used to alert outside groups that the administration is cultivating to the fact that certain decisions affecting their interests are about to be made by a government agency. Providing this kind of advance information can help to bind these groups even more tightly to the president’s cause. As is the case with individual members of Congress, the White House can thus derive considerable political benefit from its ability to play an intermediary role in the relations between the public, or at least the organized segments of it, and the bureaucracy.

Changing Presidential Styles

Over the course of recent history, individual presidents have varied a great deal in the way in which they have tried to use the collegial presidency. But they have all shared a common purpose—to create in their staffs an effective counterweight to the power of the departmental bureaucracies. John F. Kennedy, for example, in a strategy that was later to be imitated by Lyndon B. Johnson, tried to bring what he regarded as highly talented people into the White House, a group that David Halberstam was later to describe somewhat sardonically as “the best and the brightest.” Kennedy and his associates made a point of denigrating the executive office system that they inherited from Dwight Eisenhower on the grounds that its highly organized structure impeded its effectiveness. He believed that it was the people in the White House who determined the success of public policy and not the character of the organizational system in which it was made. This initial Kennedy disdain for proper organization and procedure contributed to the disaster early in his administration at the Bay of Pigs, since it led him to eliminate organizational procedures that might well have generated warnings sufficient to prevent the error of ever launching this ill-fated expedition. The possibility that elaborate organizational procedures for making decisions might have an error-correction function is not always clear to activist presidents like Kennedy when they take office.

But behind Kennedy’s strategy of bringing talented people to the White House lay the belief that the permanent government was stodgy and unimaginative and that new ideas would have to come from outside the bureaucracy. If the White House staff could not by itself generate such innovative approaches to the social and economic problems that beset American society, then experts in the private sector would also have to be recruited to help the president cope with these problems. The institution that was created to forge cooperation between the White House staff and outside experts was the presidentially appointed task force. During the Kennedy and to an even greater extent the Johnson administrations, presidential

4 In this regard, see Garry Wills, The Kennedy Imprisonment (Boston: Little, Brown, 1981), 230.
task forces wrestled with issues that under prior presidents the bureaucracy itself would have handled. This novel approach to the task of making public policy was described by Henry Fairlie as “guerilla government”—a kind of “hit-and-run” warfare by outsiders upon the permanent government.

This strategy of trying to develop public policy with a minimal reliance on the bureaucracy was adopted and refined by the Nixon administration. While the Kennedy White House had looked upon the bureaucracy as being far too timid in its approach to tough public policy issues, too reluctant to strike out in the bold new directions that Kennedy’s New Frontier philosophy demanded, the Nixon administration saw the problem from a quite different perspective. In its eye the permanent bureaucracy was a wily and aggressive champion of policies and programs that the voters had repudiated in the 1968 election. Bureaucracy was forever trying to nullify White House initiatives by dragging its feet in implementing presidential directives, or, even worse, by leaking information to the outside world in an effort to rally public opposition to plans or policy changes that the administration was considering.

In any event, the bureaucracy was certainly regarded as an enemy by the Nixon White House—perhaps not at the top of the “enemies list” compiled by the White House that the Watergate investigations brought to light, but certainly well up on the list along with the television networks and the other news organizations that were so odious to the administration. There is a striking resemblance between the negative attitude that White House courtiers in the Nixon administration, like John Ehrlichman and H.R. Haldemann, took toward departmental bureaucrats and the contempt or hostility toward bureaucracy visible in the memoirs of Kennedy aides like Arthur Schlesinger, Jr. or Theodore Sorensen.

From Nixon’s perspective, it made sense to concentrate control over policy development in the White House whenever possible. This strategy was most prominent in the field of foreign affairs, where the White House National Security staff achieved an ascendancy over foreign policy decision making that no NSC staff has attained before or since the Nixon days. This ascendancy embraced not only the framing of foreign policy but even its implementation, as evident in the leading role that NSC Adviser Henry Kissinger played in executing the opening to China or carrying on peace negotiations with North Vietnam in Paris. It relegated the national security bureaucracies at the State and Defense departments to their lowest estate in the foreign policy process during the postwar period.

The Nixon administration made several attempts to achieve a similar kind of domination over domestic policy making, but without any notable success. The chief of these attempts was the establishment of the Domestic Council in the White House in 1970. It was intended to be the domestic equivalent of the NSC—a van-

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7 As quoted by Willis, Kennedy Imprisonment, 170.
tage point from which the President and his staff could oversee the development of policy in areas other than foreign affairs. Unfortunately for Nixon, however, domestic policy proved highly resistant to such operation by remote control from the White House. The opposition came not only from the bureaucracy, which the Nixon people had anticipated, but also from the very executives they had chosen to run these domestic agencies. These political appointees tended to see the involvement of White House aides in their agency's activities as an infringement upon their own executive prerogatives.

In addition, these agencies were closely tied to the congressional committees under whose jurisdiction they fell, as well as to a variety of domestic constituencies for whom they provided services or whose interests were affected by their decisions. They were thus locked into "iron triangles"—the coalition of executive agencies, interest groups, and congressional committees that have historically dominated major sectors of domestic policy making. It was not easy for a White House institution like the Domestic Council to move into an area of policy already occupied by these formidable political coalitions. It was especially difficult when, as was true under Nixon, Congress was controlled by the Democrats and the iron triangles were centers of power in which the opposition party was strongly entrenched.

The Nixon administration was no more successful when it abandoned its effort to attain comprehensive control over all domestic policy making through an institution like the Domestic Council and sought instead to shape the development of a single area of policy through a White House office. One policy area that greatly interested and at times seemed to obsess Nixon was the field of communications policy. This field lies under the jurisdiction of the Federal Communications Commission (FCC), a highly independent regulatory agency that has among its responsibilities the task of overseeing the operation of radio and television stations. Throughout its years in office the Nixon administration was firmly convinced that a chief source of its political troubles was the strong bias against it within the media organizations that reported the news about the administration's activities. This fear of the power of the media over its own political fortunes gave the Nixon administration a strong incentive to move control over communications policy from the FCC to the White House, where the President could then use threats like antitrust suits to stifle media criticism.

In 1970, the administration made what many of its critics regarded as a strong move in this direction. Through a presidential reorganization plan, it established an Office of Telecommunications Policy (OTP)—an organization created ostensibly to administer some traditional White House responsibilities in the communications area, but also assigned the mission of monitoring decisions in all other

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government communications agencies. The director of the OTP ultimately became a thorn in the flesh of the media when he began to launch broadsides against what he alleged was their ideological slant in a liberal direction, "ideological plugula" as he put it; but his office never succeeded in exercising much influence over the FCC itself, the agency with the real regulatory power in the communications field. The chairman of the commission, Dean Burch, was a staunch conservative and a Nixon loyalist, but he was also a strong chairman, who wanted to run his own agency and was not about to allow any White House aide to override his authority.¹⁰

When the Carter administration took office in 1977, it tried in many ways to distance its own governing style from that of the Nixon White House. As part of this strategy, Carter went out of his way to underline the fact that in his presidency Cabinet members rather than the White House staff would be at the center of policy making. However, as time wore on in his administration, Carter—like his predecessors—discovered that many problems could not be dealt with by a single department and the even more painful fact that many departments did not approach policy issues with his own political priorities in mind.

So power inevitably gravitated toward the White House staff during the Carter years, especially to the Domestic Policy Staff (DPS), which Carter had established as a successor agency to Nixon’s Domestic Council. To be sure, Carter’s DPS never attained the hegemony over policy development that the White House staff enjoyed in Nixon’s first term. But its power was certainly greater than Carter initially anticipated would be the case. The DPS played a major role in prodding departments into action on issues the President considered important. It also tried to settle disputes between departments—as, for example, the conflict that erupted between the Health, Education and Welfare Department (HEW) and the Labor Department over the direction that welfare reform should take.

The Reagan administration followed the lead of the Carter presidency in accenting the role of the Cabinet in policy development and downplaying that of the White House staff. Except in the case of the arms deal with Iran in 1986, the NSC staff never reached the heights of power under Reagan that it enjoyed in previous administrations. The fact that Reagan has had so much more success than Carter in diminishing the role of the White House staff can be traced in good part to the much shorter length of his policy agenda as president. He had many fewer promises to keep than Carter. The constituency from which Reagan drew his support by and large wanted the government to do less rather than more. However, it should be noted that it was a presidential agency, the Office of Management and Budget (OMB), that led the way in the achievement of Reagan’s chief

¹⁰ An account of the rise and fall of the Office of Telecommunications Policy may be found in Francis E. Rourke, "The Presidency and the Bureaucracy" in Nelson, ed., Presidency and the Political System 353–356, also Linda L. Fisher, "Appointments and Presidential Control." (Paper delivered at the 1986 Annual Meeting of the American Political Science Association, Washington, D.C.) Surveying the experience of the past twenty years, Fisher found that presidential appointees reported having received good cooperation from agency employees in carrying out administration programs but had great difficulty in dealing with the White House staff.
policy goal when he took office—a drastic cutback in the growth of the national
government's domestic expenditures. The director of the OMB, David Stockman,
served as the administration's point man in its ultimately successful effort to prune
domestic spending programs. There is also the revealing fact that when Reagan
began to involve himself in Middle Eastern policy during his second term, because
of his personal and political concern over the plight of the American hostages
held in Lebanon, he suddenly revived the NSC staff and gave it a major role in
the foreign policy process.

What the experience of the White House in modern times strongly suggests is
that a president's ability to practice as well as preach Cabinet government largely
depends on how active a role he intends to play in the development and implementa-
tion of national policy. The more a president wishes to shape the character of
his administration's policy goals, the more likely he is to accent the role of the
White House staff rather than the Cabinet in the governing process, however pious
may be his protestations about the virtues of Cabinet government when he first
takes office. This ascendancy by the White House staff has the inevitable effect
of reducing bureaucratic influence over national policy decisions, since bureaucrats
have much better access to Cabinet officials and much more opportunity to shape
their views of policy issues than they do with respect to the president's own staff
aides, who are usually isolated in the remote precincts of the White House. The
lesson of the last half-century of American politics has thus been unmistakable—as
the power of the White House staff grows, the power of departmental bureaucrats
recedes.

**Bureaucracy as Change Agent**

The central conclusion that emerges from this analysis of the operation of the
presidency in modern times is that bureaucracy's unsung role in the evolution of
modern American government has been that of an unwitting change agent. As
we have seen, the expansion in the number and activities of bureaucratic organiza-
tions within the executive branch has been a major factor underlying the ascending
power of the presidency in the contemporary constitutional order. A variety of
efforts have been made during this period to help the president cope with an ever-
expanding bureaucracy, and each of these efforts has added another increment
of power to the presidential office. This is true of all the reorganizations the ex-
ecutive branch has experienced since the late 1930s, the changes that have been
made in the budgetary system, and the reforms that have taken place in executive
personnel procedures. The position of the imperial presidency today is in no small
measure a product of a widely perceived need to prevent the emergence of an im-

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11 Stockman has provided us with his own account of his role as architect of the Reagan administra-
tion's budgetary strategy. See David A. Stockman, The Triumph of Politics: How the Reagan Revolu-

12 A discussion of these changes may be found in Crenson and Rourke, "American Bureaucracy."
perial bureaucracy. Moreover, presidents themselves have been quite willing to play on fears of bureaucracy to justify expanding the power of their own office. The real power of bureaucracies today thus lies not with bureaucrats but with the members of a new "political class"—the policy entrepreneurs the president has appointed to run these organizations and to shape their programs in his behalf.

The influence that bureaucracy has exerted as a change agent has been very visible in the development of the legislative and judicial as well as the executive branches of government in modern times. In the case of Congress one of the most significant changes that a proliferating bureaucracy has triggered is an expansion in the size and proficiency of the legislative staff. This expansion has taken a variety of forms—in the size of the staffs that now serve individual members of Congress, in the number of professional experts presently attached to legislative committees in both the House and the Senate, and, finally, in the establishment or strengthening of four staff agencies that currently serve Congress as a collective body: the General Accounting Office, the Congressional Research Service, the Congressional Budget Office, and the Office of Technology Assessment.

The chief purpose, as well as the most important result, of this development has been to enable Congress to close the "expertise" gap that had opened up between itself and the presidency in the years immediately preceding and following World War II, when presidents began to benefit enormously from the bureaucratic apparatus that emerged at the White House during that period of time. Members of Congress are now able to draw upon the same high level of professional staff assistance that presidents command in handling complicated technical issues in both foreign and domestic policy making. Noteworthy also is the extent to which the reports and forecasts of the Congressional Budget Office are now given as much if not more credence than those of the president's own Office of Management and Budget. In net effect, therefore, the rise of bureaucracy can be said to have led not to a usurpation of legislative power, as many members of Congress feared would be the case when bureaucratic expansion first began, but to an enhancement of the legislature's capacity to do its own job.

Moreover, as Morris Fiorina has shown, the growth of bureaucracy has been of benefit to individual legislators as well as to the overall position of Congress as a legislative institution. Members of the House of Representatives have come to enjoy increased success in running for reelection, and Fiorina attributes this success to the fact that they are able to solidify political support in their own districts by helping to resolve problems that their constituents are having with the Social Security system, the Veterans Administration, or other government agen-

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12 The rise of congressional staff is traced in Harrison W. Fox, Jr. and Susan W. Hammond, *Congressional Staff: The Invisible Force in American Lawmaking* (New York: Free Press, 1977); and Michael Malbin, the *Unelected Representatives* (New York: Basic Books, 1980). It can of course be argued that all the legislature is doing in expanding its staff is putting itself under the control of its own bureaucratic apparatus in order to escape domination by executive bureaucrats.

cies. (According to the Congressional Quarterly, the number of House incumbents defeated in 1986 in both the primary and general elections was the smallest in history.) The rise of bureaucracy has thus enabled legislators to provide valuable services for the people in their districts, even if, as some critics contend, such casework activity distracts Congress from playing the part it should play in attacking major national policy issues.

The impact that the growth of bureaucracy has had upon the judicial system has been no less striking. In a variety of areas, but particularly in the field of social regulation, judges have now become major actors in the policy process, largely as a result of statutes that provide broader opportunities for private parties to challenge the decisions of executive agencies in the courts in such areas as environmental and civil rights policy. Thus agencies like the Environmental Protection Agency (EPA) or the Equal Employment Opportunity Commission (EEOC) frequently find themselves being either prodded into action or having their decisions reversed by the courts. Through Sierra Club v. Ruckelshaus and other decisions, the courts have pushed EPA toward framing a much more stringent policy to prevent significant deterioration in air quality than the agency originally intended to pursue. In the case of EEOC, court decisions helped persuade the agency to take much stronger action in defense of the position of women in the workplace than it seemed initially prepared to undertake, since the EEOC originally viewed its mission as primarily that of dealing with the employment problems of blacks and other disadvantaged minorities.

In any case, there are clearly areas of policy today in which the old-fashioned iron-triangle paradigm no longer serves to explain the way in which policy is made. Hugh Heclo makes a very compelling argument that in many highly technical policy areas—arms control, for example, or the field of monetary policy—the iron triangle has been supplanted by an “issue network,” where expertise rather than economic interest determines who participates in decision making. It can also be argued that even in fields where the old-fashioned iron-triangle structure still stands, it has been greatly altered by the arrival of the courts as major actors in the policy process. Martin Shapiro suggests that this development has created a new iron-triangle system made up of “agency, court, and interest groups” in areas of policy where statutes have created rights or entitlements to governmental assistance for groups like the aged or physically handicapped. Alternatively, in fields of social regulation like civil rights and environmental protection, the iron triangle appears to have broadened into a quadrilateral, as the courts join pressure groups, Congressional committees, and executive agencies as partners in these highly autono-

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mous subgovernment compartments within which public policy is so frequently made in the United States.

But whether it is part of a triangular or a quadrilateral policy-making structure, there can be no denying the fact that the judiciary has extended its authority and stature as an institution because of its ability to monitor and reverse the decisions of administrative agencies in numerous fields of social regulation. In the eyes of some critics, the courts have actually become an imperial judiciary in carrying out this task, as sweeping in the exercise of arbitrary power as any bureaucracy could ever hope to be. In their view, it is from the jurocracy and not the bureaucracy that the constitutional order has the most to fear. 18

But there is perhaps nowhere in American political life where the rise of bureaucracy has been accompanied by more changes than in the operation of the federal system. Since the 1930s state, local, and national agencies have been laced together by intricate bureaucratic networks carrying on domestic programs that are federally financed and locally administered. Some observers see this development as centralizing in its effect—transferring power from state and local to national agencies. Others argue that it has opened up authentic opportunities for decentralization, as opposed to the illusory opportunities that had previously existed, by providing states and localities with the resources to undertake many activities they could not otherwise afford. But both sides would certainly agree that the bureaucratization of intergovernmental relationships within the political system represents a fundamental change in the character of American federalism.

LEGITIMIZING AMERICAN BUREAUCRACY

Clearly, the evolution of modern American politics has not borne out the worst fears of those who saw the emergence of large-scale bureaucracy in the 1930s as a grave danger to constitutional government. Bureaucracy has, however, been a significant instrument of change in the structure and operation of the three national institutions specifically established by the constitution: the presidency, Congress, and the courts. And many of the changes it has wrought have strengthened these traditional institutions in ways that reduced the likelihood that bureaucracy would ever threaten their power. It is not unreasonable to conclude, therefore, that looked at in terms of institution building, bureaucracy in the United States has done far more for the other institutions of government in this country than it has done for itself. In so doing, it has reinforced the ability of the American constitutional system to cope with the burdens of modern government.

In light of these developments, what is the constitutional status of bureaucracy today? How, if at all, does it fit into the tripartite scheme of government that the framers of the Constitution devised? Is the power that bureaucracies wield legiti-

mate power, in the sense that it is accepted by those subject to it as being rightfully exercised? In our day, bureaucracy has become an indispensable instrument of government in action. Virtually all government policies depend upon some bureaucratic organization for their enforcement. While bureaucracy does not enjoy the status of explicit mention in the constitutional document itself, this is a deficiency it shares with other institutions and practices that are integral parts of the unwritten Constitution in the United States, including the preeminent position of the Cabinet and the White House staff in the executive branch, the role of political parties in the election process, and the power of judicial review that the Supreme Court has come to exercise. Certainly the written Constitution does assume the presence of a bureaucratic apparatus in government sufficient to carry out the varied tasks it assigns to the president, Congress, and the courts.

Nevertheless, there is a certain aura of illegitimacy about bureaucracy—a suspicion that its presence and activities in the governmental structure are not altogether in accord with the American constitutional order. Partly, this has been a procedural concern—focused on the way bureaucracies do things. Prior to the enactment of the Administrative Procedure Act of 1946 and to a lesser extent since then, a great deal of criticism has been directed at bureaucracy on the grounds that the administrative role in both adjudication and rulemaking frequently violates the constitutional rights of individuals affected by the agency decisions that flow from these processes. While passage of the Procedure Act and the growing role of administrative law judges in agency adjudication have done much to dispel that fear, it has never been completely dispelled.

But quite apart from these long-standing doubts about the constitutional propriety of the procedures that bureaucratic organizations follow in enforcing government policies, there has also been strong criticism of bureaucracy on the grounds that the policies it carries out are unconstitutional in their very nature. Critics on the right who regard the free-enterprise system as part of the American constitutional convenant have questioned the legitimacy of a wide range of government policies regulating the affairs of business organizations or distributing financial or other benefits to a variety of domestic groups.

Critics on the left are equally vehement in their objections to many bureaucratic activities in the national security sector that in their view are carried on by executive agencies like the CIA in violation of constitutional norms. Bureaucracies can thus be attacked on both the right and left as lacking in constitutional legitimacy in the United States because they perform governmental functions that are themselves regarded as inappropriate for the government to undertake. At the root of bureaucracy’s problem in this regard is the fact that an expansive role for the national government in the affairs of society still lacks a certain constitutional credibility in American political culture.

\[\text{For a comprehensive examination of the role that legitimacy plays in sustaining political systems, see William Connolly, ed., Legitimacy and the State (Oxford, England: Basil Blackwell, 1984).}\]
Efforts have been made in modern times to relieve bureaucracy of this burden of illegitimacy. James O. Freedman has written "that governmental power in a constitutional democracy can be legitimated in only two ways: Either it must be created by the Constitution or it must be exercised by officials directly accountable to the people through the political process."20 It is a little late in the day for any effort to be made to repair bureaucracy's omission from the written Constitution and highly questionable whether it would succeed. So that particular door to legitimation can be regarded as permanently closed as far as bureaucracy is concerned.

The other door, however, remains at least half open. Bureaucracy can be said to make a significant contribution to the process of self-government in the United States by providing opportunities for groups of citizens to be more intimately involved in government decision making than the traditional election system permits. Norton Long, for example, makes the argument that "important and vital interests in the United States are unrepresented, under-represented, or mal-represented in Congress. These interests receive more effective and more responsible representation through administrative channels than through the legislature."21 Long comes to this conclusion because the bureaucracy more closely mirrors the country from a purely demographic perspective. As he puts it: "through the breadth of the interests represented in its composition, the bureaucracy provides a significant constitutionalizing element of pluralism in our government." In Long's view many interests that are neglected in the legislature find their only voice in the bureaucracy.22

In a recent and very comprehensive analysis of the legitimate place of bureaucracy in the American constitutional order, John Rohr makes a similar and very persuasive argument.23 In his view "the administrative state heals a defect in the constitution"—the fact that it does not make adequate provision for public participation in government decision making. The growing role of bureaucracy in government opens an opportunity for many more people to become actively involved in the work of government. They may do so as civil servants, as citizens attending public hearings, or by taking advantage of other opportunities to participate in the everyday activities of administrative agencies.

The weight of this argument was greatly reinforced when citizen participation in government became the order of the day in the 1960s during President Lyndon Johnson's administration as part of the overall design of Great Society programs. When citizen participation democratized bureaucracies by allowing ordinary people to have more influence over their decisions, it also served to legitimate the role

22 Ibid., 816.
of these organizations in the governmental process. Equally important in this regard was the tendency of Great Society programs to be decentralized—directly administered by state and local rather than national agencies.

Since then even longer steps in this direction have been taken by handing programs over to private organizations or groups for their administration. This is the "third-party" or "private-federalism" approach to the implementation of government policies that has become increasingly fashionable. Of course, as it develops, this democratization movement not only legitimizes bureaucracy but also diminishes its power. It thus represents another of the "countervailing forces," which, as previously indicated, have helped American democracy weather the challenge posed by the rise of bureaucracy.

But in any case, what all these varied efforts to involve the public more directly in the administration of government programs reflect is a deep-seated belief on the part of legislative and executive officials that bureaucratic power can best be legitimated by being democratized, by bringing the decisions of public bureaucrats much more closely under the control of private citizens.

A somewhat different approach to legitimizing the role of bureaucracy in the constitutional order was initiated by Woodrow Wilson in the late nineteenth century. In his celebrated essay on the Study of Administration, Wilson avoided any claim that bureaucracy has attributes that contribute to the achievement of democratic values. Paralleling the view of Max Weber, he argued that bureaucracy could become as useful a tool in democratic as it already was in nondemocratic societies—helping to make each of these very different political systems more efficient as instruments of governance than they might otherwise be. What bureaucrats actually provide in the governmental process are technical skills that can be used to run any society. As far as political systems are concerned, bureaucracy was value-neutral in Wilson's view. It did not further the values of democracy, but neither did its presence in the governmental structure jeopardize any of these values.

The Wilsonian view, as enunciated in the 1880s, ultimately became a central article of faith in the reform creed in the United States. At the turn of the century the Progressives in Wisconsin and elsewhere saw administrative experts as the saviors of democracy, insofar as they provided the people with a means of offsetting the growing power of giant business organizations in American society. Among New Dealers in the 1930s, belief in the saving power of administrative expertise was as pronounced as it was in the Progressive era. At the state and local level of government, faith in such expertise is still very strong in some parts of the United States. It underlies the strong support given by civil-service reform groups to the proposi-

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tion that even leadership and policy-making positions in state or local bureaucracies should be filled on the basis of merit rather than election or political appointment.

The courts at first resisted the notion that administrative agencies were endowed with any knowledge superior to their own, but during the early years following World War II they came increasingly to see the legitimate role of bureaucracy in government from precisely this Wilsonian or Weberian perspective. A growing number of judges began to reason that administrative agencies brought a high level of expertise to the task of making or carrying out public policies that the courts could not provide and that effective government required. In their view bureaucrats performed an indispensable function in twentieth-century American government, and the courts were obliged to give a measure of respect and even finality to decisions that rested on their expertise.26 Divisions and disputes among experts, and the somewhat diminished stature of expertise in contemporary American society have begun to weaken this judicial deference to bureaucrats in recent years. Yet to take hold is the argument Nelson Polsby makes that power is only exercised in a legitimate way in the United States when it rests on a consensus among a variety of elites including the higher civil service.27 But there can be no disputing the fact that the knowledge and skills that bureaucrats bring to the policy process have given them an indispensable place, if not a legitimate role, in the American constitutional order. The central paradox of modern American bureaucracy thus lies in the fact that it is at one and the same time altogether indispensable and, at least in the eyes of many citizens, somewhat illegitimate.*

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26 An excellent analysis of the way the courts have regarded administrative expertise may be found in Freedman, Crisis and Legitimacy, 44–57.
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