

Who is Our Master?
- Congressional Debates during Civil Service Reforms -

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ABSTRACT

Who is the American bureaucracy's master in national government? At least three different sets of answers have been proposed. The first answer claims a single master of American bureaucracy, be it the president, Congress, or the courts. The second denies that there is any master over the bureaucracy and claims the existence of bureaucratic autonomy. In the middle of the two theories, there lies multiple masters theory. This dissertation attempts to advocate multiple masters theory by answering such questions as "Is the conception of multiple masters only theoretically conceivable, or is it historically supported?" or "Does the historical record suggest that multiple masters scheme was seriously in play in actual American constitutional dialogue?"

To be a master, one should have at least one of the following powers—budget, personnel, information, and regulatory review. This dissertation focuses on one of them—the appointing power. To look at it historically, this dissertation chose four distinct periods of American history. They are the founding era, Jacksonian era, Republican era, and the Carter Administration. These eras were related to the four important civil service reform acts: the two Tenure of Office Acts of 1820 and 1867, Pendleton Act of 1883, and the CSRA of 1978. Congressional debates recorded in

Congressional Record were analyzed to find evidences supporting multiple masters perspective.

There were evidences that support the significant existence and role of the multiple masters perspective in all the four eras analyzed. Although weakened in the 1978 debate, the multiple masters theory was supported in important congressional debates by leading politicians of the day, providing historical foundation for the theory.

The multiple masters perspective provides a need to construct a normative foundation for bureaucrats to adopt, because bureaucrats, in many cases, cannot avoid making decisions on which master to choose and which to ignore at a given time on a given issue.

Under the multiple masters scheme, bureaucrats may have to play the role of balance wheel in the constitutional order, using their statutory powers and professional expertise to favor whichever constitutional masters need their help to preserve the purpose of the Constitution itself.

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Chapter 1: Introduction

[W]hen the Constitution failed even to decide the fundamental question of whether the legislature or the chief executive was their *master*, it results that it was hardly possible to speak of the executive as completed. (*emphasis added*)

Charles Thach, Jr.

1.1. Line of Argument

1.1.1. The Issue

“Who is the American bureaucracy’s master in national government?” is a question that is both old and new. It is old, in that as far back as 1789 the question was raised and debated when Congress contemplated whether the president could remove the Secretary of Foreign Affairs without the Senate’s consent.¹ The question is still new because, despite various proposals, a single answer has yet to be agreed upon. Throughout American administrative history, this same question has been discussed again and again in many congressional debates, judicial proceedings, and scholarly works—most notably regarding presidential powers such as appointment, removal, governmental reorganization, and civil service reform. Numerous books and articles have been dedicated to this issue, although most of them do not explicitly use “master” as their metaphor.

At least two very different sets of answers have been proposed. The first answer claims a *single* master of American bureaucracy, be it the president, Congress, or the

¹ For a nice summary of “The Decision of 1789” see John Rohr, *The President and the Public Administration* (Washington DC: American Historical Association, 1989), pp. 19-24.

court. Scholarly works as well as the popular press are full of accounts of the president as the master of public administrators. The president, because he and his running mate are the only nationally elected officials in the United States, is often described as having sole responsibility over the bureaucracy. For public administrators to follow presidents' orders is the best way to maintain democracy in the administrative state.² For many other scholars and practitioners, however, Congress is the master of the bureaucracy. The dictum of rule of law indicates that Congress, as the sole representative of popular will guaranteed by popular votes, determines the laws, and bureaucrats are expected simply to obey them. When faced with the need for administrative expertise and the flexibility to cope with rapidly changing complex environments, the rule of law has been extended to the theory of delegation and its corollary, bureaucratic discretion.³ Under the concept of delegation, bureaucrats retain some discretion, but Congress maintains its mastery because discretion is allowed only within the purview of those responsibilities that are willingly delegated by Congress. Less frequently, one finds the argument that the courts are the master of public bureaucracy. Scholars following this vein note that the Supreme Court, since *Marbury v. Madison*,⁴ has retained the authority to decide the constitutionality of legislative acts. Their reasoning is that if the law can be declared unconstitutional by the Court, then the Court itself becomes the ultimate master of public administration—at least on Constitutional matters.

In contrast to the single master theory of the American bureaucracy, the second answer denies that there is any mastery over the bureaucracy. Instead, it emphasizes

² Emmette Redford, *Democracy in the Administrative State* (New York: Oxford Univ. Press, 1969).

³ John Huber & Charles Shipan, *Deliberate Discretion?: The Institutional Foundations of Bureaucratic Autonomy* (Cambridge, UK: Cambridge Univ. Press, 2002).

⁴ 5 U.S. 137, 1803.

bureaucratic autonomy, with which public administrators decide and implement policies despite their presumed-to-be masters' opposition. Some scholars view bureaucratic autonomy positively because they believe bureaucrats are more representative and less corrupt than politicians,⁵ have neutral competence,⁶ have access to better information,⁷ and maintain strong networks with citizens.⁸ For others, bureaucratic autonomy is a fact but a lamentable one. It is a cause of "runaway agency,"⁹ of an unconstitutional "fourth branch" of government,¹⁰ or of the "ruling servants."¹¹

Often the theories of bureaucratic autonomy seem to go too far, as in the case of Daniel Carpenter, who claims that the bureaucrats can decide and implement policies *despite* oppositions from any of their masters, or as in the case of Brian Cook, who claims that public administration can even "reshape the moral and behavioral component of the popular will."¹² Both Carpenter's and Cook's opinions seem to be too heterodox and do not adequately reflect administrative realities. In most instances, bureaucrats follow their masters' orders because there is congruence between them and their masters. Carpenter's cases and Cook's ideal simply do not match up with the normal workings of government. Carpenter deals with cases where there is congruence among the three constitutional

⁵ Norton Long, "Bureaucracy and Constitutionalism," *APSR* 46 (Sept. 1952): 811.

⁶ Herbert Kaufman, "Emerging Conflicts in the Doctrines of Public Administration," *APSR* 50 (December 1956): 1057-73; Francis Rourke, "Responsiveness and Neutral Competence in American Bureaucracy," *PAR* 52 (Nov/Dec 1992).

⁷ Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy*, 2nd ed. (Washington DC: CQ Press, 1999), p. 29.

⁸ Daniel Carpenter, *The Forging of Bureaucratic Autonomy* (Princeton, NJ: Princeton Univ. Press, 2001).

⁹ Ronald Johnson & Gary D. Libecap, *The Federal Civil Service System and the Problem of Bureaucracy* (Chicago: The Univ. of Chicago Press, 1994).

¹⁰ This notion of "fourth branch" of government was originated from the *Brownlow Report*. Its term "headless fourth branch" included only the independent regulatory commissions. This confinement was extended to mean all administrative agencies. See John Rohr, *To Run a Constitution* (Lawrence, KS: Univ. Press of Kansas, 1986), p. 152.

¹¹ Eric Strauss, *The Ruling Servants* (NY: Praeger, 1961).

¹² Brian Cook, *Bureaucracy and Self-Government: Reconsidering the Role of Public Administration in American Politics* (Baltimore, MD: Johns Hopkins Univ. Press, 1996), p. 78.

masters but the bureaucracy is in opposition. His notion of bureaucratic autonomy is conceptually possible and supported by his detailed analysis of the U.S. Post Office and the U.S. Department of Agriculture. However, his argument is marginal in that such cases are rare and outdated.¹³ A more ubiquitous and subtle situation, however, is that in which constitutional masters have different opinions among themselves and bureaucrats have to choose which master to serve. That master choosing situation is one of the core assumptions of the multiple masters theory.

What is interesting for our purposes is that the theories of single master and bureaucratic autonomy provide a need for normative foundations on which bureaucrats should behave. No single master can oversee every aspect of public administration. They can pay attention to only a few selected issues at a given time. For instance, unlike the notion of “overhead democracy” implies, presidents can deal with only a small number of national issues at any given time. Congress is the same. Members of Congress cannot oversee every decision that should be made to run a government. The need becomes greater if, as Carpenter claims, bureaucrats have autonomy to decide despite politicians’ opposition. In any event, much of normal proceedings of government should inevitably be left to bureaucrats’ discretion. If that is the case, we will need normative criteria for bureaucrats to apply when they make the decisions that they cannot avoid.

There is a growing number of scholarly works which recognize that multiple masters have different opinions. Most notably, John Rohr maintains that the bureaucracy can make its peculiar contribution “by choosing which of its constitutional masters it will favor at a given time on a given issue in the continual struggle among the three

¹³ Carpenter talks about cases that occurred between 1862 and 1928.

branches.”¹⁴ Patricia Ingraham also emphasizes the importance of multiple masters and the bureaucrats’ choosing “which to follow and which to ignore.”¹⁵ This multiple masters scheme also requests normative criteria for bureaucrats to adopt, when they cannot avoid choosing which master to follow. Despite its significance, the conceptualization of multiple masters has not fully developed into a theory bolstered by the accumulation of case studies or historical analysis.

1.1.2. The Metaphor—“Master”

Metaphor is a particular type of discourse, which encompasses narration, explanation, and argumentation. Often metaphor relies on a word that denotes an idea to depict another.¹⁶ As Shi-Xu defines it, metaphor is “a *comparative* discursive process” (emphasis original).¹⁷ That is, metaphor is used to explain something unfamiliar or hard to explain by comparing it to something familiar or easy to understand. It is especially useful in social sciences when it permits a researcher to bypass a lengthy explanation and helps readers to grasp the idea that the researcher wants to convey. As Deborah Stone indicates, a description using a metaphor sometimes makes readers jump to prescription in policy.¹⁸

The metaphor of master/servant is common. Alexis de Tocqueville used the metaphor in 1835, implying that Congress was the master of bureaucracy: “The majority, being an *absolute master* in making the law and in overseeing its execution, having equal

¹⁴ Rohr, Ibid, p. 182.

¹⁵ Patricia Ingraham, *The Foundation of Merit* (Johns Hopkins Univ. Press, 1995) p. 110.

¹⁶ Deborah Stone, *Policy Paradox: The Art of Political Decision Making* (New York: W.W. Norton & Company, 1997), p. 148.

¹⁷ Shi-xu, “Linguistics as Metaphor: Analysing the Discursive Ontology of the Object of Linguistic Inquiry,” *Language Sciences* 22 (2000), p. 429.

¹⁸ Stone, p. 148.

control over those who govern and those who are governed, regards public officials as its passive agents”¹⁹ (*emphasis added*). In 1922 Max Weber wrote, “This holds whether the *master* whom the bureaucracy serves is a ‘people,’ equipped with the weapons of ‘legislative initiative,’ the ‘referendum,’ and the right to remove officials, or a parliament ...”²⁰ (*emphasis added*). Writing on the creation of the presidency, Charles Thach raised the question of mastery of bureaucracy, noting that “when the Constitution failed even to decide the fundamental question of whether the legislature or the chief executive was their *master*, it results that it was hardly possible to speak of the executive as completed.”²¹ During the civil service reform era, George Curtis was probably the first to use the metaphor to imply bureaucratic autonomy. Curtis argued that “the essential point is...to find...coal-heavers who, being properly qualified for heaving coal, are their *own masters* and not the tools of politicians.”²² In 1980, Richard Neustadt observed in his celebrated book, *Presidential Power*, that the bureaucrats had multiple masters instead of one: “All agency administrators are responsible to him [the president]. But they are

¹⁹ Alexis de Tocqueville, *Democracy in America*, translated and edited by Harvey Mansfield & Delba Winthrop (Chicago: Univ. of Chicago Press, 2000 [1835]), p. 243. In this case, master was a French translation of “*maître*,” which is quite equivalent to the English word “master.” The original French sentence was as follows: “*La majorité étant maîtresse absolue de faire la loi et d’en surveiller l’exécution, ayant un égal contrôle sur les gouvernants et sur les gouvernés, regarde les fonctionnaires publics comme ses agents passifs.*” (*De La Démocratie En Amérique*, p. 123).

²⁰ Max Weber, “Bureaucracy,” in Gerth (ed.) & Mills (trans.), *From Max Weber: Essays in Sociology*, (NY: Oxford Univ. Press, 1970 [1946]), p.232. Weber’s writing, of course, was translated. The original German word that Weber used was “*der Herr*,” and the original text was as follows: “*Einerlei, ob der “Herr,” dem sie dient, ein mit der Waffe der “Gesetzesinitiative,” des “Referendums,” und der Beamtenabsetzung ausgerüstetes “Volk,” ein mit dem Recht oder der faktischen Maßgeblichkeit des “Mißtrauensvotums” ausgerüstetes, nach mehr aristokratischer oder mehr “demokratischer.”*” (*Wirtschaft und Gesellschaft*, VI. Bürokratie, p. 671).

²¹ Charles C. Thach, *The Creation of the Presidency, 1775-1789: A Study in Constitutional History* (Baltimore, MD: The Johns Hopkins Press, 1969 [1923]).

²² Quoted in David Rosenbloom, *Federal Service and the Constitution: The Development of the Public Employment Relationship* (Ithaca, NY: Cornell Univ. Press, 1971), p. 79.

responsible to Congress, to their clients, to their staffs, and to themselves. In short, they have five *masters*.”²³

This master metaphor is important for public administrators, because it reminds them of their broader constitutional setting and prevents them from confining themselves to the narrow internal management of their organizations. In other words, with the concept of master in mind, public administrators can grasp a better picture of the constitutional context under which they run their government.

1.1.3. Master Perspective v. Bureaucracy Perspective

One of the most important rationales for studying public administration as an interdisciplinary field is that it prepares public administrators to participate in “running” a state. At times the structures, behaviors, interactions, and ethics of politicians, interest groups, non-governmental organizations, or citizens can surely be research topics for students of public administration. Yet, a strong emphasis should be put on public administrators. In other words, public administration should put the bureaucracy *front and center*. Most of the attempts to find bureaucracy’s masters, however, tend to focus not on public administrators but on the masters.²⁴ Often bureaucrats are not treated as an important factor, or are treated only as secondary or as a dependent variable.²⁵ In this

²³ Richard Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: The Free Press, 1990), p.34..

²⁴ For instance, Terry Moe’s “The Presidency and the Bureaucracy: The Presidential Advantage,” in Michael Nelson (ed), *The Presidency and the Political System*, 4th ed. (Washington DC: Congressional Quarterly Inc., 1995) talks about neither the bureaucracy itself nor the relationship between the president and the bureaucracy. What it really deals with is the relationship between the president and Congress concerning the control of the bureaucracy. As such, bureaucracy has not been a central but a secondary topic in Moe’s article.

²⁵ Larry Hill believes that “political scientists’ failure to study adequately the phenomenon of bureaucratic power is a manifestation of their larger disinclination to take seriously the position of public administration

sense, the search for the single master seems to be out of the core purview of the study of public administration.

Where to focus a field's analysis is very important because it often predetermines its perspective, with which different views become incommensurable.²⁶ Thus, if one sees public administration from the master's point of view (hereafter, "master perspective"), research topics seek to answer such questions as under what conditions the master prefers to delegate to the bureaucrats, how to control the bureaucrats after delegation, or how to make the bureaucrats responsive to the masters. On the other hand, if one considers public administration from the bureaucrats' viewpoint (hereafter, "bureaucracy perspective"), entirely different questions take priority such as how to formulate public policies, how to represent the public interest, how to coordinate the demands of masters, or what ethical standard should be used when bureaucrats make decisions.

The master perspective and the bureaucracy perspective occupy opposite ends of the same spectrum. The master perspective identifies one of the three masters and devises methods to secure responsiveness from the bureaucracy. Those in this school tend to work on the theories of delegation and discretion. In contrast, the bureaucracy perspective has entirely different ideas. One of them, the bureaucratic autonomy perspective, negates the existence of political masters. Whereas the master perspective looks at the bureaucracy too passively—that is, simply executing what is given,—the bureaucratic autonomy perspective views bureaucracy too proactively. Bureaucratic autonomy is conceptually possible, but not at all common in the practice of running a

in governance." Larry Hill, "Who Governs the American Administrative State? A Bureaucratic-Centered Image of Governance," *J-PART* 1:3 (1991), pl. 262.

²⁶ Although Thomas Kuhn popularized the idea of incommensurability, it was Burrell and Morgan that brought it to the forefront in the social sciences. See Gibson Burrell and Gareth Morgan, *Sociological Paradigms and Organizational Analysis* (London: Heinemann, 1979).

government. Another type of the bureaucracy perspective is a multiple masters perspective. This perspective holds the middle ground between the master perspective on the one hand, and the bureaucratic autonomy perspective on the other. The multiple masters perspective is conceptually more realistic and matches with reality better than either the bureaucratic autonomy perspective or the master perspective as they are currently conceptualized. Unfortunately, however, the conceptualization of multiple masters has not yet fully developed into a solid theory of bureaucracy. More historical evidence as well as case studies of specific bureaucrats who struggled to serve their multiple masters need to be accumulated as a basis for theory development.

1.1.4. Research Questions and Approaches

Building on the momentum generated by the conception of multiple masters, this dissertation proposes to address the following questions. First, “Is the conception of multiple masters only theoretically conceivable, or is it historically supported?” That is, “does the historical record suggest that multiple masters scheme was seriously in play in actual American constitutional dialogue?” Second, “If historical evidence is found, on what grounds, by whom, and under which circumstances was the conception supported?” Here, I propose to look at the scope and consistency of arguments made in defense of a multiple masters scheme. Third, “How does the conception relate to the Constitutional provisions?” The bedrock arguments made for or against the multiple masters perspective must be tied to actual constitutional texts. It is important to understand the nature of these ties. And finally, “What implications can contemporary students of public administration deduce from the historical evidence?” This is, of course, the most

important question. As scholars in an applied field, we are deeply concerned with historical causes and contexts, but we are ultimately driven by how these factors influence contemporary governance. For better or worse, the public administrative systems of the United States have evolved over time. In order to develop some understanding of how the multiple masters scheme might have developed, or must continue to evolve, we must understand its past and where today's theory stands.

My approach to answer these questions will be to explore historical debates in Congress on the bureaucracy's masters and to identify and compare the arguments that either supported or negated the conception of multiple masters. Bureaucracy's masters have been debated in most budget system reforms, reorganization plans, and deregulation programs. One of these has been civil service reform. That topic has been one of the most fiercely debated issues. Although there have been quite a few civil service reforms, a scholarly consensus has fallen on three of them as far more important than the others. They are the Jacksonian reform, the Republican reform (1869-1901), and the Carter administration's reform. For example, O. Glenn Stahl's *Public Personnel Administration* considers the above three reforms as the most important ones.²⁷ Jay Shafritz, Norma Riccucci, David Rosenbloom, and Albert Hyde's *Personnel Management in Government: Politics and Process* also view the same three reforms as fundamental.²⁸ The same Shafritz, writing before the Civil Service Reform Act of 1978, thought only the Jacksonian reform and the Pendleton Act the most important civil service reforms.²⁹ Michael Cohen and Robert Golembiewski saw the Pendleton Act and the CSRA as vital

²⁷ O. Glenn Stahl, *Public Personnel Administration*, 8th ed. (New York: Harper & Row, 1983), pp. 34 -40.

²⁸ Jay Shafritz, Norma Riccucci, David Rosenbloom, and Albert Hyde (eds.), *Personnel Management in Government: Politics and Process* (New York: M. Dekker, 1992), p. 5-22.

²⁹ Jay Shafritz, *Public Personnel Management: The Heritage of Civil Service Reform* (New York: Praeger, 1975).

civil service reforms.³⁰ In their *The New Public Personnel Administration*, Felix Nigro and Lloyd Nigro had a similar view. They believed that the Jackson, Pendleton, and Carter reforms were key reforms, although they added, somewhat curiously, the 1938 establishment of a “*bona fide*, professionally staffed personnel office” in every Department as a fourth key civil service reform.³¹

Like Cohen and Golembiewski, those who are accustomed to merit system reforms may find it difficult to include President Jackson’s spoils system as one of the civil service reforms. However, President Jackson considered the dramatic change toward political patronage a “reform,” and the change was highly accepted by his contemporaries.

The three key reforms were related to the four most important civil service laws in the American history of public personnel management: the Tenure of Office Acts of 1820 and 1867, the Civil Service Act of 1883, and the Civil Service Reform Act of 1978. This dissertation will analyze the congressional debates regarding these four acts. During Jackson’s presidency, Congress fiercely debated whether to repeal the Tenure of Office Act of 1820. That congressional debate is often dubbed as the “Debate of 1835.” As for the Republican civil service reform, the Tenure of Office Act of 1867 and the Civil Service Act of 1883 will be analyzed. And for the Carter administration reform, the congressional debate on the Civil Service Reform Act of 1978 will be examined.

Upon exploring these debates, when I find historical cases that support a collaboration of Congress and the president in running the bureaucracy, rather than cases

³⁰ Michael Cohen & Robert Golembiewski, *Public Personnel Update* (New York: M. Dekker, 1984), p. 9-26.

³¹ Felix Nigro & Lloyd Nigro, *The New Public Personnel Administration*, 2nd ed. (Itasca, IL: F.E. Peacock Publishers, 1981), p. 5-11.

supporting sole control by either branch of the government, I shall treat them as evidence of multiple masters scheme, which will in turn be objects of in-depth analysis relating to the above research questions. Failure to find meaningful debates supporting a collaboration of Congress and the president would leave the multiple masters perspective, regardless of its theoretical merits, bereft of empirical support.

1.1.5. An Illuminating Case

A specific case may illuminate the issue. In December 1988, before the federal government set off on Christmas holiday, President Reagan's Surgeon General, Dr. Everett Koop, faced a dilemma. He needed to decide whether to release a report on the health effects of abortion on women, which the President had ordered him to prepare. Since he was a pro-life adherent, it seemed at first blush an easy task for Koop to report the negative effects of abortion on women. As he worked on the research, however, he was not able to find scientific evidence beyond anecdotal information. The pro-life conservatives in the White House—apparently including the President himself—wanted Koop to release a report that could support their position. Yet, as a physician as well as a civil servant, Koop could not release a report that was not scientifically grounded. He could have released a report saying there was no scientific evidence that abortion might negatively affect women, but this would not have met the President's expectation. This option would also have aided pro-choice Democrats in Congress, one of whom, Congressman Ted Weiss (D.-N.Y.), was working to set up a hearing to investigate the preparation of the abortion report. Koop could not release a report that supported Democrats in Congress. What made matters worse was that President Reagan had

embraced the idea that the evidence of adverse health effects would provide momentum to overturn *Roe v. Wade* (93 S. Ct. 705, 1973), and possibly affect *Webster v.*

Reproductive Health Services (109 S. Ct. 3040, 1989), which was then soon to be appealed to the Supreme Court. Therefore, on a wintry morning in 1988, Koop found himself under crossfire from two of his masters, the President and Congress, and potentially from a third, the Supreme Court.³²

Koop's story is not unusual, because the struggle among the three constitutional masters over who is to control the bureaucracy has been an enduring characteristic of the history of American public administration. Other fascinating examples include Edward Sylvester of the Office of Federal Contract Compliance, Department of Labor, who had to reconcile completely opposite views of Congress and the president on affirmative action³³; Eileen Claussen of the Environmental Protection Agency, who chose to treat Congress as her master in securing the passage of the Clean Air Act amendment when faced with the president's opposition³⁴; the Justice Department attorneys who had to contend with sharply different opinions on the part of the president and the Supreme Court, both of which had different opinions on school desegregation³⁵; and inspectors general who are "straddling on the barbed wire fence,"³⁶ by working in the Executive branch but reporting to Congress.

³² C. Everett Koop, *Koop: The Memoirs of America's Family Doctor* (NY: Random House, 1991)

³³ Hugh Davis Graham, "The Origins of Affirmative Action: Civil Rights and the Regulatory State," *ANNALS*, AAPSS 523 (September 1992).

³⁴ Norma M. Riccucci, *Unsung Heroes: Federal Execucrats Making a Difference* (Washington DC: Georgetown Univ. Press, 1995).

³⁵ Gary J. Greenberg, "Revolt at Justice," in Amy Gutmann and Dennis Thompson (eds.), *Ethics and Politics: Cases and Comments* (2nd ed.) (Chicago: Nelson-Hall Publishers, 1990), p. 86.

³⁶ John Rohr, *Public Service, Ethics, and Constitutional Practice* (Lawrence, KS: Univ. of Kansas Press, 1998), pp. 95-9.

1.2. Historical Context of the Issue

The history of American public administration, in a sense, is a history of struggle among the three masters over the bureaucracy. They have sometimes covertly, but often times overtly, fought with each other on these contested grounds. During the Revolution, Congress was virtually the only master of public administration. With the memory of the British tyranny still fresh in their minds, Americans opted against a strong executive. Most of the administrative functions were administered by boards or commissions directly controlled by Congress. The Philadelphia Convention of 1787 presented an opportune moment for the Founding Fathers to make it clear who would have mastery over bureaucracy. However, the convention debates were all but silent on the issue of who would control the administrative apparatus of government. Not surprisingly the Constitution produced by those debates is no more helpful on this question. Despite the decision of 1789, when Congress declared that the president could remove the Secretary of Foreign Affairs without the consent of Senate, most scholars of American history agree that until the end of the nineteenth century, Congress was in general the master of the bureaucracy. There were notable exceptions. George Washington, when asked to submit the records of executive deliberations on a matter central to the unpopular Jay Treaty of 1794, stiffly rejected the request on the grounds that the president was the master of the Foreign Service. Andrew Jackson was perhaps the first president after Washington to claim presidential mastery over the national bureaucracy when he removed Treasury Secretary Duane who was willing to comply with the legislature's

view on the national bank. Duane was replaced with an official who dutifully accepted the president as his master. This decision ignited a firestorm of protest.

After the Civil War, Congressional mastery persisted until the end of the 19th century. Congress attempted to dominate all administrative activities. In his book, *The American Presidency*, Richard Pious gives a vivid description of the extent to which the legislature achieved mastery over the bureaucracy in the days when President Andrew Johnson was facing impeachment for defying congressional efforts to restrict his power of removal: “[B]y the time the House voted its impeachment, control of the departments already rested in the hands of congressional leaders. They instituted a system of congressional supremacy, involving a close connection between department secretaries and committee chairs, which remained in effect for the remainder of the century.”³⁷

Starting in the early 20th century, the presidents again began to reclaim their mastery. It was Theodore Roosevelt who, by creating the first presidentially initiated administrative reform commission, the Keep Commission, asserted himself as the master over the bureaucracy. However, Roosevelt’s claim met a fierce counterattack from Congress. Not even the Commission’s final reports were published because Congress would not approve the necessary appropriation. Indeed, what fueled the legislators’ ire was Roosevelt’s efforts to exercise a mastery over the bureaucracy, which legislators thought was rightfully theirs. Senator Thomas H. Carter bluntly characterized the Keep Commission’s work as “executive encroachment on the sphere of Congressional action.”³⁸ Presidents who came after Roosevelt wanted to reassert their mastery over the bureaucracy through consecutive administrative reforms. Almost every president

³⁷ Richard Pious, *The American Presidency* (NY: Basic Books, 1979), p. 74.

³⁸ Quoted in Oscar Kraines, “The President versus Congress: the Keep Commission, 1905-1909,” *The Western Political Quarterly*, V.23 (March, 1970), p.40.

attempted to create institutions that reinforced presidential mastery, with the *Brownlow Report* of 1937 a most conspicuous example. The report's often-quoted phrase, "the principle of the separation of powers places in the President, and in the President alone, the whole executive power of the Government of the United States,"³⁹ is a ringing affirmation that the president is the master of the bureaucracy.⁴⁰ This salient view continued in a number of administrative reforms including the two Hoover commissions, the Ash Council, the Reorganization Plans No. 1 and No. 2, the Grace Commission, and the National Performance Review.

The Supreme Court has also claimed mastery over the bureaucracy—but in less overt ways. In *Marbury v. Madison*,⁴¹ Chief Justice John Marshall ruled that the Supreme Court had the power to declare acts of Congress unconstitutional, thus effectively maintaining the Supreme Court as the master of public administration, Congress, and the president. However, until the end of the Civil War, the judicial branch was dominated by a majoritarian ideology. That is, the courts viewed questions of law as issues of policy and were unlikely to challenge acts adopted by a majoritarian legislature. This is most clearly illustrated by the fact that before the Reconstruction Era, there were only two acts of Congress ruled unconstitutional by the Supreme Court.⁴²

After the Civil War, however, the Court refurbished itself with a doctrinal change toward "legal formalism," which claimed that judicial decisions should not be based on political expediency or economic consequences. Instead, it maintained, the Court should

³⁹ *The Brownlow Report*, p. 31; For a critical view of this report, see John Rohr, *To Run a Constitution* (Lawrence, KS: Univ. of Kansas Press, 1986), pp. 139-40.

⁴⁰ Nevertheless, it should be noted that the Report claimed that the merit system should be broadly extended "to include all positions in the Executive Branch of the Government except those which are policy-determining in character." This places the Report in the position of endorsing some degree of bureaucratic independence. *The Brownlow Report*, p. 7.

⁴¹ 5 U.S. 137 (1803).

⁴² They were *Marbury v. Madison* and the notorious *Dred Scott v. Sanford* (19 Howard 393, 1857).

consider inherent judicial principles of natural rights and justice. By relying on its own principles, the Court had fewer problems in challenging a statute or administrative programs.⁴³

1.3. Methodology

By analyzing congressional debates documented in the *Congressional Record* for the three periods of civil service reform, this dissertation is fundamentally historical, and a major approach will be case studies as well as textual analysis. As a result, this dissertation's methodology will be fundamentally qualitative.

1.3.1. Historical Analysis

Many scholars have noted that American public administration has a poor understanding of its own history.⁴⁴ For instance, Dwight Waldo lamented that “the study of public administration in the United States has been strongly anti- or un-historical”⁴⁵ with the exception of four scholars including Charles Beard, Arthur Macmahon, John Gaus, and Leonard White. Similarly, Gary Wamsley states that the field is “incredibly lacking in a historical perspective” and was “misfounded historically” during the reform

⁴³ See William Nelson, *The Roots of American Bureaucracy, 1830-1900* (Cambridge, MA: Harvard Univ. Press, 1982).

⁴⁴ See, e.g., Camilla Stivers, “Settlement Women and Bureau Men: Constructing a Usable Past for Public Administration,” *PAR* 55:6 (1995): 522-9; Adams, Guy, “Enthralled with Modernity: The Historical Context of Knowledge and Theory Development in Public Administration,” *PAR* 52:4 (1992): 363-73.

⁴⁵ Dwight Waldo, *Perspectives on Administration* (Univ. of Alabama Press, 1956), p. 51.

era.⁴⁶ This lack of historical perspective in public administration is further affirmed by H. L. Schachter, who has provided quantitative evidence for this belief.⁴⁷

However, as James Fesler states, “[H]istory reminds us of the profession’s roots and its development,”⁴⁸ or as Guy Adams maintains, if we are “to view history more inclusively as a source for understanding how public administrators have handled relations between themselves and their sovereigns,”⁴⁹ the study of public administration will need to return again and again to a historical understanding of its institutions.

Despite the importance of historical understanding, it is not always easy to incorporate historical analysis into one’s research, because history is in nature multifaceted. It contains the nature of science, art, and philosophy. As Louis Gottschalk reminds us, “As a method, it [history] follows strict rules for ascertaining verifiable fact; as exposition and narrative, it calls for imagination, literary taste, and critical standards; as interpretation of life, it demands the philosopher’s insight and judgments.”⁵⁰

Gottschalk suggests four bare essentials of writing history on any particular period⁵¹:

1. the collection of the surviving objects and of the printed, written, and oral materials that may be relevant;
2. the exclusion of those materials (or parts thereof) that are unauthentic;
3. the extraction from the authentic material of testimony that is credible;
4. the organization of that reliable testimony into a meaningful narrative or exposition.

⁴⁶ Gary Wamsley and James Wolf (eds.), *Refounding Democratic Public Administration: Modern Paradoxes, Postmodern Challenges* (Thousand Oaks, CA: Sage, 1996), p.12.

⁴⁷ H.L. Schachter, “History and Identity in the Field of Public Administration: An Analysis from Public Administration Review,” *Administrative Theory & Praxis* 20:1 (1998): 16-22.

⁴⁸ James Fesler, “The Presence of Administrative Past,” in James Fesler (ed.), *American Public Administration: Patterns of the Past* (ASPA, 1982), p. 2.

⁴⁹ Guy Adams, “Enthralled with Modernity: The Historical Context of Knowledge and Theory Development in Public Administration,” *PAR* 52:4 (1992), p. 370.

⁵⁰ Louis Gottschalk, *Understanding History: A Primer of Historical Method* (New York: Alfred A. Knopf, 1951), p. viii.

⁵¹ Gottschalk, p. 28.

The basic idea of Gottschalk's as it applies to a social scientist, rather than historian, is exercise of critical judgment regarding all source materials. Gottschalk addresses that point as follows:

They [social scientists] sometimes use secondary historical writings without careful analysis of their merits and sources of information or due consideration of conflicting schools of thought. For instance, a study of the natural history of revolution based exclusively on the liberal historians may well be criticized as one-sided. ... No one can reasonably expect a social scientist to derive his particulars from an analysis of the primary and original sources, but perhaps he ought to learn to be more critical of the standard secondary works of history.⁵²

Despite Gottschalk's claim that social scientists are not expected to use primary and original sources, this dissertation relies not on secondary writings but on a primary source, the Congressional Record.

While the Constitution mandates that "Each House shall keep a Journal of its proceedings,"⁵³ no clause requires detailed recording of congressional debates—in a sense the Founders did not anticipate this historical need we have developed. Fortunately, Congress has nevertheless maintained comprehensive records of its activities. Before the current official publication, the *Congressional Record*, was established in 1873, there were three sets of preceding records. The first of these records is *The Debates and Proceedings in the Congress of the United States*, which covers the first Congress through the first session of the 18th Congress (1789-1824). It is also known as the *Annals of Congress*. The *Annals* were not published immediately, but were compiled between 1834 and 1856, using the best records available at that time, primarily newspaper accounts. The second of these records is *The Register of Debates in Congress*. It is a

⁵² Ibid, p. 261.

⁵³ Article I, Section 5.

record of the congressional debates from the second session of the 18th Congress to the 1st session of the 25th Congress (1824-1837). The next set of records is *The Congressional Globe*, which covers the 23rd through the 42nd Congresses (1833-1873). The first five volumes of *The Globe* overlap the *Register of Debates*.⁵⁴ The fourth and final series of publications that record congressional debate is *The Congressional Record*. It is the first set of records to be published by the federal government specifically through the Government Printing Office. This dissertation will explore the three civil service reform era debates that were recorded in this series of publications. Secondary works of scholars and newspaper reports, and other related documents will be incorporated as well. However, congressional records will be the primary source for analysis.

1.3.2. Case Studies

Alexander George and Andrew Bennett define a case study as “the detailed examination of an aspect of a historical episode to develop or test historical explanations that may be generalized to other events.”⁵⁵ Based on this definition, the methodology this dissertation adopts is that of the case study.

Like other social science methodologies, the case study has both strengths and weaknesses. One of the strengths is that the method allows for “conceptual refinement” by making it possible to consider contextual factors that fit each case. In contrast, statistical analysis runs the risk of “conceptual stretching” by ignoring the individual

⁵⁴ The reason for this overlap is normally explained by the conflict between Whigs and then-newly-elected President Jackson. Jackson supported a new creation of Congressional Globe, which Whigs denounced as “habitual falsifiers of debate.” See U.S. Senate, “Reporters of Debate and the Congressional Record,” (http://www.senate.gov/artandhistory/history/common/briefing/Reporters_Debate_Congressional_Record.htm).

⁵⁵ Alexander George & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: MIT Press, 2005), p. 5.

contexts in which cases are located.⁵⁶ Another strength of case studies is that they have an advantage in the identification of new hypotheses.⁵⁷ Compared to statistical analysis, which usually investigates data about already known variables, case studies provide a greater opportunity to identify new variables resulting in new hypotheses.

However, case studies may be seriously limited by “selection bias.” That is, there is a danger that a researcher may intentionally select only cases that support what his/her hypothesis suggests, “ignoring cases that appear to contradict the theory.”⁵⁸ In a historical approach, a selection bias often occurs when researchers draw upon historiography that fits their assertion.⁵⁹ In other words, selection bias crops up, as John Goldthorpe puts it, when researchers “enjoy a delightful freedom to play ‘pick-and-mix’ in history’s sweetshop.”⁶⁰ As for this dissertation, if the three cases were intentionally selected to support what I will maintain in this dissertation, it would be biased. A random selection would prevent this bias, but because there are only a small number of cases of civil service reform, random sampling is not desirable. As previously discussed, the three civil service reform cases are viewed by many prominent scholars as the most fundamental reforms. In other words, the cases were pre-selected by other scholars before my bias, if any, could be involved. In addition, as this dissertation uses primary documents of the *Congressional Record* rather than historians’ differing accounts of the past, the danger of selection bias rapidly decreases.

⁵⁶ George & Bennett call this advantage “high conceptual validity.”; Ibid, p. 18.

⁵⁷ Ibid, p. 20.

⁵⁸ Ibid, p. 24.

⁵⁹ Ian Lustick, “History, Historiography, and Political Science: Multiple Historical Records and the Problem of Selection Bias,” *APSR* 90:3 (September 1996), p. 606.

⁶⁰ John Goldthorpe, “The Uses of History in Sociology: Reflections on Some Recent Tendencies,” *British Journal of Sociology* 42 (June 1991), p. 225; quoted in Ibid, p. 608.

1.3.3. Textual Analysis

Textual analysis encompasses the following four methodologies: content analysis, analytical semantics, structuralism, and hermeneutics.⁶¹ This dissertation primarily uses content analysis. Historically, content analysis was considered a way of obtaining a quantitative description of documents. It has meant “a glorified frequency count,”⁶² often relying on computerized methodology. Although still popular, this image of content analysis is outdated. Content analysis can be a qualitative research tool, if used properly. As Sue Wilkinson writes, content analysis does not have to “employ a formal coding scheme,” nor “be a precursor to any kind of quantification.”⁶³ Thus, in its broader sense, content analysis is simply involved in “inspection of the data for recurrent instances of some kind, irrespective of the type of instance ... and whether the instances—or larger units—are counted or not.”⁶⁴ This dissertation adopts the latter, more recent concept of qualitative content analysis, because it analyzes debates in the *Congressional Record* not by counting frequencies but by relying on in-depth and careful reading of the document to identify evidence for as well as the grounds of a multiple masters theory.

The raw material for content analysis can be any form of communication. More specifically, the entire texts of the floor speeches and committee reports concerning the four civil service reform acts, including the two Tenure of Office Acts of 1832 and 1867, the Civil Service Act of 1883, and the Civil Service Reform Act of 1978, became the primary unit of analysis. Committee hearing reports were added when analyzing the

⁶¹ Kent Lindkvist, “Approaches to Textual Analysis,” in Karl Rosengren (ed.), *Advances in Content Analysis* (Beverly Hills, CA: Sage Publications, 1981), p. 26.

⁶² Thomas Carney, *Content Analysis: A Technique for Systematic Inference from Communications* (Winnipeg, Canada: Univ. of Manitoba Press, 1972), p.26.

⁶³ Sue Wilkinson, “Focus Group Research,” in David Silverman (ed.), *Qualitative Research* (Thousand Oaks, CA: Sage, 1997), p. 184.

⁶⁴ *Ibid*, p. 184.

enactment of the Civil Service Reform Act. Special attention was paid to the appointing and removal power of the president and Congress. The analysis will focus on, in terms of the appointing and removal power, whether the floor speeches and committee reports upheld either the president or Congress as the single master of the bureaucracy, or opposed the idea of a single master denouncing it as a system making the bureaucracy subservient to either of them.

1.3.4. Qualitative Methods

The term “qualitative methods” usually encompasses case studies as well as interpretive approaches,⁶⁵ neither of which ordinarily relies on numerical measurements. As this dissertation adopts depth analysis of historical materials, it is qualitative in that sense. Gary King, Robert Keohane, and Sidney Verba propose important suggestions for improving qualitative methods by applying principles derived from quantitative methods.⁶⁶ They ambitiously attempt to show that qualitative approaches have much in common with quantitative approaches and thus can become a better research tool “using insights and techniques gleaned”⁶⁷ from the quantitative approach. To be sure, there is much room for qualitative approach to be improved by the principles of quantitative approach. For instance, if random selection, which is rigorously required in any quantitative research, can be obtained in qualitative research, it would become a great improvement. However, the challenge is that not all principles of the quantitative

⁶⁵ George & Bennett, p. 18.

⁶⁶ Gary King, Robert Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, NJ: Princeton Univ. Press, 1994).

⁶⁷ Charles Ragin, “Turning the Tables: How Case-Oriented Research Challenges Variable-Oriented Research,” in Henry Brady & David Collier (eds.), *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (Lanham, MD: Rowman & Littlefield, 2004), p.123.

approach can be applied to qualitative research. For example, when using case studies, what is important is the significance of the cases chosen. Researchers choose cases not randomly but purposefully. Sacrificing randomness does not necessarily entail poor research design and unreliable results. It is simply *different* from “homogenous observations drawn at random from a pool of equally plausible selections.”⁶⁸ Further, King et al. seem to assume that a theory is given for *testing*, and most of the principles concentrate on how greater objectivity can be secured in testing the theory. In contrast, however, qualitative approaches often aim at sharpening useful concepts, developing new theories, or finding historical evidence. Therefore, despite important contributions that King et al. made, the qualitative/quantitative dichotomy still holds. What really matters is to keep their claims in mind and to attempt not to be biased as far as a researcher can be. After all, the distinction between qualitative and quantitative is less important than doing systematic and defensible research. As for this dissertation, if historical cases are pre-selected by numerous researchers based on the significance of the cases, it will be hard to claim a selection bias based on its lack of random selection.

1.4. Plan of Dissertation

The dissertation will be composed of seven chapters. Following the introduction, the second chapter will introduce the theoretical background focusing on different theories of bureaucracy’s masters. Questions such as who advocated which master of bureaucracy on what grounds will be explored. The third chapter will deal with the debates during the Founding era to serve as a basis for future discussions in later chapters.

⁶⁸ Ragin, p. 125.

The framers' intention will be presented and analyzed. The fourth chapter will address congressional debates during the Jacksonian era concerning its introduction of the patronage system and the repeal of the Tenure of Office Act of 1820. The fifth chapter will engage in the late nineteenth century debates on civil service reforms. Included will be a discussion on the Tenure of Office Act of 1867 and the Civil Service Act of 1883. The sixth chapter will go over the Carter administration's enactment of the CSRA. Politicization of the bureaucracy during this era will be discussed in order to reveal the era's understanding of the bureaucracy's masters. The final chapter will summarize findings, briefly discuss the limitations of the dissertation, and suggest future research topics.

Chapter 2: Masters of Bureaucracy in Theory

This chapter will explore bureaucracy's masters in theory. It will look at what social scientists have to say about the relationship between the bureaucracy and its political masters. Before beginning with theories, however, constitutional arrangements will be discussed as a background.

2.1. Masters of Bureaucracy in the Constitution

As Charles Thach points out, the Constitution was never clear on the question of whether the legislature or the chief executive is the bureaucracy's master. Indeed, there are only a few clauses in the entire document dealing with public administration. Article II, Section 2 is one of them. It allows the president to require the written opinion of the principal officers of the *executive* departments on subjects under their jurisdiction. It also gives the president the power "with the advice and consent of the Senate" to appoint public officials, whose offices shall have been created by law. This provision, in fact, gives Congress a great deal of formal mastery over the bureaucracy. Since the bureaucracy must be established by law, the Constitution grants Congress the power to create agencies, to organize them, to determine the number of staffs, and to assign missions. In so doing, the Constitution gives Congress the opportunity to become one of the masters of the bureaucracy.

At the same time, however, the Constitution places the bureaucracy under the direction of the president. Article II provides: "The *executive* Power shall be vested in a

President of the United States of America,” who “shall take Care that the Laws be faithfully executed.” The same article calls the agencies *executive* departments. Therefore, according to a literal reading of the Constitution, the executive departments seem to belong to the president.⁶⁹

Article III of the Constitution, which creates the Judiciary, does not have a clause that can be interpreted to furnish a foundation for the judicial mastery of the bureaucracy. However, it opens a window for ad hoc judicial mastery by providing that “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” The courts’ implied power to declare acts of Congress and deeds of the president unconstitutional gives the courts an indirect control over the bureaucracy. Many claims of judicial mastery over the bureaucracy, in fact, come from court decisions instead of the Constitution itself.

2.2. Theory of a Single Master

2.2.1. Congress as the Master

As shown earlier, the power of the three Constitutional masters has fluctuated over time. Historically, Congress was considered the supreme master of the bureaucracy as a result of the principles of representative democracy and the rule of law. As the principle of representative democracy claims that all major governmental decisions and

⁶⁹ One rebuttal to this argument relates to the etymology of the word “executive.” Executive originally came from the Latin verb *exsequi*, meaning to follow through or carry out. Thus, etymologically, the executive is a follower. The executive branch as a whole, then, may mean to follow the legislative branch. For detail, see John Rohr, *Public Service, Ethics, and Constitutional Practice* (Lawrence, KS: Univ. Press of Kansas, 1998), p. 101.

policies should be made by popularly elected officials, who are in turn accountable to the electorate for their actions, and as the rule of law maintains that all governmental actions should be based on and controlled by laws, Congress becomes the master of the bureaucracy.

In the realm of public administration, the idea of congressional mastery was manifested in the politics/administration dichotomy. Woodrow Wilson's seminal paper "The Study of Administration,"⁷⁰ for example, claims that the bureaucrats should simply follow congressional decision-making expressed in laws. In *Congressional Government*, Wilson also claims that "The predominant and controlling force, the centre and source of all motives and of all regulative power is Congress. ... The legislative is the aggressive spirit."⁷¹ Along similar lines, Frank Goodnow employs an instrumental view of public administration that neatly fits a model of bureaucracy resting on legislative mastery.⁷²

Faced with the complexity of modern administrative agendas and the resulting need for administrative flexibility, scholars began to acknowledge the inevitability of delegation. There seem to have been two different schools of thought. Although both schools agree that Congress is the master of public administration, they disagree on several important points such as whether Congress still keeps control over the bureaucracy and whether Congressional delegation of power to the bureaucracy is lamentable or laudable.

Delegation as a Lamentable Abdication

One of the schools of thought believes that the delegation of Congressional power to the bureaucracy is inevitable but lamentable. Samuel Huntington is one of them. He

⁷⁰ Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* 2 (June 1887): 197-222.

⁷¹ Woodrow Wilson, *Congressional Government* (Boston: Houghton Mifflin Company, 1885), pp. 11, 36.

⁷² Frank Goodnow, *Politics and Administration: A Study in Government* (NY: Russell and Russell, 1967).

believes that Congress, which should be the sole master, lost its grip on the bureaucracy when Congress began to disperse the House Speaker's centralized power to committees and subcommittees. In his view, "since 1910 in the House and since 1915 in the Senate" the weakening of central leadership has been a trend in Congress. This dispersion of power was effective for the specialization of Congress but failed because it caused Congress to lose its control over the bureaucracy.⁷³ William Niskanen revived this school of thought. In his model, the principal seeks certain non-market services from the bureaucracy, which is the monopoly supplier of public services. In return for a budget, the budget-maximizing bureaucracy performs certain functions requested by the principal. The problem is that the principal cannot correctly figure out the agency's true budgetary need to perform the tasks it requested. A crucial insight of Niskanen model is that due to the asymmetric information between Congress and the bureaucracy, the bureaucracy can extract rents from the sponsor.⁷⁴ If this is the case, Congress loses its mastery over the bureaucracy, which is most deplorable from a democratic perspective.

Theodore Lowi presents a similar view. To him, a national government is a government ideally suited for legislative mastery, and it was no wonder that the national government under what he called "the First Republic" was clearly Congress-centered. According to him, two events in 1962 relating to President Kennedy initiated the transfer of mastery over the bureaucracy from Congress to the president. The first of these was *Economic Report of the President*. In the report, President Kennedy asked for full-fledged discretion to make laws controlling budget deficits and surpluses; discretion over laws determining the level of public capital investment; and discretion to manipulate the

⁷³ Samuel Huntington, "Congressional Responses to the Twentieth Century," David Truman (ed.), *The Congress and America's Future* (Englewood Cliffs, NJ: Prentice-Hall, 1965), pp. 18-19.

⁷⁴ William Niskanen, *Bureaucracy and Representative Government* (Chicago: Aldine & Atherton, 1971).

rates that determine tax liability. In so doing, the president virtually claimed to become the master of the bureaucracy. The second event was President Kennedy's Yale commencement address in the summer of that year. In it, he enhanced the president as the master of bureaucracy by arguing for the end of ideology and the beginning of practical means of reaching common goals. It was the beginning of the end of congressional mastery as well as "the end of liberalism," which Lowi bemoans.⁷⁵

Delegation as a Rational Grant

The so-called rational choice theorists, however, have a different view. To them, the transfer of power to the bureaucracy was not lamentable but perfectly rational. These scholars argue that considering the limited time, money, and energy of Congress, it was a rational choice on Congress' part to delegate its legislative authority to the bureaucracy. Several metaphors have evolved to explain this choice.

A seminal article in this vein is Barry Weingast and Mark Moran's. They analyze the Federal Trade Commission (FTC) and find that, despite popular criticism of the FTC as a "runaway agency," Congress still retains its mastery over the bureaucracy, because "ex post sanctions" by Congress provide "ex ante incentives" for the bureaucracy to follow Congressional decision-making.⁷⁶ According to them, the FTC was not a rampant bureaucracy but a loyal agent of a Congressional committee. They maintain that Congressmen may appear ignorant of agency proceedings by not dedicating themselves to detailed study. However, their study reveals that the FTC's rapid policy changes from stringent sanctions to looser sanctions only reflected the new subcommittee's demand to

⁷⁵ Theodore Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (NY: W.W. Norton, 1969).

⁷⁶ Barry Weingast & Mark Moran, "Bureaucratic Discretion or Congressional Control?—Regulatory Policymaking by the FTC," *Journal of Political Economy* 91 (1983), p. 769.

reverse the policies of their predecessors. Thus, Weingast and Moran argued that despite the image of congressional ignorance, Congress in fact retains its mastery over the bureaucracy.

Successive studies bolstered Weingast and Moran's idea. Weingast alone did a case study of the Securities Exchange Commission's deregulation during the 1960s and 1970s. What he found was that the delegation was exactly what *Congress* wanted—something desired neither by the president nor by the bureaucracy. The presence of bureaucratic discretion does not imply that the system fails to serve congressional interests. He maintains that congressional representatives judge agency success through the “decibel meter,” that is, by listening to constituency reactions to agency decisions. In other words, congressional representatives can judge agency success without ever directly evaluating agency decisions.⁷⁷ This idea was further developed by McCubbins and Schwartz in their 1984 article, where they claim that “Congress has not necessarily relinquished legislative responsibility to anyone else. It has just found a more efficient way to legislate.” That efficient way is what they call “fire-alarm oversight,” meaning that citizens and interest groups will sound an alarm in most cases in which the bureaucracy has violated congressional intent. Congress can then intervene to rectify the violation.⁷⁸

Morris Fiorina started from a different perspective but ended with the same conclusion as Weingast and others. He maintains that congressional delegation is not a passive reaction to the complex world but a reflection of strong congressional intent. The

⁷⁷ Barry Weingast, “The Congressional-Bureaucratic System: A Principal-Agent Perspective,” *Public Choice* 44 (1984), p. 155.

⁷⁸ Mathew McCubbins & Thomas Schwarz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” *AJPS* 28 (February 1984), p. 175.

reason why Congress wants to delegate is related to the highest incentive for congressional representatives—being reelected. In order to be reelected, congressional representatives need to take care of “case works” of their constituents. If the bureaucracy is orderly and does not have discretion, congressional representatives may find it harder to solve their case works.⁷⁹ Therefore, according to Fiorina, congressional representatives intentionally chose the “runaway bureaucracy.”

Recently, David Rosenbloom rekindled the argument for congressional mastery by claiming that after the Administrative Procedure Act of 1946, Congress repositioned itself to regain its mastery over the bureaucracy.⁸⁰ Reacting to the concern that Congress was not fulfilling its proper responsibility as prescribed in the Constitution, Congress introduced several deliberate measures. Those measures include re-conceptualization of the relationship between Congress and the bureaucracy, incorporation of legislative values to administrative agencies, and structurally adjusting Congress itself to fit the new concept and environment. First, agencies were re-conceptualized as “extensions of Congress.” This conceptualization was made possible by recognizing that the Constitution’s grant of legislative power to Congress includes a responsibility to make sure that delegated authority is properly exercised in agencies. Secondly, traditionally congressional rather than executive values—such as participation, transparency, and intrusiveness—were transmitted to the bureaucracy through the enactment of several laws including the Federal Advisory Committee Act of 1972, the Freedom of Information Act

⁷⁹ Morris Fiorina, “Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power,” *Journal of Law, Economics, & Organization* 2 (1986): 33-51; “Congressional Control of Bureaucracy: A Mismatch of Incentives and Capabilities,” in Lawrence Dodd & Bruce Oppenheimer (eds.), *Congress Reconsidered*, 2d ed., (Washington DC: CQ Press, 1981).

⁸⁰ David Rosenbloom *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* (Tuscaloosa, AL: Univ. of Alabama Press, 2002).

of 1966, and the Paperwork Reduction Act of 1980. And finally, Congress reformed itself in terms of structure, staffing, budgeting, research and performance evaluation. In addition, Congress tried to reduce its workload by enacting the Federal Tort Claims Act and the General Bridge Act. For instance, to secure better oversight over the agencies the number of standing committees in each chamber was severely reduced, House and Senate committees were given parallel jurisdictions, and the overall committee structure was designed to follow that of the executive branch.

2.2.2. The President as the Master

It would not be an overstatement to say that almost every modern president has been afraid that the bureaucrats might either reluctantly cooperate with him or covertly shirk their responsibilities. Therefore, every administrative reform, despite its alleged aims and purposes, has intended to enhance presidential mastery over the bureaucracy.

One of the most significant calls for presidential mastery came from *The Brownlow Report* of 1937. Based on the belief that “The President is indeed the one and only national officer representative of the entire nation,” the members of the Brownlow committee, who were the most prominent public administration scholars of the time, maintain that “[t]he separation of powers places in the President, and in the President alone, the whole executive power of the Government of the United States.”⁸¹ As American society experienced the Great Depression, the World Wars, and the rise of the Welfare State, every president since FDR has attempted a strategy to enhance presidential

⁸¹ *The Brownlow Report*, p. 31; For a critical view of this report, see John Rohr, *To Run a Constitution* (Lawrence, KS: Univ. of Kansas Press, 1986), pp. 139-40.

mastery over the bureaucracy⁸² and, concomitantly, many scholars developed theories to explain this phenomenon.

Until at least the time of Edward Corwin, scholars of the American presidency had worked from a legal/constitutional tradition in their study of the presidency. First published in 1960, Richard Neustadt's *Presidential Power* transformed this tradition. In his view, the power of the presidency does not stem from the legal/constitutional authority of the office. Instead, Neustadt argues, presidential power is a function of an individual president's "personal capacity" to influence the bureaucracy⁸³ and thus "presidential power is the power to persuade" not to command. Though this view has influenced many later studies of the presidency, it is difficult for this personalized presidency to become a stable source of presidential mastery over the bureaucracy.

Full-fledged theories of the presidency as the master of bureaucracy emerge later as a reaction to Neustadt's idea. Much of the literature has recognized presidential mastery as manifest in his legal power to restructure governmental organizations, to appoint public officials, or to control agency funds through what is called the "executive budget."⁸⁴ The conceptions of the presidency that appeared include the administrative presidency, institutional presidency, managerial presidency, politicized presidency, and imperial presidency, although they have different emphases and nuances. Nonetheless, they have one thing in common: emphasis on the presidential mastery over the bureaucracy. The administrative presidency stresses the president's utilization of the

⁸² Patricia Ingraham, *The Foundation of Merit* (Johns Hopkins Univ. Press, 1995) p. 93.

⁸³ Richard Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: The Free Press, 1990), p.4.

⁸⁴ The executive budget was originally recommended by the Taft Commission in 1913, and later introduced in 1921 through the enactment of the Budget and Accounting Act. Concerning this act, James Sundquist wrote, "The modern presidency, judged in terms of institutional responsibility began on June 10, 1921, the day that President Harding signed the Budget and Accounting Act." on page 39 of his book *The Decline and Resurgence of Congress* (Washington DC: Brookings Institute, 1981).

bureaucracy as a way to bypass more cumbersome legislative procedures.⁸⁵ According to Robert Durant and Adam Warber, this notion of administrative presidency is premised on three assumptions. First, congressional opposition to presidential legislative initiative is the rule rather than the exception. Second, federal agencies make policy as they exercise bureaucratic discretion when implementing statutes. Consequently, presidents have another opportunity to “legislate” that does not require them to mobilize legislative support. Third, presidents can influence agency policies by either direct or indirect tools that are available to them.⁸⁶ John Burke’s notion of institutional presidency puts an emphasis on the president’s effort to centralize authority by enlarging presidential apparatuses including the White House and the Executive Office of the President (EOP).⁸⁷ As is well known, the formal institutional power began with the passage of the Budget and Accounting Act of 1921, which created the Bureau of the Budget. That power was later fundamentally enhanced with the establishment of the EOP in 1939, which was originally proposed by the Brownlow Committee Report of 1937. Through these institutions, presidents can more effectively control the bureaucracy. The managerial presidency underlines the president’s direct involvement in the management of the major component of the administration. This managerial interest includes political appointment, the executive budget, press relations, and regulatory clearance. For instance, the appointment of high-level political positions, which used to be delegated to cabinet secretaries, is now directly managed by the president himself with the help of his

⁸⁵ Richard Nathan, *The Plot that Failed: Nixon and the Administrative Presidency* (NY: Wiley, 1975).

⁸⁶ Robert Durant & Adam Warber, “Networking in the Shadow of Hierarchy: Public Policy, the Administrative Presidency, and the Neoadministrative State,” *Presidential Studies Quarterly* 31:2 (June 2001), p. 221-2.

⁸⁷ John Burke, *The Institutional Presidency* (Baltimore: Johns Hopkins Univ. Press, 1992); and, “The Institutional Presidency,” in Michael Nelson, (ed.), *The Presidency and the Political System*, 4th ed. (Washington DC: CQ Press, 1995).

personal assistants.⁸⁸ At the heart of Moe's notion of politicized presidency lies "the politicization of administrative arrangements and the centralization of policy-related concerns in the White House."⁸⁹ It emphasizes ideological congruence of the bureaucrats with the president and attempts to secure loyalty by "infiltrating" the bureaucracy to increase bureaucratic responsiveness. The imperial presidency is a notion presented by Arthur Schlesinger, Jr. to depict the Nixon administration and its "extravagant theory of absolute privilege." The imperial presidency carries the most negative connotation among the above-discussed conceptions of the president as the single master of the bureaucracy.⁹⁰

Often the president's mastery over the bureaucracy is compared to congressional power. According to Moe, in the battle over the bureaucracy, the president has advantages, because the president can make quick and unilateral decisions, whereas Congress relies on deliberative and collective actions. In times when quick and unilateral decisions are preferred, the president naturally becomes the master of the bureaucracy.⁹¹ In a recent article, Moe and Howell reinforced this argument by claiming that the constitutional ambiguity about the governing structure provides the president with the unique power to change the power structure itself.⁹²

⁸⁸ James Pfiffner, *The Managerial Presidency* (Pacific Grove, CA: Brooks/Cole, 1990), p. 2.

⁸⁹ Terry M. Moe, "The Politicized Presidency," in John Chubb and Paul Peterson (ed), *The New Direction in American Politics* (Washington DC: Brookings Institution, 1985), p. 235.

⁹⁰ Arthur Schlesinger, Jr., *The Imperial Presidency* (Boston, MA: Houton Mifflin, 1973).

⁹¹ See, e.g., Terry M. Moe, "The Presidency and the Bureaucracy: The Presidential Advantage," in Michael Nelson (ed.), *The Presidency and the Political System*, 7th ed. (Washington, D.C.: Congressional Quarterly Inc., 2003), pp.408-39; Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* (Cambridge, MA: Belknap Press, 1993). More recent articles include Daniel Ponder, "Presidential Leadership in a Fractured State: Capacity, Autonomy, and the American State," *International Journal of Public Administration* (forthcoming).

⁹² Terry M. Moe & William Howell, "Unilateral Action and Presidential Power: A Theory," *Presidential Studies Quarterly* 29:4 (December 1999), p. 856.

Since the early days of the Republic, presidents have taken steps they deemed necessary to control bureaucrats. One of the unrelenting tools is the appointing power which Article II, Section 2 of the Constitution vests in the president—although it should be checked by senatorial confirmation. However, as one of Nixon’s advisors, John Ehrlichman, aptly articulated, presidents’ political appointees tend to “marry the natives.”⁹³ If such a case occurs, the betrayed president may replace his appointees. Yet removing his own appointees after something happens is always troublesome and sometimes politically risky as well. After all, the decision that prompted the removal remains until a new appointee reverses the action. For these reasons, the power of removal may be considered a last resort. Thus, the presidents felt the need for a more systematized control over the bureaucracy. Such devices as the executive budget, administrative reorganization, regulatory review have been added to the appointing/removing power.

To understand the characteristics of presidential tools, Robert Durant and Adam Warber’s differentiation between “contextual” and “unilateral” approaches is useful. The “contextual” approach describes the indirect tools of the president, which attempt to achieve presidential objectives through political appointees. Compared to the “contextual” approach, the “unilateral” approach is more direct, using tools such as executive orders,⁹⁴ proclamations, signing statements, and presidential memoranda. Recently, the “unilateral” approach has been more frequently adopted than before because of the limitations of the “contextual” approach. As several scholars reveal,

⁹³ Quoted in Andrew Rudalevige, *Managing the President’s Program: Presidential Leadership and Legislative Policy Formulation* (Princeton, NJ: Princeton Univ. Press, 2002), p. 21.

⁹⁴ Recent studies on the executive order include Phillip Cooper, *By Order of the President: the use and abuse of executive direct action* (Lawrence, KS: Univ. Press of Kansas, 2002), and Kenneth Mayer, *With the Stroke of A Pen: Executive Orders and Presidential Power* (Princeton, NJ: Princeton Univ. Press, 2001).

although the number of political appointees is growing,⁹⁵ their short tenure and lack of preparedness hinders the effectiveness of the “contextual” approach.⁹⁶ To Richard Cole and David Caputo, the appointment strategy is “near-impossible.”⁹⁷ To Durant and Warber’s two useful conceptions, Moe adds the “automatic” approach. He claims that even though the presidents do not either directly or indirectly control the bureaucracy, administrative agencies “automatically” serve the president as their master. The effectiveness of the “automatic” approach is supported by several scholars including Francis Rourke,⁹⁸ Aberbach and Rockman,⁹⁹ Karen Holt,¹⁰⁰ and Marissa Golden¹⁰¹ among others. They claim that even bureaucrats with ideologies different from the presidents’ tend to adapt themselves to the president’s direction, and consequently there is not as much sabotage as many presidential aides are apt to believe.

2.2.3. The Court as the Master

Among the three branches of government, the judicial branch has been considered the master of the bureaucracy much less than the other two branches. This school of thought has a long tradition. For instance, Publius maintains that “the judiciary is beyond

⁹⁵ Paul Light, *Thickening Government: federal hierarchy and diffusion of accountability* (Washington DC: Brookings Institution, 1995).

⁹⁶ Patricia Ingraham, “Building Bridges or Burning Them? The Presidents, the Appointees and the Bureaucrats,” *PAR* (Sept./Oct. 1987).

⁹⁷ Richard Cole and David Caputo, “Presidential Control of the Senior Civil Service: Assessing the Strategies of the Nixon Years,” *APSR* 73 (June 1979), p. 412.

⁹⁸ Francis Rourke, “The Presidency and the Bureaucracy,” in Frederick Lane (ed.), *Current Issues in Public Administration*, 3rd ed. (New York: St. Martin’s Press, 1986):71-89.

⁹⁹ Joel Aberbach & Bert Rockman, *In the Web of Politics: Three Decades of the US Federal Executive* (Washington DC: Brookings Institution, 2000).

¹⁰⁰ Karen Holt, *When Officials Clash: Implementation of the Civil Rights of Institutionalized Persons Act* (Westport, CT: Praeger, 1998).

¹⁰¹ Marissa Martino Golden, *What Motivates Bureaucrats? Politics and Administration During the Reagan Years* (NY: Columbia Univ. Press, 2000).

comparison the weakest of the three departments of power.”¹⁰² According to him, the executive branch holds the “honors” and “sword,” and the legislature commands the “purse” and “rule,” whereas the court has “no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society [...]”¹⁰³ More recently, David Nachmias and David Rosenbloom confirm that assertion: “[j]udicial impact upon the operation and decision of federal administrative agencies has been minimal.”^{104 105}

Because of this belief, much less scholarly attention has been given to the courts than to Congress and the president concerning the issue of mastery over the bureaucracy. Perhaps as George Hale argues, “students of the courts have for the most part ignored the bureaucracy, and students of the bureaucracy have ignored the courts.”¹⁰⁶ More recently, however, it seems that both scholars of the court and students of the bureaucracy agree that the courts’ claim of mastery over the bureaucracy has been increasing.

Just when the mastery began is not agreed upon by scholars. Nathan Glazer, who coined the term “imperial judiciary,”¹⁰⁷ maintains that the beginning was the court’s landmark decision on school desegregation in 1954.¹⁰⁸ Rosenbloom, though he does not mention a specific case, has a similar view and holds that with the advent of the Warren court, the federal courts began to claim mastery over the bureaucracy by taking a more

¹⁰² *Federalist 78* in Jacob Cooke (ed.), *The Federalist* (Middletown, CT: Wesleyan Univ. Press, 1961), p. 523.

¹⁰³ *Ibid.*

¹⁰⁴ David Nachmias & David Rosenbloom, *Bureaucratic Government, USA* (New York: St. Martin’s Press, 1980), p. 56.

¹⁰⁵ Rosenbloom changed his position by 1981. See Rosenbloom, “The Judicial Response to the Bureaucratic State,” *American Review of Public Administration* 50 (Spring 1981): 29-51; this article was reprinted in Francis Rourke (ed.), *Bureaucratic Power in National Policy Making*, 4th ed. (Boston, MA: Little, Brown, 1986): 231-256.

¹⁰⁶ George Hale, “Federal Courts and the State Budgetary Process,” *Administration & Society* 11:3 (November 1979), p. 357.

¹⁰⁷ Nathan Glazer, “Towards an Imperial Judiciary?” *The Public Interest* 41 (Fall 1975): 104-23.

¹⁰⁸ *Brown v. Board of Education of Topeka* (347 U.S. 483, 1954).

activist stance in reviewing bureaucratic activities.¹⁰⁹ On the contrary, Phillip Cooper views the late 1960s as the beginning of the courts' mastery over the bureaucracy by making "greater interference in administrative matters."¹¹⁰ Ronald Moe and Robert Gilmore have yet another opinion. In their view, it was in the early 1970s rather than 1950s or 1960s that the courts' mastery began.¹¹¹ In his recent article on judicial activism, Keenan Kmiec explored the term by analyzing the frequency of its appearance in journal and law review articles. He found that during the 1990s, the term appeared in 3,815 articles, and in the first four years of the 21st century the term has shown up in another 1,817 articles.¹¹² Therefore, whenever the court's mastery began, it is undeniable that the mastery is growing or at least scholarly interest in the courts' mastery is growing.

Many case studies support this idea that the courts' mastery over the bureaucracy is growing. Writing in 1979, Hale maintains that the courts became one of the most important masters of the bureaucracy, at least in state governments. He found that nearly half of the agencies in the surveyed states operate judicially mandated programs, which inevitably entails budgetary adjustment.¹¹³ In this sense, as Donald Horowitz maintains, the courts have exercised mastery over the bureaucracy by using "de facto appropriation power."¹¹⁴ A similar study was conducted by Linda Harriman and Jeffery Straussman on

¹⁰⁹ David Rosenbloom & R. O'Leary, *Public Administration and Law*, 2nd ed. (N.Y.: Marcel Dekker, 1997), p. 40.

¹¹⁰ Phillip Cooper, "Conflict or Constructive Tension: The Changing Relationship of Judges and Administrators," *PAR* 45 (November 1985), p. 643.

¹¹¹ Ronald Moe & Robert Gilmore, "Rediscovering Principles of Public Administration: the Neglected Foundation of Public Law," *PAR* 55:2 (March/April 1995): 135-46; they seem to have both the *Environmental Defense Fund v. Ruckelshaus* (439 F.2d. 584, 1971) and the *Greater Boston Television Corp. v. FCC* (444 F.2d. 841, 1971) in mind.

¹¹² Keenan Kmiec, "The Origin and Current Meanings of Judicial Activism," 92 *California Law Review* 1441. According to him, the term "judicial activism" was first used by Arthur Schlesinger Jr. in 1947, and first adopted in the Supreme Court case of *Theriot v. Mercer* (262 F.2d 754, 1959).

¹¹³ George Hale, "Federal Courts and the State Budgetary Process," *Administration & Society* 11:3 (November 1979): 367.

¹¹⁴ Donald Horowitz, *The Court and Social Policy* (Washington DC: Brookings Institution, 1977), p. 358.

federal court decisions and state spending for corrections. In their study twelve out of fourteen states have responded to court decisions by increasing the level of capital expenditures on correction facilities.¹¹⁵ Susan Mezey performed a case study of the Social Security Administration (SSA) and found the federal courts' decisions changed SSA's policy regarding disability benefit termination from a strict standard of current medical evidence to a more lenient standard of medical improvement. A more recent and more extreme case of the courts' mastery over the bureaucracy is found in *Missouri v. Jenkins*.¹¹⁶ In *Jenkins I*, the Supreme Court surprised many by supporting District Court Judge Clark's action. It upheld the authority of a federal judge to order a local government to levy a tax increase in order to accelerate school desegregation. It is all the more surprising because the power to levy taxes is one of the most important powers of the legislature, and yet the bureaucracy has to serve the court despite the constitutional mandate given to the legislature. The Court claims that the taxing power can be held by the judiciary and in so doing also claims judicial mastery over the bureaucracy. As Rosemary O'Leary and Charles Wise maintain, the formerly "least dangerous" player is "now holding most of the cards."¹¹⁷

The possibility that these case studies of judicial mastery might be just anecdotal led O'Leary to conduct a comprehensive study of the Environmental Protection Agency's policy change by examining every case in which the EPA was a plaintiff or defendant from 1970 through 1988. What she finds is that the federal courts have been neither

¹¹⁵ Linda Harriman & Jeffrey Straussman, "Do Judges Determine Budget Decisions? Federal Court Decisions in Prison Reform and State Spending for Corrections," *PAR* 43:4 (July/August 1983).

¹¹⁶ A series of decisions were made either by District Court, the Eighth Circuit Court of Appeals, or the Supreme Court. Of our concern are the two decisions of the Supreme Court, *495 U.S. 33* (1990) and *515 U.S. 70* (1995), which are respectively called *Jenkins I* and *Jenkins II*.

¹¹⁷ Rosemary O'Leary & Charles Wise, "Public Managers, Judges, and Legislators: Redefining the "New Partnership," *PAR* 51:4 (1991), p. 325; see also Charles Wise & Rosemary O'Leary, "Breaking up Is Hard to Do: The Dissolution of Judicial Supervision of Public Services," *PAR* 63:2 (2003):177-91.

entirely passive nor totally aggressive. Instead, the judges' actions concerning the mastery of the bureaucracy fall along a continuum from judicial deference to aggressive activism where the courts exercise strong mastery. In an extreme case, she found that a judge waived a congressionally mandated sixty days' notice provision in order to facilitate the filing of a lawsuit.¹¹⁸

Just what made it possible for the courts to wield mastery over the bureaucracy? According to David Rosenbloom, there were four distinct developments. First, beginning in the 1950s, the federal courts established previously undeclared rights for individuals when they face bureaucrats. For instance, clients gained substantive rights, procedural due-process protections, and far greater equal protection of the laws. Second, the courts made it easier for individuals to gain standing to sue administrative agencies for violation of their rights. Third, a growing number of remedial law suits enabled judges to run entire public facilities such as prisons, or mental health facilities. Fourth, the bureaucrat's personal liability for violations of clearly established constitutional rights was expanded.¹¹⁹

It seems that judges and scholars have different views on the impact of the courts' mastery over the bureaucracy. On the one hand, the courts' activism was greeted warmly. This warm reception was first initiated by a judge on the D.C. Circuit Court. In *Ruckelshaus*,¹²⁰ Judge Bazelon depicts the relationship between the courts and the bureaucracy as a "new partnership" under "a new era in the history of long and fruitful

¹¹⁸ Rosemary O'Leary, "The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency," 41 *Administrative Law Review* 549 (Fall 1989).

¹¹⁹ David Rosenbloom, "Retrofitting the Administrative State to the Constitution: Congress and the Judiciary's Twentieth-Century Progress," *PAR* 60:1 (January/February 2000).

¹²⁰ *Environmental Defense Fund, Inc. v. Ruckelshaus* (439 F.2d 584, 1971).

collaboration.”¹²¹ Having been framed this way by an influential judge, the relationship has been debated under this positive imagery. For instance, O’Leary and Wise’s article on *Jenkins* begins with a discussion of a “new partnership.” However, not every scholar views the relationship as favorably as Judge Bazelon. In fact, many scholars are skeptical about the issue—most notably R. Shep Melnick. Melnick is able to penetrate the ideological mask behind the “new partnership” and argues that “all the court’s talk about partnership and collaboration could not hide the fact that this court and many others were overruling agency decisions at an accelerating rate.”¹²² Martin Shapiro has a similar view. He maintains that the new partnership is in fact a mere transfer of executive discretion to the courts. He believes that “the assertion that reviewing judges only decide whether administrative discretion was wielded according to law or not is misleading.”¹²³ In a similar vein, scholars express their concerns through such terms as “imperial judiciary,”¹²⁴ “judicial legislation,” “managerial judges,”¹²⁵ and “judges as administrators.”¹²⁶ If judges decide not to remain guardians but become actors themselves, it raises a serious question that Shapiro also raised, “Who guards the guardians?”¹²⁷

¹²¹ See also Judge David Bazelon, “The Impact of the Courts on Public Administration,” 52 *Indianan Law Journal* 101 (1976).

¹²² R. Shep Melnick, “The Politics of Partnership,” *PAR* 45 (November 1985): 653-60.

¹²³ Martin Shapiro, “Discretion,” in David Rosenbloom & R.O. Schwartz (eds.), *Handbook of Regulation and Administrative Law* (NY: Marcel Dekker, 1994), p. 513.

¹²⁴ Nathan Glazer, “Towards an Imperial Judiciary?” *The Public Interest* 41 (Fall 1975): 104-23.

¹²⁵ Judith Resnik, “Managerial Judges,” 96 *Harvard Law Review* 374 (1982).

¹²⁶ Rosemary O’Leary, “The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency,” 41 *Administrative Law Review* 549 (Fall 1989).

¹²⁷ Martin Shapiro, *Who Guards the Guardians?* (Athens, GA: Univ. of Georgia Press, 1988).

2.3. Theory of Bureaucratic Autonomy

Having discussed one end of the spectrum—that is, the theories of a single master, I now move to the other end of the spectrum—theories of bureaucratic autonomy. Before scholars began to look at bureaucratic autonomy, they first set out to explore the autonomy of the state in the 1960s. As Gianfranco Poggi, in his 1978 book *The Development of the Modern State*, aptly states, “over the past thirty years or so” social scientists have gone to “incredible length[s] to forget the state [...]”¹²⁸ Social scientists’ abandonment of the state was due to the following two important intellectual schools. One school was the pluralist tradition. Under then-prevalent pluralism, the state was virtually meaningless with little value. Under society-centered ways of explaining politics, governmental activities were mere results of decisions shaped by dominance or compromise by economic interest groups within a society. The other school was behaviorism, which claims that it is useless to try to understand formal and legal institutions such as the government. Only actual behaviors can explain societal phenomena.

Thus, “bringing the state back in” from the mid-1960s onward was a “sudden upsurge” at that time.¹²⁹ European neo-Marxists such as Nico Poulantzas¹³⁰ and Ralph Miliband¹³¹ rekindled the debate over the “relative autonomy” of the state. Later

¹²⁸ Quoted in Dwight Waldo, “A Theory of Public Administration Means in Our Time a Theory of Politics Also,” in Naomi Lynn & Aaron Wildavsky (eds.), *Public Administration: The State of the Discipline* (Chatham, NJ: Chatham House Publishers, 1990), p. 81.

¹²⁹ Theda Skocpol, “Bringing the State Back In: Strategies of Analysis in Current Research,” in Peter Evans, Dietrich Rueschemeyer, and Theda Skocpol (eds.), *Bringing the State Back In* (Cambridge, UK: Cambridge Univ. Press, 1985), p. 4.

¹³⁰ Nico Poulantzas, “The Problem of the Capitalist State,” *New Left Review* 58 (1969): 67-78.

¹³¹ Ralph Miliband, *The State in Capitalist Society* (Quartet Books, 1973).

American “statists” including Steven Krasner,¹³² Theda Skocpol, and Eric Nordlinger¹³³ explored the issue in depth. One caveat of the debate on state autonomy is that the debate is so abstract that it is not clear which institutions of the state have autonomy—Congress, the presidency, the judiciary, or the bureaucracy. Still remaining were questions such as whether all of the institutions have autonomy, or only some of them. If all of them have some level of autonomy, who has relatively greater autonomy than others? If it depends on specific circumstances, under what conditions do they have greater or lesser autonomy? While public administration scholars seem to have remained silent on this issue, political scientists have used their master paradigm to continue to explore these questions.

Like the state autonomy debate, the discussion about bureaucratic autonomy received little explicit attention before the 1960s. Although the question of bureaucratic autonomy in American governance has always been a lingering issue, only generalized discussions deploring the “runaway” bureaucracy have dominated the scene.¹³⁴ For instance, Justice Jackson lamented bureaucratic autonomy as a “fourth branch of government,” which “deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.”¹³⁵ To many scholars,

¹³² Steven Krasner, *Defending the National Interest* (Princeton, NJ: Princeton Univ. Press, 1978).

¹³³ Eric Nordlinger, *On the Autonomy of the Democratic State* (Cambridge, MA: Harvard Univ. Press, 1981).

¹³⁴ Larry Hill, “Who Governs the American Administrative State? A Bureaucratic-Centered Image of Governance,” *J-PART* 1:3 (1991), p. 261-2.

¹³⁵ *FTC v. Ruberoid Co.* (343 U.S. 470, 1952); quoted in David Rosenbloom, “Retrofitting the Administrative State to the Constitution: Congress and the Judiciary’s Twentieth-Century Progress,” *PAR* 60:1 (January/February 2000), p. 39.

bureaucratic autonomy was simply a cause of “runaway agency,”¹³⁶ or of the “ruling servants.”¹³⁷

For others, however, bureaucratic autonomy became an object for neutral analysis. For many years Norton Long maintained that bureaucrats are more representative than politicians while deploring the irresponsible behavior of elected and partisan legislatures. He believed that “the bureaucrats fill in the deficiencies of the process of representation in the legislature.”¹³⁸

Several case studies that support the existence of bureaucratic autonomy have been presented. B. Dan Wood pursued a case study of the EPA’s policy changes during the early 1980s. Not surprisingly, he found that Clean Air Act enforcement was much weakened after President Reagan first took office together with a Republican Senate. However, he then finds—this time, surprisingly—that the enforcement went back up to an unprecedented level three years later in 1983. Based on this surprising finding, Wood concludes that “bureaucrats can move outputs in directions *completely opposite* from what a model of hierarchy would predict,” and thus the bureaucrats, even under a strongly ideological administration such as Reagan’s, retained an important autonomy.¹³⁹ Another case study was done by Marc Eisner and Kenneth Meier. In their study of the Department of Justice, Eisner and Meier reached a similar conclusion. The Antitrust Division changed its policy orientation from a strict to a lenient antitrust enforcement around 1980, which was widely believed to be due to the entrance of the Reagan

¹³⁶ Ronald Johnson & Gary D. Libecap, *The Federal Civil Service System and the Problem of Bureaucracy* (Chicago: The Univ. of Chicago Press, 1994).

¹³⁷ Eric Strauss, *The Ruling Servants* (NY: Praeger, 1961).

¹³⁸ Norton Long, *Polity* (Chicago, IL: Land McNally, 1962), p. 72.

¹³⁹ B. Dan Wood, “Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements,” *American Political Science Review* 82:1 (March 1988), p. 213.

administration and the Republican Congress. Contrary to common belief, what Eisner and Meier found was that the change was long prepared and executed by the bureaucrats themselves. According to Eisner and Meier, the Antitrust Division created the Economic Policy Office (EPO) in 1972 and recruited many economists who were indoctrinated with Chicago school's economic theories, which claim that economic concentration is not a structural basis for collusion but an expression of efficiency in a given market. Thus, the policy change in the Antitrust Division, Eisner and Meier claim, was a result of bureaucratic autonomy rather than presidential or congressional influence.¹⁴⁰

One avenue of study began to explore the necessary conditions under which bureaucrats can exert their autonomy. Francis Rourke finds that not all agencies have the same amount of autonomy.¹⁴¹ He differentiates "constituency agencies" from "self-directing agencies." Constituency agencies act as agents for special interests that seek favorable treatment from the bureaucracy and accordingly do not have much autonomy to wield. Self-directing agencies, on the other hand, can make autonomous decisions regardless of political masters' intentions. Such agencies as the FBI and CIA (which depend on the necessity to operate in secret) or the NASA and NIH (which rely on esoteric knowledge) are included in that category. Rourke hastens to add that this traditional bureaucratic autonomy is decreasing for three reasons: 1) citizen organization has become stronger than ever resulting in higher citizen participation; 2) administrative processes have become more highly visible in all sectors than it once was; and 3) public

¹⁴⁰ Marc Eisner & Kenneth Meier, "Presidential Control versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust," *AJPS* 34:1 (Feb. 1990): 269-87.

¹⁴¹ Francis Rourke, "Bureaucratic Autonomy and the Public Interest," in Carol Weiss and Allen Barton (eds.), *Making Bureaucracy Work* (Beverly Hills, CA: Sage, 1979).

faith in professional expertise has been declining. Despite these trends, Rourke believes that under certain conditions, bureaucrats have a strong autonomy.

Bureaucratic autonomy is notably revitalized by Daniel Carpenter's recent and well-received work. In line with Rourke, Carpenter attempts to identify the conditions under which the bureaucracy can exert autonomy. According to him, autonomy prevails when the bureaucracy can retain both reputation and network. Reputation is an accumulated result of organizational capacity for expertise, efficiency, and morality, whereas network is a function of diverse complex ties to organized interests and the media. Equipped with reputation and network, the bureaucracy can effectively earn its autonomy and formulate policy goals even when elected politicians oppose them. Carpenter applies his theory of bureaucratic autonomy to the cases of the Post Office, Department of Agriculture, and Department of Interior. For instance, Carpenter analyzes the Post Office's formation and implementation of the Rural Free Delivery System. Before 1896, rural residents did not receive their mail directly. Instead, they made weekly trips to the nearest post office to retrieve it from stores managed by fourth-class postmasters. These fourth-class postmasters were important political assets to both the president and congressional representatives, because they were sources of patronage and were strong political actors in their respective regions. Despite opposition from elected officials, the Post Office under the leadership of August Machen effectively overcame congressional opposition and made the policy a success.¹⁴²

Another scholar of bureaucratic autonomy is Brian Cook. Although he uses his own term, the "constitutive role of bureaucracy" instead of bureaucratic autonomy, his arguments are akin to Carpenter's notion of autonomy. Cook presents his case by

¹⁴² Daniel Carpenter, *The Forging of Bureaucratic Autonomy* (Princeton, NJ: Princeton Univ. Press, 2001).

juxtaposing what he calls the “instrumental role” and the “constitutive role.” He uses “instrumental,” to refer to the model of bureaucracy as a neutral tool that may be used for whatever ends political actors desire. The “constitutive” model, on the other hand, recognizes that bureaucrats play an autonomous role in formulating public policies. One of the biggest problems confronting public administration, Cook maintains, is that many people consider its role to be solely “instrumental.” This is partly a result of Americans’ “strong aversion to the notion of a professional cadre of public servants,”¹⁴³ but what is worse is that this aversion has been strengthened by subsequent critical eras such as Jacksonian Democracy, Wilson’s New Democracy, and Franklin Roosevelt’s New Deal. For Cook, this widespread instrumental view of public administration is problematic, because it leads to the inevitable frustration of the citizenry, who find a huge discrepancy between the rhetoric and reality of public administration. This frustration might be one reason for the growing distrust of government. Cook holds that if citizens realize the “constitutive” role of public administration in shaping policies, then the frustration of the citizenry would be much ameliorated. In other words, Cook blames the instrumental view of administration for encouraging the cynicism of Americans when they discover that their bureaucrats actually govern them. Bureaucratic autonomy leads to bureaucratic governance which cannot be reconciled with the prevailing instrumental doctrine. Cook sometimes goes too far, however, when he claims that public administration can even “reshape the moral and behavioral component of the popular will.”¹⁴⁴

¹⁴³ Brian Cook, *Bureaucracy and Self-Government: Reconsidering the Role of Public Administration in American Politics* (Baltimore, MD: Johns Hopkins Univ. Press, 1996), p. 157.

¹⁴⁴ *Ibid.*, p. 78.

2.4. Theory of Multiple Masters

Having discussed the two ends of the spectrum—that is, single master and bureaucratic autonomy, this dissertation now turns its attention to the *via media* perspective of the theories of multiple masters.

It seems that there have been different schools of thought within the theories of multiple masters. The first school of thought comes from those who simply recognize the existence of multiple masters of the bureaucracy. Such scholars as Richard Neustadt, James Pfiffner, Hugh Hecló, and Michael Nelson are examples. Most of them, however, stop at simply *recognizing* the multiple masters. For them, the existence of multiple masters is seen as a source of a “mixed picture,”¹⁴⁵ a “neither clear nor consistent relationship,”¹⁴⁶ or a “haunted relationship.”¹⁴⁷ What they failed to do is to identify a legitimate role that the bureaucracy can play under the system of multiple masters. In a sense, they do not provide theories that are based on the bureaucracy-centered perspective.

The second school of thought stretches beyond simple recognition and presents positive models to explain the system of multiple masters. Richard Waterman and Kenneth Meier’s article is an example of this school. They question the validity of two assumptions of principal-agent models: 1) goal conflict between principals and agents; 2) information asymmetry. By loosening the two assumptions, Waterman and Meier

¹⁴⁵ Hugh Hecló, “What has happened to the Separation of Powers,” in James Pfiffner (ed.), *Governance and American Politics: Classic and Current Perspectives* (Fort Worth, TX: Harcourt Brace College Publishers, 1995), p. 312.

¹⁴⁶ Douglas Brook, “Merit and the Civil Service Reform Act,” in James Pfiffner and Douglas Brook (eds.), *The Future of Merit: Twenty Years after the Civil Service Reform Act* (Washington DC: The Woodrow Wilson Center Press, 2000), p. 7.

¹⁴⁷ Francis Rourke, “Whose Bureaucracy Is This, Anyway? Congress, the President and Public Administration,” *PS: Political Science & Politics* 26:4 (December 1993), p. 687.

suggest eight different models of the relationship between the masters and the bureaucracy as an effort to present a broader theoretical framework for conceptualizing bureaucratic politics. In so doing, they identify at least fourteen masters of the bureaucracy and expanded the model to a wider spectrum.¹⁴⁸ B. Dan Wood and Richard Waterman performed a similar analysis, and through their statistical analysis they proposed the dynamic bureaucratic adaptation model, in which the bureaucrats continuously adapt to multiple masters of the president, Congress, and the courts.¹⁴⁹ John Ferejohn and Charles Shipan are yet other scholars in this school. Their model aims at explaining bureaucratic decision-making under the system of multiple masters. According to them, bureaucrats make strategic choices which effectively prohibit congressional committees from playing the single master's role in policy-decision, using constitutionally provided "sequential structure." That is, congressional committee members should consider the "structure" that their decisions may be overturned by "parent chamber," presidential veto, and judicial review. Ferejohn and Shipan attempted to show their argument through a decision-making equilibrium outcome model.¹⁵⁰ Later, Thomas Hammond and Jack Knott developed this model into a complicated one allegedly explaining the conditions under which an agency will have considerable autonomy under the system of multiple masters.¹⁵¹

¹⁴⁸ Richard Waterman & Kenneth Meier, "Principal-Agent Models: An Expansion?" *J-PART* 8:2 (1998): 173-202.

¹⁴⁹ B. Dan Wood & Richard Waterman, "The Dynamics of Political-Bureaucratic Adaptation," *American Journal of Political Science* 37 (1993): 497-525.

¹⁵⁰ John Ferejohn & Charles Shipan, "Congressional Influence on Bureaucracy," *Journal of Law, Economics, and Organization* 6 (1990): 1-20.

¹⁵¹ Thomas Hammond & Jack Knott, "Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making," *The Journal of Law, Economics, & Organization* 12:1 (April 1996).

There are some other scholars who pay attention to the subject of multiple masters from perspectives other than positive theory. Terry Moe is one of them. Although Moe is generally considered a presidential scholar,¹⁵² he acknowledges the importance of multiple masters of the bureaucracy in several of his articles. Moe wrote in 1987 that “[n]one of this is intended to suggest that Congress actually has no influence over the bureaucracy. Congress is surely important in this respect. But so are the presidents, the courts, interest groups—and, not least, the agencies themselves.”¹⁵³ Among the multiple masters, however, Moe, in my view, puts greater emphasis on the president and interest groups than other players. That is why Moe was dealt with earlier when this dissertation discussed the president as the master. However, despite his contribution to the development of social science in general and the literature of presidency in particular, that is where his contribution to the issue of multiple masters stops. In other words, though Moe has a clear recognition of the importance of multiple masters, he does not put the bureaucracy front and center. Instead, he hastens to return to the master perspective. Similar challenges are found in David Rosenbloom. Through many of his articles, Rosenbloom shows his deep interest in the system of multiple masters and its impact on the bureaucracy. His detailed analyses of Congress and the courts concerning their “retrofitting” efforts were well received.¹⁵⁴ However, he falls short of presenting

¹⁵² For instance, Aberbach and Rockman views Moe as a scholar who emphasizes the need for more presidentialism. See Joel D. Aberbach & Bert A. Rockman, “Mandates or Mandarins? Control and Discretion in the Modern Administrative State,” *PAR* 48:2 (1988): 606-12.

¹⁵³ Terry Moe, “An Assessment of the Positive Theory of Congressional Dominance,” *Legislative Studies Quarterly* 12:4 (November 1987), p. 477.

¹⁵⁴ David Rosenbloom, “Retrofitting the Administrative State to the Constitution: Congress and the Judiciary’s Twentieth-Century Progress,” *PAR* 60:1 (January/February 2000); “The Judicial Response to the Rise of the American Administrative State,” in Frederick Lane (ed.), *Current Issues in Public Administration*, 3rd ed. (New York: St. Martin’s Press, 1986): 129-149; *Public Administration and Law*, 2nd ed. (N.Y.: Marcel Dekker, 1997).

practical guidelines and normative implications for the bureaucrats on how they should behave under the system.

As discussed above, most theories of multiple masters fall into one of the following categories: 1) a mere recognition; 2) positive models without normative implications; 3) a master perspective that fails to guide the bureaucrats properly. Therefore, future research that focuses on the multiple masters should transcend a mere recognition of the relationship, provide normative implications for the bureaucrats, and beware of going back to the master perspective.

One exemplary study that overcomes the above challenges comes from John Rohr. The normative implication that was ignored in the other studies has so far been best postulated by Rohr in his metaphor of a “balance wheel.” Rohr maintains that choosing its masters “at a given time on a given issue” has been the *modus vivendi* of American bureaucracy “ever since Alexander Hamilton’s fascinating efforts to position the Treasury Department he headed.”¹⁵⁵ Rohr’s idea of balance wheel is reflected in the so-called Blacksburg Manifesto, which maintains that “the Public Administrators may have to play the role of balance wheel in the constitutional order, using their statutory powers and professional expertise to favor whichever participant in the constitutional process needs their help at a given time in history to preserve the purpose of the Constitution itself.”¹⁵⁶

¹⁵⁵ Rohr, *To Run a Constitution*, p. 182.

¹⁵⁶ Gary Wamsley et al., *Refounding Public Administration* (Newbury Park, CA: Sage, 1990), p.49.

Chapter 3: Masters in History I: the Founding Era

Having discussed in the previous chapter a number of theoretical arguments, I now turn to historical analysis in search of public administrators' masters. The first part of this journey, the Founding era, though it is not one of the "civil service reform eras," is nevertheless important, for it provides foundations for the establishment of American civil service and its reforms.¹⁵⁷ Unlike other chapters that will address specific civil service acts, this chapter will address the Constitution, for the obvious reason that there were no civil service acts at that time. Additionally, given that there was no official record (such as the *Congressional Record*) at that time, this chapter will look at records of the Constitutional convention and ensuing ratification debates recorded by private individuals.¹⁵⁸

As discussed in the first chapter, there are several critical tools for political masters to use to maintain mastery over the bureaucracy. These tools include appointing and removal power, budgeting power, and regulatory reviews. Since the Founding era lacked finely structured regulatory review systems such as the one developed by President Reagan's Executive Order 12291,¹⁵⁹ discussions concerning mastery over the

¹⁵⁷ In a sense, the founding was itself a reform of corrupt and inefficient British civil service system.

¹⁵⁸ During the Philadelphia Convention, journals were taken by the secretary, William Jackson, and were published in 1819 under President Monroe by the effort of John Quincy Adams with a rather lengthy title of *Journal, Acts and Proceedings of the Convention, Assembled at Philadelphia, Monday, May 14, and Dissolved Monday, September 17, 1787, which Formed the Constitution of the United States*. However, the most important and detailed records of all is James Madison's *Debates*. In 1911, Max Farrand gathered all available records into a single work of three volumes, which was considered the most comprehensive. This three-volume book, *The Records of the Federal Convention of 1787* (New Haven, CT: Yale Univ. Press, 1911) was in 1936 revised in four volumes and in 1966 in five volumes incorporating corrections of errors and new information.

¹⁵⁹ For Executive Order 12291, see Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291," 80 *Michigan Law Review* 193 (December 1981); for executive orders in general, see Phillip J. Cooper, *By Order of the President*

bureaucracy have centered on the budgeting power and the power to appoint and remove. As this dissertation confines itself within the debates concerning civil service reforms, the power to appoint and remove civil servants will be the primary focus of this chapter.

3.1. Defects of the Confederate and the Appointing Power

The Appointment Clause of the Article II of the Constitution provides that the public officers of the United States shall first be nominated by the President, then approved by the Senate, and finally appointed by the President. Having been accustomed to Senate confirmation hearings covered by the press, contemporary Americans seem to find little controversy in the clause. Yet the provision has spawned great debates during the American history.

Cases involving the appointing power are often contested on the ground of its converse—the removal power.¹⁶⁰ There appear to be several reasons why many scholars and practitioners have more frequently and fiercely debated the removal power rather than the appointing power. First, as the court stated in *Bowsher*, once an officer is appointed “it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.”¹⁶¹

(Lawrence, KS: Univ. Press of Kansas, 2002); Kenneth Mayer, *With the Stroke of a Pen* (Princeton, NJ: Princeton Univ. Press, 2001).

¹⁶⁰ Early cases on the removal power include *Myers v. U.S.* (272 U.S. 52, 1926), *Humphrey’s Executor v. U.S.* (295 U.S. 602, 1935), and *Wiener v. U.S.* (357 U.S. 349, 1958), which respectively related to the removals by the President of a first-class postmaster, federal trade commissioner, and war claims commissioner. Cases on the appointing power, on the other hand, include *Ex parte Siebold* (100 U.S. 371, 1880), *Ex parte Hennen* (13 Pet. 230, 1839), *Shoemaker v. U.S.* (147 U.S. 282, 1893), and *Buckley v. Valeo* (424 U.S. 1, 1976). More recently *Morrison v. Olson* (487 U.S. 654, 1988) deals with the office of the special prosecutor. This case is normally classified as a removal power case, but in my view the crux of the case is more akin to the appointing power.

¹⁶¹ *Bowsher v. Synar*, (478 U.S. 714, 1986), at 726.

Second, unlike the appointing power, the Constitution is silent on the removal power aside from the provision for impeachment, thus providing an open field for scholarly debates. A third factor is the “Decision of 1789,” in which various opinions were raised and, more importantly, well recorded. Many textbooks on the Constitution and several public administration books deal with this historical debate in-depth, providing yet another starting point for later debates.¹⁶² The appointing power, on the contrary, has failed to receive the proper attention that it deserves. To address this disparity, the remainder of this chapter will explore and discuss the issue of the appointing power.

The Articles of Confederation vested the appointing power in “the United States in Congress Assembled,” making Congress the sole master of the bureaucracy. Article IX prescribes:

[...] *The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated 'A Committee of the States', and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction — to appoint one of their members to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years [...]* (emphasis added).

When the Articles were proposed in 1777 and ratified in 1781, a congressional form of government was clearly what most Americans aspired to have. The master of bureaucracy had to be Congress because Americans “were in no mood to give an independent executive in the United States what they were busy denying to an

¹⁶² As for public administration texts, see, for example, John Rohr, *The President and the Public Administration* (Washington DC: American Historical Association, 1989), pp.19-24; Brian Cook, *Bureaucracy and SelfGovernment: Reconsidering the Role of Public Administration in American Politics* (Baltimore, MD: Johns Hopkins Univ. Press, 1996), pp. 24-26. For a more classic interpretation of the Decision, see L. D. White, *The Federalists* (New York: The Free Press, 1948), pp. 20-25; Paul Van Riper, *History of the United States Civil Service* (Evanston, IL: Row Peterson and Co., 1958), pp. 14-16.

independent executive in Britain.”¹⁶³ As Publius wrote, “the aversion of people to monarchy” was simply too strong.¹⁶⁴ In addition, because the experience of domineering British central authority was still alive in Americans’ minds, the Articles deliberately created a weak confederation of states. Not surprisingly, the Articles at first were considered a vital key to America’s future. As Edmund Randolph stated in the 1787 Convention, the authors of the Articles had “done all that patriots could do, in the then infancy of the science, of constitutions, & of confederacies.”¹⁶⁵

However patriotic that motive had been, the governance system of the Articles of Confederation soon fell under harsh criticisms and, accordingly, were severely transformed during the Philadelphia Convention of 1787. Among the changes was the mastery over the bureaucracy, more specifically, the question of who would appoint officers. It is worth reiterating a related clause from the Constitution, which of course is the product of the Convention. Article II, section 2 stipulates:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The change of authority to appoint public officers from “the United States in Congress Assembled” to the president “with the Advice and Consent of the Senate” is a dramatic one. Therefore, a review of this important debate is in order even though there does not

¹⁶³ Clinton Rossiter, *1787: The Grand Convention* (New York: Macmillan, 1966), p. 47.

¹⁶⁴ *Federalist* 67; Jacob Cooke (ed.), *The Federalist* (Middletown, CT: Wesleyan Univ. Press, 1961), p. 452.

¹⁶⁵ May 29, 1787; Max Farrand (ed.), *The Records of the Federal Convention of 1787*, Volume I (New Haven, CT: Yale Univ. Press, 1937), p. 18.

seem to be as much heated debate on this subject as others (such as the great debate on federalism).

One reason for the lack of heated debate on the change regarding the appointing power was that the Convention debate did not start from scratch but was based on two carefully crafted plans—with at least one of them made prior to the assembly of convention. The two plans, the Virginia Plan and the New Jersey Plan, framed the debate by setting forward from the beginning a similar position on the issue of changing the appointing power from Congress to the executive. First, the Virginia Plan was proposed by Edmund Randolph on May 29th—the first day of real debates.¹⁶⁶ Written primarily by James Madison, the Virginia Plan moved most of the Executive rights of Congress to a “National Executive.” It articulates:

7. Resolved that a National Executive be instituted; to be chosen by the National Legislature for the term of ___ years, to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that *besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.* (emphasis added)

The other plan, the New Jersey Plan, was a counterattack from smaller states to the Virginia Plan. Curiously, however, in terms of the appointing power, the New Jersey Plan was not much different from the Virginia Plan. In fact, the New Jersey Plan, proposed by William Patterson on June 15, was clearer in its provision regarding the appointing power than the Virginia Plan. The power was plainly vested in the

¹⁶⁶ The Delegates first met on May 14th, but the meeting was adjourned since “a majority of the States [were] no being represented.” The first two days when the Delegates finally met were spent mostly on setting rules, thus making May 29th the beginning day of debate.

“Executives,” and it also included the appointment of federal judges. Articles 4 and 5 of the Plan states,

4. Resd, [...] That the Executives besides their general authority to execute the federal acts *ought to appoint all federal officers* not otherwise provided for, & to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity [...].

5. Resd, that a federal Judiciary be established, to consist of a supreme Tribunal the *Judges of which to be appointed by the Executive* [...] (emphasis added).

Being cognizant of this information, it could be contended that one of the key reasons the framers did not fiercely debate the appointing power was because of the similarity of the two plans to each other.

But why did both of the plans uphold the transfer? It seems that the defects of the Confederation were so widely accepted by contemporaries that some kind of executive government was deemed too natural to be discussed. George Washington, having been a Commander-in-Chief of the colonial armies, was one of the contemporaries who felt the defects more acutely than others might have. In fact, in one of his letters to Alexander Hamilton, Washington himself acknowledged that “[n]o man in the United States is, or can be more deeply impressed with the necessity of a reform in our present Confederation than [himself].”¹⁶⁷ Faced with slow and incompetent decision-making processes in Congress and an ensuing lack of supplies for the war, Washington was able to shatter the illusion that the Articles of Confederation once provided. In another letter, again to Hamilton, Washington wrote:

¹⁶⁷ March 31, 1783; Harold Syrett & Jacob Cooke (eds.), *The Papers of Alexander Hamilton*, Vol. III (New York: Columbia Univ. Press, 1962), p. 310.

The predicament in which I stand as Citizen & Soldier, is as critical and delicate as can well be conceived. It has been the subject of many contemplative hours. The sufferings of a complaining army on one hand, and the inability of Congress and tardiness of the States on the other, are the forebodings of evil [...]¹⁶⁸

Hamilton denounced the deficiencies of the Confederation even more vigorously than Washington. Having been a lieutenant colonel working as an aide-de-camp to Washington and a field commander at the battle of Yorktown,¹⁶⁹ Hamilton directly experienced several defects of the Confederation. The same year when he wrote a resolution for the Continental Congress pinpointing the origin of the national problem as “confounding legislative and executive power in a single body,”¹⁷⁰ Hamilton wrote a lengthy letter to James Duane expounding the necessity of a national convention. In that letter, Hamilton sharply pointed out the limitations of congressional government and called for the transfer of executive powers (such as the appointing power) from Congress to the executive. He wrote:

Another defect in our system is want of method and energy in the administration. This has partly resulted from the other defect, but in a great degree from prejudice and the want of a proper executive. Congress have kept the power too much into their own hands and have meddled too much with details of every sort. Congress is properly a deliberative corps and it forgets itself when it attempts to play the executive. It is impossible such a body, numerous as it is, constantly fluctuating, can ever act with sufficient decision, or with system.¹⁷¹

After three years, Hamilton’s thoughts on the defects of congressional government did not change, and he reiterated them in another letter to George Clinton. He wrote, “Every day proves more & more the insufficiency of the confederation. The proselytes to this

¹⁶⁸ March 4, 1783; Syrett & Cooke, Vol. III, p. 278.

¹⁶⁹ Richard Green, “Oracle at Weehawken: Alexander Hamilton and Development of the Administrative State,” Ph.D. dissertation (Virginia Tech, 1987), p. 31-2.

¹⁷⁰ “Unsubmitted Resolution Calling for a Convention to Amend the Articles of Confederation” (July, 1783); Syrett & Cooke, Vol. III, p. 420.

¹⁷¹ September 3, 1780; Syrett & Cooke, Vo. II, p. 404.

opinion are increasing fast, and many of the most sensible men acknowledge the wisdom of the measure recommended by your [New York] legislature at their last sitting.”¹⁷²

James Madison was even clearer in pointing out problems of the appointing power. In a letter to Washington, he wrote that the “National supremacy in the Executive departments” would suffer “unless the officers administering them could be made appointable by the supreme Government.”¹⁷³

As reflected in the framers’ experiences and thoughts, the defects of the Articles of Confederation and its lack of an “energetic” executive department was so widely accepted that the transfer of the appointing power from Congress to the executive did not need to be hotly debated, at least by those chosen to attend the Constitutional Convention.

3.2. Convention Debates

What lessons did the debates at the Constitutional Convention teach us regarding the central question that this dissertation poses—“Who is our master?” Who has the constitutional authority to make appointments of the bureaucrats? Is it simply the President or Congress, or both of them? What was the reasoning behind the Appointment Clause that changed several times during the Convention? How significant is the so-called “Excepting Clause”? These are the questions that must be addressed.

¹⁷² January 12, 1783: Syrett & Cooke, Vol. III, p. 240.

¹⁷³ April 16, 1787; Marvin Meyers, *Sources of the Political Thought of James Madison* (New York: The Bobbs-Merrill Co, 1973), p. 97.

3.2.1. The Appointment Clause

As previously explained, both the Virginia Plan and the New Jersey Plan vested solely in the executive the power to appoint public officials. It was Hamilton, however, who first advocated the idea of multiple masters by proposing the adoption of approval resting in the Senate. Until June 18, Hamilton had been silent partly out of respect to others and partly because of his delicate situation with respect to his own state.¹⁷⁴ But on that day, he made an unusually long speech, which was praised by Gouverneur Morris as “the most able and impressive [address] he had ever heard.”¹⁷⁵ His proposal differed somewhat from the final draft of the Constitution, but was quite interesting for our purposes. Hamilton’s proposal vested in the president the sole appointing power of the head of departments, while adding the Senate’s approval for all other officers including ambassadors. His reasoning is not hard to surmise. Hamilton argued that while the heads of departments should retain their responsiveness to the president at all times and serve the president as their single master, other bureaucrats should serve both the president and the Senate as their dual masters.

Hamilton’s brilliant idea, however, was not readily accepted by other framers. His plan of multiple masters, requiring the president and the Senate collaborate in the appointment process, had to wait until September 4, when the Committee of Eleven submitted its report—an outcome which will be discussed later.

Going back to June 19, the day after Hamilton’s address, the Committee of the Whole, while reporting the rejection of the New Jersey Plan, went back to its original resolution of the single master, excepting only federal judges who were to be appointed

¹⁷⁴ Farrand, Vol. I, p. 282.

¹⁷⁵ Farrand, Vol. I, p. 293.

by the Senate alone.¹⁷⁶ On July 18, however, Nathaniel Gorham made an interesting proposition—interesting in terms of multiple masters. Though the debate was about the appointment of judges rather than public officials of the executive branch, Gorham’s argument is relevant. Drawing on the Massachusetts Constitution, Gorham argued for a proposal that appointments be made “by the executive by and with the advice and consent of the second branch.” Hamilton’s idea of multiple masters seemed to be given new life. Gorham’s proposal, however, failed to attract necessary support from fellow framers.¹⁷⁷ On July 26, the Convention agreed to refer the Appointment Clause to the Committee of Detail without reflecting on either Hamilton’s or Gorham’s proposal. Thus, the clause referred to the Committee had no changes at all from the June 19 resolution. It read:

Resolved, that a national Executive be instituted [...] with power [...] to appoint to Offices in case not otherwise provided for.

During an adjournment of the Convention for ten days, the Committee of Detail worked on its draft and on August 6 submitted its report to the Convention. Not much is known about the work of this committee, and it seems “as if these five men had adopted a secrecy rule of their own.”¹⁷⁸ However, regarding the Appointment Clause, the report offered at least two interesting changes. First, the president shall appoint “officers” instead of appointing “to Offices.”¹⁷⁹ Second, the Treasurer shall be appointed not by the president but by the “Legislature of the United States.”¹⁸⁰

¹⁷⁶ Specific provisions were as follows: 9. Resolved, that a national executive be instituted [...] with power [...] to appoint to offices in cases not otherwise provided for; 11. Resolved, That [...] the Judges of which [National Tribunal] to be appointed by the second Branch of the National Legislature.

¹⁷⁷ Farrand, pp. 41-4.

¹⁷⁸ Rossiter, p. 201. The five men were John Rutledge (South Carolina), Edmund Randolph (Virginia), Nathaniel Gorham (Massachusetts), Oliver Ellsworth (Connecticut), and James Wilson (Pennsylvania).

¹⁷⁹ Article X, section 2.

¹⁸⁰ Article VII, Section 1.

At first glance, the change to “officers” from “to Offices” may seem trivial. Yet it carries a deeper ramification. Although the fact that public offices should be created by Congress was never challenged, if the Constitution allowed the president to appoint “officers” instead of “to offices,” the provision might open a path to an interpretation that the president could appoint officers even when the offices had not been created by Congress. Madison caught this possibility. On August 24, Madison clearly made his case when he maintained that the provision should be restored “in order to obviate doubts that he [the president] might appoint officers without a previous creation of the offices by the Legislature.” In other words, Madison wanted to make sure that a delicate balance between the two masters of the bureaucracy would be maintained by switching the word from “officers” to “to Offices.” This slight alteration would guarantee the effectiveness of Congress’s authority to create offices and prevent the president’s sole mastery over the bureaucracy.

The appointment of the Treasurer by Congress is interesting as well as significant. It is interesting because it seemingly contradicts the principle of separation of powers. It is significant because it was one of the seeds for later turmoil between Congress and the president regarding control of the Treasury Department. On August 17, George Read proposed to return the appointing power from Congress to the president. It was opposed by Madison and survived until almost the end of the Convention—September 14. Thus, until the last minute, the framers were willing to vest the appointment of at least one executive officer in Congress. It is one but important example illuminating the difference between the framers’ thoughts as compared to contemporary scholars’ beliefs that all the bureaucrats of the executive branch should serve the president as the sole master of them.

The controversy over the Treasurer being caught in-between the president and Congress—what Rohr calls “straddling the barbed wire fence”¹⁸¹—resurfaced under later Secretaries of the Treasury including Hamilton, Crawford, and Duane. But the issue began when the first Congress created the first three departments in 1789. When Congress established the Departments of Foreign Affairs on July 27, as the title of the act indicates, Congress designated it as an “executive” department.¹⁸² The Department of War followed suit. On August 7 Congress passed “An Act to establish an Executive Department, to be denominated the Department of War.”¹⁸³ These titles of departments are clearly contrasted to the title of the act creating the Treasury Department, where Congress simply omitted “Executive” from the title.¹⁸⁴ The contrast, however, did not stop there. The two acts establishing the departments of Foreign Affairs and War were respectively composed of only four sections with little detail. However, the secretaries were obligated to “perform and execute such duties as shall from time to time be enjoined on or intrusted to them by the President of the United States.”¹⁸⁵ But the treatment of the Department of Treasury was much different. The act was composed of eight sections which specified in detail the internal structures and functions of the department. Moreover, it obligated the Treasurer (an officer of the Treasury Department) to submit directly to Congress “fair and accurate copies of all accounts by him” as well as “a true and perfect account of the state of the Treasury.”¹⁸⁶ In addition, Congress required the Comptroller (another officer of the Treasury Department) to “countersign all warrants

¹⁸¹ John Rohr, *Public Service, Ethics, and Constitutional Practice* (Lawrence, KS: Univ. of Kansas Press, 1998), p. 95.

¹⁸² “An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs,” 1 *Stat.* 28 (July 27, 1789).

¹⁸³ 1 *Stat.* 49 (August 7, 1789).

¹⁸⁴ “An Act to establish the Treasury Department,” 1 *Stat.* 65 (September 2, 1789).

¹⁸⁵ Section 1 of the both acts.

¹⁸⁶ Section 4 of the act.

drawn by the Secretary of the Treasury.” An officer who should “countersign” what was decided by his boss—a principal officer appointed by the president? This kind of officer was never intended within the Departments of Foreign Affairs and War.¹⁸⁷

Relying on these differences, Hamilton, the first Secretary of Treasury, put himself on the fence between the two political masters by sometimes bypassing the president and reporting directly to Congress. As Rohr maintains, Hamilton’s statesmanship saw the advantage of having two masters instead of one from the perspective of a treasury secretary.¹⁸⁸ Hamilton was not the only Secretary who “straddled the fence.” Under President Monroe, Secretary Crawford transmitted annual estimates directly to Congress without first sharing them with the president.¹⁸⁹ Similarly, under President Jackson, Secretary Duane refused to remove deposits from the Second Bank of the United States by declaring that “In this particular case, congress confers a discretionary power, and requires reasons if I exercise it. Surely this contemplates responsibility on my part.”¹⁹⁰

On August 24, another relevant debate occurred. Roger Sherman objected to a sentence in the Appointment Clause—“[the president] shall appoint officers in all cases

¹⁸⁷ In the first Congress, Madison made an interesting comment about the Comptroller. He found the office a perfect example that serves three Constitutional masters. He stated: “[t]he Comptroller would be dependent upon the President, because he can be removed by him; he will be dependent upon the Senate, because they must consent to his election for every term of years; and he will be dependent upon this House, through the means of impeachment, and the power we shall reserve over his salary; by which means we shall effectually secure the dependence of this officer upon the Government. But making him thus thoroughly dependent, would make it necessary to secure his impartiality, with respect to the individual. This might be effected by giving any person, who conceived himself aggrieved, a right to petition the Supreme Court for redress, and they should be empowered to do right therein; this will enable the individual to carry his claim before an independent tribunal.” 1 *Annals of Congress* 611.

¹⁸⁸ John Rohr, *Public Service, Ethics, and Constitutional Practice* (Lawrence, KS: Univ. of Kansas Press, 1998), p. 96-7.

¹⁸⁹ Steven Calabresi & Christopher Yoo, “The Removal Power: The Unitary Executive During the First Half-Century,” 47 *Case Western Reserve Law Review* 1451 (Summer 1997), p. 1514.

¹⁹⁰ L.D. White, *The Jeffersonians: A Study in Administrative History, 1801-1829* (NY: Macmillan, 1951), p. 37.

not otherwise provided for by this Constitution.” Sherman thought it vested too much power in the president. In its stead, he moved to insert “or by law” after the word “Constitution,” vesting greater power in Congress to curtail presidential appointing power. Sherman’s move, however, was defeated by nine to one. After Sherman’s failed attempt, John Dickinson, criticizing the appointment clause for giving too much power to the president, proposed a seemingly similar but subtly different proposal: “[the president] shall appoint to all offices established by this Constitution, except in cases herein otherwise provided for, and to all offices which may hereafter be created by law.” Unlike Sherman’s proposal, Dickinson’s proposal carried by a vote of six to four, because it was in line with Madison’s proposal to switch the word from “officers” to “Offices,” making sure Congress’s authority to create offices. Thus, the framers agreed on the balanced idea of giving Congress the discretion to create offices but retaining the appointing power with the president. Later, however, when Dickinson went further and tried to move some of the appointing power from the president to the legislature or the governors of states, the framers objected. They found unacceptable Dickinson’s proposal, which provided: “except where by law the appointment shall be vested in the Legislature or Executives of the several States.” What we see here is an incessant effort by the framers to keep a subtle balance between the two masters of the bureaucracy. In plain terms, it appears that the framers wanted neither the president nor Congress to become the sole master of the bureaucracy.¹⁹¹

On September 4, the Committee of Eleven submitted its report. Regarding the Appointment Clause, the report offered a very interesting scheme. It revived Hamilton’s (June 18) and Gorham’s (July 18) proposals—a relatively complex system of multiple

¹⁹¹ Farrand, Vol. II, pp. 396-411.

masters. Section 4 of the report was quite similar to the current Constitution, which articulates:

[the President] shall nominate and by and with the advice and consent of the Senate shall appoint Ambassadors and other public Ministers, Judges of the supreme Court, and all other officers of the U.S. whose appointment are not otherwise herein provided for.

The debate on this clause occurred three days later on September 7. After a series of debates, however, the framers agreed on the clause *unanimously*. This unanimity indicates that the framers saw a great merit in the schemes of multiple masters originally proposed by both Hamilton and Gorham. This merit, as Gouverneur Morris later maintained, stemmed from the combination of the “responsibility” supplied by the president and the “security” provided by the Senate.¹⁹²

Now, after the report of the Committee of Eleven, the only remaining exception to the mode of appointment was the appointment of the Treasurer. On September 14, John Rutledge moved to return the appointing power to the president. Since the appointment was by then agreed to be completed with the collaboration of the president and Senate, the transfer seemed natural. There were several who voiced oppositions, though. Gorham, for instance, found it “a mischievous tendency,” while Sherman emphasized the importance of a “natural link” between Congress and the Treasurer. However, when put to a vote, it was agreed, by eight to three, to strike the clause. Despite this opposition, the Convention approved the new mode of appointing officers, wherein power was denied to a sole master of the bureaucracy. Put differently, had it not been for the new appointment clause spelling out the cooperation of dual masters, it would have been

¹⁹² Farrand, Vol. II, p. 539.

extremely difficult to secure an agreement to move the appointing power from Congress to the president.

3.2.2. The “Excepting Clause”

The last part of the Appointment Clause, the “Excepting Clause,” was inserted during the final days of the Convention. It states: “but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”

On September 15, just two days before the closing of the Convention, Gouverneur Morris moved to add this clause. There was only one comment by Madison made on this motion. Madison maintained that the clause did not “go far enough” because it did not allow Congress the discretion to vest the appointing power in “superior officers below heads of departments.” The first vote on the motion was lost in a tie. When presented a second time with the advice that “some such provision [was] too necessary, to be omitted,” the proposal was adopted unanimously.¹⁹³

It is interesting to note that it was not until the very end of the Convention that the framers finally caught their oversight in having every office, however trivial it might be, be filled through the tedious process of presidential nomination and Senatorial approval. By this last minute provision of the Excepting Clause, the Convention empowered Congress to delegate the appointing powers to the president alone, the heads of the departments, and the courts.

Even more interesting for our purpose was the brevity of the debate regarding the clause at the Convention—only the one previously mentioned comment made by

¹⁹³ Farrand, Vol. II, p. 627-8.

Madison. There is no doubt that Congress can delegate the appointing power for *intrabran*ch appointment—that is, the president or the heads of departments can appoint public officials within the executive branch without resorting to the cumbersome process of Senate approval, and the courts can exert similar powers within the judicial branch. However, that consensus falls apart when it comes to *interbran*ch appointment. The issue became apparent in the Supreme Court cases concerning the constitutionality of special counsels. For instance, in *Morrison v. Olson*,¹⁹⁴ Chief Justice Rehnquist and Justice Scalia had completely different views. The facts of that case were as follows:

In 1986, pursuant to the Ethics in Government Act, the “Special Court”—a specially convened panel of federal judges—appointed Alexia Morrison as an independent counsel to investigate allegations of improper conduct by Theodore Olson, a former Assistant Attorney General, who advised the Environmental Protection Agency not to release certain key documents about alleged misuse of Superfund money. In 1987, when faced with a subpoena, Olson filed suit to quash the subpoena issued to him. He contended that the independent counsel provisions of the Act were unconstitutional because they violated the appointment clause and the doctrine of separation of powers. The Supreme Court denied Olson’s constitutional claim by seven to one.

Among the many interesting issues in the case, two stand out as particularly instructive for our purposes. The first issue was whether Morrison was a “principal officer” who should be nominated by the president, approved by the Senate, and finally appointed by the president; or an “inferior officer” that the courts of law could appoint without resorting to the appointment clause procedures. In his opinion for the Court, Chief Justice Rehnquist stated that Morrison was an “inferior officer.” To the contrary,

¹⁹⁴ 487 U.S. 654 (1988).

Justice Scalia found no ground to see Morrison as an inferior officer. Thus, for Scalia, the appointment of a non-inferior officer by the court was unconstitutional.

A more fundamental issue concerns *interbranch* appointment. Scalia seemed to claim that though, as the Court's opinion maintains, Morrison may have been an inferior officer, she could not be appointed by the court. His reasoning was that the Excepting Clause, which appertained to *intra*branch appointments only, could not be applied to *interbranch* appointments. In other words, a special prosecutor, who is a part of the executive branch, may not be appointed by the special court, which is a part of the judicial branch. He saw it as a violation of separation of powers.¹⁹⁵ In Scalia's view, article II, section 1, clause 1 of the Constitution—"The executive Power shall be vested in a President of the United States."—"does not mean *some of* the executive power but *all of* the executive power"¹⁹⁶ (emphasis original). Otherwise, it would "deeply [wound] the President, by substantially reducing the President's ability to protect himself and his staff." Scalia believed that all bureaucrats of the executive branch should serve only one master—the president of the United States.

Scalia reviewed the framers' intent to find whether the Excepting Clause was intended to include interbranch appointments. He thought that if the framers had intended to allow interbranch appointments, there would have been a lengthy debate on the issue. Otherwise, the framers simply had only intrabranched appointments in mind. Since there was only one comment on the clause, the framers, in his view, intended only intrabranched appointment by the courts. In his dissenting opinion, Scalia stated:

¹⁹⁵ Despite Scalia's claim, the framers might not have viewed prosecution as an inherently executive function. See Lawrence Lessig & Cass Sunstein, "The President and the Administration," 94 *Columbia Law Review* 1 (January 1994), pp. 16-7.

¹⁹⁶ 487 U.S. 654 (1988) at 705.

No great debate ensued: the only disagreement was over whether it was necessary at all. Nobody thought that it was a fundamental change, excluding from the President's appointment power and the Senate's confirmation power a category of officers who might function on their own, outside the supervision of those appointed in more cumbersome fashion.

The same brevity of debate, however, led Chief Justice Rehnquist to hold that “there is nothing to suggest that the Framers intended to prevent Congress from having that power.”¹⁹⁷ Rehnquist did not mean that Congress had *unlimited* discretion to enact interbranch appointments of “inferior officers.” Yet, at the same time, he did not argue that the special counsel's responsibility was so central as to hamper the executive function from working properly.

By a seven-to-one majority, the Supreme Court upheld constitutional the special counsel provision of the Ethics in Government Act, which later grounded Kenneth Starr's mandate to investigate President Clinton. The Court's decision may seem odd especially from the strict principle of separation of powers. Nevertheless, by allowing a member of the executive branch, appointed by the judicial branch, to investigate and prosecute his or her own branch members—in certain cases, his or her own master, the Court signaled that the bureaucrats can have multiple masters rather than a single master—the president. Clearly the debates held in Philadelphia so long ago continue to reverberate in the highest chambers of government.

¹⁹⁷ 487 U.S. 654 (1988) at 675.

3.3. Ratification Debates

Ratification debates are the next issue at hand after having considered the Convention debates on the issue of bureaucratic mastery. What did the Anti-Federalists have to say about the Appointing Clause? What were the Federalists' rejoinders to these criticisms? What were the substantive differences? Was there any common ground to be found? Following up on these questions is crucial to understanding the intentions and desires of the framers.

3.3.1. The Anti-Federalists' Argument

At least two prominent Anti-Federalists raised issues about the appointing power—Luther Martin and Federal Farmer. Both were concerned about the Appointment Clause, but for two very different reasons: one feared presidential dictatorship, the other senatorial tyranny. There was, however, some common ground between them. Both were concerned about the risk that a single master might lead to dictatorship. A review of how the two Anti-Federalists deployed their arguments will assist in understanding the ratification period proceedings.

In his “Genuine Information,”¹⁹⁸ Luther Martin did not conceal his concern about the Appointment Clause. He argued that the president with his power of nomination would dominate Congress and would become “a King in *name*, as well as in *substance*”¹⁹⁹ (emphasis original). Martin was especially concerned about the possibility

¹⁹⁸ “The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia,” November 29, 1788.

¹⁹⁹ Herbert Storing (ed.), *The Complete Anti-Federalist*, Vol. II (Chicago: Univ. of Chicago Press, 1981), 2.4.86.

that all officers appointed by the president might become servants of the president alone “ready to execute his commands” only. In his own words:

[t]he person who nominates, will always in reality appoint, and that this was giving the President a power and influence, which together with the other powers, bestowed upon him, would place him above all restraint or controul. [...] That the army and navy, which may be increased without restraint as to numbers, the officers of which, from the highest to the lowest, are all to be appointed by him, and dependant on his will and pleasure, and *commanded by him in person*, will, of course, *be subservient to his wishes* [...] (emphasis added).²⁰⁰

Federal Farmer also found problems in the Appointment Clause that differed from those of Martin. In his view, the Senate, having a share in the important power of appointing officers, would not become “a body to advise” but one “to order and dictate.” As a result, the president would be a mere “*primus inter pares*.”²⁰¹ He feared that the Senate would not pass laws delegating the appointing power to other authorities including the department heads, or the courts of law. Instead, the Senate would “jealously guard this power for itself.”²⁰² In place of the Appointment Clause, Farmer proposed two schemes of appointment. The first of them was to divide the appointing power and assign it to various entities. He seemed to propose giving the appointment of the Treasurer to Congress; ambassadors to Senate; militia officers to state governments; and inferior officers to the president alone, the heads of the departments, or the courts of law. For Farmer, the judges and the department heads were considered to be “best informed as to proper persons to fill inferior offices in them,” and thus “impartial and judicious appointments” could be made.²⁰³ He then moved on to propose an appointing council composed of seven to nine members in order to appoint all other residual officers. Thus,

²⁰⁰ Storing, 2.4.86.

²⁰¹ *Ibid.*, 2.8.170.

²⁰² John Rohr, *To Run a Constitution* (Lawrence, KS: Univ. of Kansas Press, 1986), p. 35.

²⁰³ Storing, 2.8.173.

Farmer suggested highly dispersed appointing powers to avoid making a single master of the bureaucracy, which might result in dictatorship.²⁰⁴

Anti-Federalists Martin and Farmer were alarmed by possible defects in the Appointment Clause. The impact of the defects, however, was distinct. For Martin, presidential dictatorship was the concern; for Farmer, senatorial tyranny was the danger. Despite the difference, they had one thing in common—the fear of a *single master* who might make bureaucrats subservient. They were not concerned about a lack of bureaucratic responsiveness either to the president or to Congress. Rather, they felt uneasy about the threat of a single master.

3.3.2. The Federalists' Arguments

In *Federalist 76* and *77*, Publius rejoined the Anti-Federalists' arguments.²⁰⁵ As was often the case, Publius from the outset laid out the boundary of alternatives and explored them one by one with refined logic and passion. In *Federalist 76*, he presented three ways to appoint public officers. "It ought either to be vested in a single man—or in a select assembly of a moderate number—or in a single man with the concurrence of such an assembly."²⁰⁶

In his view, the exercise of appointing power by an assembly of men always involved party warfare and would end up with either a "victory gained by one party over

²⁰⁴ Another important argument presented by Farmer is related to the department heads role as "balance wheel." If the president is too strong, it can be "reduced within proper bounds, by placing many of the inferior appointments" in other entities. According to Rohr, this role of "check on the president" by the department heads is "strictly Anti-Federalist." See Rohr, *Ibid*, p. 37.

²⁰⁵ Luther Martin's General Information was delivered on November 29, 1787 and Federal Farmer's letter was published on January 14, 1788. As Hamilton's two pieces were published on April 1 and 2 of 1788, we can safely assume that his pieces were rejoinders to the Anti-federalists'.

²⁰⁶ Jacob Cooke (ed.), *The Federalist* (Middletown, CT: Wesleyan Univ. Press, 1961), p. 510.

the other,” or a “compromise between the parties.” As Publius legitimately claimed, in either case, the “intrinsic merit of the candidate” would disappear.

On the other hand, appointments by a single person provide “sole and undivided responsibility,” which far exceeds some virtues that the appointments by an assembly may carry. However, a single person may not always be reliable. This judgment is related to his understanding of human nature. In the first half of the *Federalist Papers*, Publius did not seem to place much trust in human nature. His basic understanding of human nature rested in his characterization of man as “ambitious, vindictive and rapacious.”²⁰⁷ “No man is allowed to be a judge in his own cause,” Publius writes, “because his interest would certainly bias his judgment, and not improbably, corrupt his integrity.”²⁰⁸ In addition, “the latent causes of faction are sown in the nature of man.”²⁰⁹ Therefore, for the appointing power to be vested in one person alone, there should be “an excellent check” upon that person to avoid “the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”²¹⁰ But if human nature is, as early Publius maintained, completely replete with dishonesty, vice, and fallibility, how can a mere approval by the Senate prevent presidential tyranny? Facing this dilemma, Publius reveals, in the latter half of *Federalist Papers*, an evolved view of human nature.²¹¹ For instance, when writing about the

²⁰⁷ *Federalist 6*; Cooke, p. 28.

²⁰⁸ *Federalist 10*; Cooke, p. 59.

²⁰⁹ *Federalist 10*; Cooke, p. 58.

²¹⁰ Storing, p. 513.

²¹¹ Green claims that Hamilton discerned *designing* a government from *running* one. For the former, human nature was assumed to be evil “to prepare for the worst.” For the latter, human nature was considered “a compound of good and ill tendencies.” Green finds David Hume’s influence on Hamilton about the dual perspectives of human nature. See Richard Green, “Oracle at Weehawken: Alexander Hamilton and Development of the Administrative State,” Ph.D. dissertation (Virginia Tech, 1987), pp. 109-20.

Appointment Clause, he claims that human nature is not completely good or bad but a blending of evils and virtues. In *Federalist 76*, Publius maintains:

The proposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude. The institution of delegated power implies that there is *a portion of virtue and honor among mankind*, which may be a reasonable foundation of confidence (emphasis added).

Relying on that “portion of virtue and honor among mankind,” Publius believed that Senate approval would play a critical role in preventing the darker side of human nature from taking control, thus securing the choice of men of “intrinsic merit” who would fill the government.

In *Federalist 68*, Publius claimed that “the true test of a good government is its aptitude and tendency to produce a good administration.”²¹² Put differently, good public administration is a cornerstone of good government. When opening his discussion of the appointing power, Publius reemphasized this claim and maintained that the ultimate goal of appointing officers was to produce a good public administration. In *Federalist 76* and *77*, he repeatedly emphasized the importance of a stable government, which would be achievable by making Congress and the president dual masters of the bureaucracy. The dual master system would be “an efficacious source of stability in the administration.” When Publius opposed the appointing council, his rationale was none other than a “decrease of stability in the administration.” That was also the case when he criticized vesting the power in the House. If the power is given to a body “so fluctuating” and “so

²¹² *Federalist 68*; Cooke, p. 461.

numerous,” “all the advantages of stability, both of the executive and of the Senate, would be defeated by this union.”²¹³

Thus, in Publius’ mind, an important chain of logical events would fall into place. First, the cooperation of Congress and the president in the appointment of officers would produce a stable public administration. This, in turn, would generate a good administration, which, in turn, would create a good government. For no less a source than Publius, dual masters are cornerstones of a good government.

The Anti-Federalists and Federalists had very different views on the appointment scheme that the Constitution proposed. The former opposed it, because they saw the possibility of dictatorship by either the president or the Senate. The latter upheld it, because they saw the scheme as necessary to prevent dictatorship by either branch of the government. Despite their critical differences, what is common between them is that neither the Anti-Federalists nor the Federalists wanted a government controlled solely by one branch of the government and did not desire strong responsiveness from the bureaucrats to a single master.²¹⁴

This chapter contained a historical analysis of the Founding era focusing on the Convention debates as well as the Ratification debates. Though not a part of the “civil service *reform* eras,” the Founding era provides an important foundation for the later

²¹³ *Federalist 77*; Cooke, p. 519.

²¹⁴ David Lowery implicitly proposed a similar view. Lowery examined what he called a “conceptual schema” of three different groups of the framers: the Whigs, Federalists, and Republicans. He found that the Whigs were afraid of bureaucratic tyranny, the Federalists were fearful of legislative dictatorship, and the Republicans were worried about presidential autocracy. Lowery’s findings are very interesting, in that the groups did not strongly endorse any one branch’s dominance. In its stead, the framers were concerned about possible tyranny by a single branch of the government. Thus, a converse of Lowery’s argument is that the framers preferred multiple masters to a single master. See David Lowery, “A Bureaucratic-Centered Image of Governance: The Founders’ Thought in Modern Perspective,” *J-PART* 3:2 (1993): 182-208.

development of American civil service system. The dramatic change of the appointing power from a single master under the Articles of Confederation to dual masters under the Constitution was, after a long tug-of-war, *unanimously* agreed to by the framers. In devising a wise system of combining presidential nomination and senatorial approval, the framers saw a merit that could prevent tyranny by either the president alone or by Congress alone.

In addition, as the Convention wound down, the framers agreed to disperse the appointing power among several authorities such as “the President alone,” “the Courts of Law,” and “the Heads of Departments.” Had this agreement not been made, every federal appointment would have required a very difficult procedure—senatorial approval. A more critical role that this clause played, however, was to allow *interbranch* appointments. In *Morrison v. Olson*, the Supreme Court upheld the constitutionality of judges’ appointing of an important member of the executive branch, opening a bigger venue for the legitimacy of multiple masters of the bureaucracy.

During the ratification debates, the Anti-Federalists and Federalists had very different opinions regarding the Appointment Clause as well as the Excepting Clause of the Constitution. Nevertheless, they had in common one critical matter. Neither of them aspired to have the bureaucracy subservient solely to one branch of the government. Thus, during the Founding era, the framers managed to lay out a scheme that would support multiple masters of the bureaucracy.

Chapter 4: Masters in History II: the Jacksonian Era

The previous chapter discussed the Founding era, which is important because it provided foundations for the American civil service system. Having canvassed the Founding era, I now turn to the first civil service reform era—the Jacksonian era, which is known for the introduction of the spoils system. Unlike the previous chapter that addressed the Constitutional Convention and the Constitution itself, this chapter will address “the Debate of 1835” and an act of Congress—the Tenure of Office Act. Carl Fish described the debate as full of “eloquent and sincere [speeches]; they exhibited high ideals of the civil service pleasing to contemplate, and are full of passages for quotation by the civil service reformers.”²¹⁵ We will find that during the debate leading politicians of the day fiercely discussed who the bureaucrats’ masters should be and why.

This chapter will compare the different opinions of the era proposed by four principal political figures, and attempt to understand the differences among them and the ramifications of their positions. The four figures are Senators Tallmadge, Benton, Clay, and Calhoun, who had distinct thoughts on the Tenure of Office Act. The comparison of the reasoning behind their arguments either for or against the act provides an opportunity for our search for the master of the bureaucracy. Senator Tallmadge wanted to retain the Tenure of Office Act and expand its four-year tenure to other officers who were not originally included in the act. On the contrary, the other three Senators all wanted to repeal the act, although for different reasons. Exploring the differences among the arguments is this chapter’s chief objective. Furthermore, the four arguments of the

²¹⁵ Carl Fish, *The Civil Service and the Patronage* (New York: Russell & Russell, 1963), p. 142.

Jacksonian era will be compared to the framers' arguments discussed in the previous chapter.

4.1 President Jackson and Civil Service Reform

The advent of the Jacksonian era was accompanied by important developments in the electoral system. At the federal level, the congressional nominating caucus, also known as the "King Caucus," was abolished in 1824 and replaced by a national party convention, making Jackson the first president since Washington to be chosen in an election that did not rely on congressional caucus. At the state level a new electoral system was introduced that replaced state legislatures with direct popular voters in the selection of presidential electors. In the first three presidential elections, most electors had been chosen by the state legislatures. According to Sidney Milkis and Michael Nelson, however, in 1824 electors were selected by popular votes in all but six states, and by 1832 in all states but South Carolina.²¹⁶ As a result of the changes to the federal and state electoral systems, Jackson was arguably the first president elected through a direct appeal to the public rather than through the support of legislatures.²¹⁷

Alexis de Tocqueville, who visited America during the Jacksonian era, wrote,

No sooner do you set foot upon American ground, then you are stunned by *a kind of tumult* ... almost the only pleasure which an American knows is to take a part in the government, and to discuss its measures (emphasis added).²¹⁸

²¹⁶ Sidney Milkis & Michael Nelson, *The American Presidency: Origins and Development* (Washington DC: CQ Press, 1999), p. 119.

²¹⁷ Ibid, p. 119. Milkis and Nelson add the elimination of the property qualifications for voting as another important change that enabled the Jacksonians to prevail.

²¹⁸ Alexis de Tocqueville, *Democracy in America* (Cambridge, MA: Sever and Francis, 1863), I, p. 318-9; quoted in L. D. White, *The Jacksonians: A Study in Administrative History, 1829-1861* (NY: Macmillan, 1954), p. 11.

Jackson is often criticized as the originator of that tumult—the spoils system. Many scholars, including Carl Fish, Leonard D. White, and Paul Van Riper, however, do not agree with that judgment. Fish believed that the first case of removal for party reasons occurred in 1797, when the Secretary of the Treasury, Oliver Wolcott, fired a commissioner of revenue for “deliberate misconduct in office.” The misconduct, however, was related to giving aid to the Republicans using his official position.²¹⁹ If, however, the spoils system is defined as public employment based on political beliefs rather than merits, the origin of the spoils system may go back to George Washington. He wrote in 1795 that he would not “bring men into any office of consequence knowingly whose *political tenets* are adverse to the measures the general government is pursuing; for this, in my opinion, would be a sort of political suicide (emphasis added).”²²⁰

Although often used interchangeably, the two concepts of the spoils system and rotation of office are distinct. Jackson might legitimately be accused of systematizing rotation in the federal government, but he did not initiate the spoils system. White agreed on this point. He, while acknowledging the fact that Jackson introduced *rotation* into the federal system, dismissed Jackson as the originator of the spoils system.²²¹

²¹⁹ Carl Fish, *The Civil Service and the Patronage* (New York: Russell & Russell, 1963), p. 19.

²²⁰ Quoted in Ari Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement, 1865-1883* (Urbana, IL: Univ. of Illinois Press, 1961), p. 4.

²²¹ L. D. White, *The Jacksonians: A Study in Administrative History, 1829-1861* (NY: Macmillan, 1954), p. 4-5; Van Riper has a similar view. See Paul Van Riper, *History of the United States Civil Service* (Evanston, IL: Row, Peterson, 1958), p. 30.

Another myth about Jackson is that he was the first president to sweep most of the “Adams and Clay men”²²² out of office. As Van Riper wrote, however, Jackson did not even come close to a wholesale proscription. According to historian Erik Eriksson, who counted all the political removals during the Jackson presidency, “less than one-fifth—probably closer to one-tenth” of all federal civil servants were dismissed.²²³ White also reports,

The shock was undoubtedly great, but the statistics show that the number of removals, although unprecedented, was small in terms of percentage... [During the first eighteen months of Jackson’s term, the] figures showed a total of 919 removals out of 10,093 officeholders or somewhat less than 10 per cent.²²⁴

Although Jackson was neither the originator of the spoils system nor the first president to remove a large portion of incumbent bureaucrats, the credit for framing the old practice of patronage into a *systematic doctrine of rotation* should be granted to Jackson.²²⁵

Granted that the rotation of office was later bitterly attacked as one of the most serious illnesses of the government, how can the Jacksonian era be a part of the history of *reform* in America? To many readers who are used to considering the Pendleton Act of 1883 and the civil service reformers who successfully devised the act as epitomes of reform, the Jacksonian era seems not a reform era but a target for reform. For many contemporaries of the era, however, the spoils system and rotation of offices were indeed reforms. The spoils system was considered a break with the tradition of “natural fit.”

²²² Erik Eriksson, “The Federal Civil Service Under President Jackson,” *The Mississippi Valley Historical Review*, 13:4 (March 1927), p. 530.

²²³ *Ibid*, p. 529.

²²⁴ White, p. 307-8; Eriksson claimed that these 919 officers accounted for “one-sixth of the Adams and Clay men holding office in Washington.” See Eriksson, *Ibid*, p. 530.

²²⁵ Jackson’s predecessor, John Quincy Adams, was a fervent opponent of all patronage. He declined to remove people who should have been removed, fearing that it would be interpreted as an act of political patronage.

Despite that tradition's beneficial function of recruiting qualified and educated persons to be public officials, problems with the old system provided a basis for a mounting grievances from ordinary citizens. The biggest problem was monopolization of public offices by representatives of the upper classes, some of whom even bequeathed public positions to descendents as if the positions were personal properties. The growing number of farmers and immigrants of the West and South by that time had enough political self-consciousness to demand public participation in the business of government. They showed widespread resentment at the monopolization of public offices by the upper classes. In other words, the new spoils system under Jackson was considered an instrument of "bureaucratic depersonalization."²²⁶

In his inaugural address, Jackson made it clear that one of his mandates was nothing less than the *reform* of the old patronage system. He stated,

The recent demonstration of public sentiment inscribes on the list of Executive duties, in characters too legible to be overlooked, the task of *reform*, which will require particularly the correction of those abuses that have brought the patronage of the Federal Government into conflict with the freedom of elections, and the counteraction of those causes which have disturbed the rightful course of appointment and have placed or continued power in unfaithful or incompetent hands (emphasis original).²²⁷

Despite Jackson's use of the word "task of reform," his contemporaries were not so sure whether that reform meant a sweep removal or a mere reduction of public personnel, partly because of the accompanying but less quoted sentence of his inaugural speech: "I shall endeavor to select men whose diligence and talents will insure in their respective stations able and faithful cooperation, depending ... [rather] on *the integrity and zeal of the public officers than on their numbers.*"(emphasis added).

²²⁶ Matthew Crenson, *The Federal Machine: Beginnings of Bureaucracy in Jacksonian America* (Baltimore, MD: John Hopkins Univ. Press, 1975), p. 56.

²²⁷ March 4, 1829.

The opponents of Jackson wanted to believe that he would not attempt a general change in office, but provide “a mere sop to soothe the hunger ... of the thousand expectants for office who throng the city....”²²⁸ The supporters of Jackson, however, were confident that he would interpret reform as they desired. The *Richmond Enquirer* wrote, “A salutary reform will be attempted under the coming Republican administration; in perfecting it friends will be preferred to opponents.”²²⁹ They demanded that Jackson act accordingly. In a letter to Van Buren, Jesse Hoyt reveals the pressure on the president, “I have said from the commencement of the contest that I would not support any administration who would support men in power that had contributed to overthrow the democratic party in this State. I have preached this doctrine too long, and it has taken too [blank] a footing here, to be easily got rid of. This is not only the doctrine in theory, but we require it to be reduced to practice.”²³⁰

Jackson responded to this demand and made his intention clear in his first annual message to Congress. He denounced the traditional way of considering public office as personal property and then declared the removal of old officers:

Office is considered as a species of property, and government rather as a means of promoting individual interests than as an instrument created solely for the service of the people...make government an engine for the support of the few at the expense of many. The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; and I cannot but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience...In a country where offices are created solely for the benefit of the people, no one man has any more intrinsic right to official station than another. No individual wrong is, therefore, done by removal, since neither appointment to nor continuance in office is matter of right.²³¹

²²⁸ Daniel Webster’s letter in January 1829; quoted in Fish, p. 105.

²²⁹ Quoted in Fish, p. 106.

²³⁰ Quoted in Fish, p. 107.

²³¹ December 8, 1829.

This official declaration of the new spoils system must have been a priority for Jackson. In his annual address, the issue was only preceded by his proposal to amend the Constitution for direct election of the president, and was immediately accompanied by such important issues as commerce and tariffs. The introduction of the new spoils system was a reflection of a public resentment of the old system as well as a public belief that republican government required wide participation by the people in the works of government. In the state and local governments, this belief was transformed into policy by the establishment of direct election of officeholders. In the federal government, however, a Constitutional amendment was required to this end. Considering the near impossibility of Constitutional amendment, an effective alternative was rotation of offices.²³²

In this context, the road to the spoils system was considered an important reform that Jackson had to deal with. It was a reform to meet not only the public sentiment of the day but also “justice and principle”²³³ to restore the republican ideal.

4.2. Everett/McLean Correspondences

In order to fully understand the Tenure of Office Act, it is helpful to consider important correspondence between Edward Everett and Postmaster General John McLean. The letters they exchanged show a prelude to the Debate of 1835.

Everett advocated party politics and wanted to make the victors of the presidential election sole masters of the bureaucracy by granting the victorious party comprehensive

²³² White, *The Jacksonians*, p. 300.

²³³ Van Riper, p. 37.

power to remove all the officers who served in the previous administration and to appoint the friends of the victors. In a letter to McLean, Everett maintained that parties could exist only by “the hope of offices” and if administrations failed to distribute offices along party lines, they would cause the destruction of parties. Everett acknowledged the importance of public will, but for him that public will would only be expressed through the victorious party of the presidential election.²³⁴

McLean’s replies were full of statesmanlike judgments and keen insights. At the outset, McLean made it clear that he opposed using government officers for political activities such as re-election of the president. Public administration, in his view, should be used “to sustain the general measures of the Administration.”²³⁵ McLean agreed with Everett that the bureaucrats should serve the popular will, but disagreed with Everett’s claim that the only public will that matters was the one represented by the president and his victorious party. McLean maintained that if the bureaucrats began to serve party principles over the public interest, “the distinction between right and wrong [would be] disregarded.”²³⁶ He opposed the idea of bureaucrats becoming mere servants of the president and claimed, anticipating Norton Long,²³⁷ that like the president, the bureaucrats should be “the representative[s] of the people.” He wrote,

If subserviency to the President, and an ardent zeal in the promotion of his personal views, shall be the passport to office, . . . , offices would be filled, not by high minded and patriotic citizens, but by fawning sycophants, loud in their professions, without principle, but ready at all times to execute the biddings of their *master*. As the President would be looked to, and not the people, more efforts would be made to conciliate them, than to serve them (emphasis added).²³⁸

²³⁴ Everett to McLean (August 1, 1828), *Proceedings of the Massachusetts Historical Society*, Third Series, Vol. 1 (Boston, MA: Massachusetts Historical Society, 1907/1908), p. 360-3.

²³⁵ McLean to Everett (August 8, 1828), *Proceedings of the Massachusetts Historical Society*, p. 365.

²³⁶ McLean to Everett (August 27, 1828), *Proceedings of the Massachusetts Historical Society*, p. 382.

²³⁷ See chapters 1 and 2 of this dissertation.

²³⁸ *Ibid*, p. 385.

McLean also emphasized the importance of community to discourage disappointed applicants from making complaints publicly. He envisioned, presaging the advent of the civil service reformers, a society in which few sympathized with office-seekers and in which the principle of merit was the foundation of government.

The ideal government McLean envisioned relied not on patronage but on “high moral principle.”²³⁹ If this principle were sacrificed by an unprincipled patronage, resulting in failure to recruit the best men in the country, “a deep distrust of the uprightness of public agents”²⁴⁰ would entail—an acute prophecy that presaged growing distrust in government.

4.3. The Tenure of Office Act and the Debate of 1835

4.3.1. Passage of the Act

“An Act to Limit the Term of Office of Certain Officers Therein Named, and for Other Purposes”²⁴¹ is the official name of the act popularly known as “The Tenure of Office Act of 1820.”²⁴² The act established that officers concerned with the collection or disbursement of money should be appointed for fixed terms of four years. The offices affected by the act included all district attorneys, collectors of the customs, naval officers and surveyors of the customs, navy agents, receivers of public moneys for lands, registers

²³⁹ Ibid, p. 366.

²⁴⁰ Ibid, p. 367.

²⁴¹ Sixteenth Congress, Session I, Chapter 102 (May 15, 1820); III *Statutes At Large*, 582.

²⁴² This act is also known as “The Four Years Act.” During the congressional debate in 1835, this title was frequently used.

of the land offices, paymasters in the army, the apothecary general, the assistant apothecaries general, and the commissary general of purchases.²⁴³

Scholars seem to agree that this act was the work of William Crawford. Crawford's motives have been the subject of different interpretations. John Quincy Adams, for example, claimed that Crawford's purpose was to become the president "by turning all office-holders, their families and friends" to his support.²⁴⁴ Fish, however, did not agree with Adams and claimed that Crawford's real purpose was to secure a greater sense of responsibility for those who were in charge of monetary expenses. According to Fish, Crawford was the kind of person who refused to accept the secretaryship of the treasury until the law had been enacted.²⁴⁵

Curiously, when this important law was passed by Congress, there was no "comment or protest" and then President Monroe signed it immediately.²⁴⁶ There were, however, concerns from elder statesmen such as Jefferson and Madison. These two men saw the law as an encroachment of the Senate upon the president's legitimate power and as an opportunity to make the Senate the sole master of the bureaucracy. In a letter to Madison, Jefferson, calling the act a "mischievous law," wrote,

It [The law] saps the constitutional and salutary functions of the President... It is more baneful than the attempt which failed in the beginning of the government, to make all officers irremovable but with the consent of the Senate. This places, every four years, all appointments under their [Senators'] power, and even obliges them to act on every one nomination... It will keep in constant excitement all the hungry cormorants for office, render them, as well as those in place, *sycophants to their Senators* (emphasis added).²⁴⁷

²⁴³ Section 1 of the Act.

²⁴⁴ For details, see White, *The Jeffersonians*, pp. 387-8.

²⁴⁵ Fish, p. 68.

²⁴⁶ Eriksson, p. 523.

²⁴⁷ Jefferson, *Works*, XII, pp.174-5 (November 29, 1820); quoted in White, *The Jeffersonians*, p. 388.

Madison agreed with Jefferson and responded, “The law ... is pregnant with mischiefs such as you describe....If the error be not soon corrected, the task will be very difficult; for it is of a nature to take a deep root.”²⁴⁸ It seems that the two statesmen agreed on two points: 1) The Tenure of Office Act would be an infringement by the Senate of the constitutionally vested presidential power and had a potential to make the Senate the sole master of the bureaucracy; 2) the Senate’s approval power, which was strong enough to check the president’s appointing power, could be used in the Senate’s favor. These two insights were, however, later proved to be not entirely correct. Under President Jackson, the act became an essential tool for the president (not for the Senate) to execute the spoils system.²⁴⁹ Contrary to the two elder statesmen’s concern, the law tended to make the president (instead of the Senate) the single master of the bureaucracy. As evidenced by recurring defeat in the fight with the president, the Senate’s “advise” and “consent” proved only a weak tool to check the president.

4.3.2. Senator Tallmadge on the Act

Rotation in office and appointment on partisan grounds, Jackson argued, would democratize public service by expanding the number of persons eligible for public positions. In his view, the new spoils system would guarantee bureaucratic

²⁴⁸ Madison, *Letters*, III, p. 196 (December 10, 1820); quoted in White, *The Jeffersonians*, p. 389.

²⁴⁹ In the long run, however, the Jefferson and Madison’s concern proved legitimate. By 1865, Congress controlled most of the appointments. Ari Hoogenboom wrote as follows: “The Constitution gave Congress no right of appointment, but by 1865 that body dictated most civil service appointments.” Ari Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement, 1865-1883* (Urbana, IL: Univ. of Illinois Press, 1961), p. 5.

responsiveness to the popular will and reduce corruption developed during lengthy tenure in office.²⁵⁰

In his first annual address to Congress, President Jackson expressed his desire to extend the application of the Tenure of Office Act to other officers who were not originally included in the act. He stated,

I submit, therefore, to your consideration whether the efficiency of the Government would not be promoted and official industry and integrity better secured by a *general extension of the law* which limits appointments to four years (emphasis added).

For Jacksonians, it was considered a natural principle for the winning president to claim single mastery of the bureaucracy. Senator William Marcy of New York summarized this spirit well in his often-quoted speech:

It may be, sir, that the politicians of the United States are not so fastidious as some gentlemen are, as to disclosing the principles on which they act. They boldly preach what they practice. When they are contending for victory, they avow their intention of enjoying the fruits of it. If they are defeated, they expect to retire from office. If they are successful, they claim, as a matter of right, the advantage of success. They see nothing wrong in the rule, that to *the victor belong the spoils* of the enemy.^{251 252}

Perhaps Senator Nathaniel Tallmadge's speech during the Debate of 1835 was the best argument that spoke for the president. Tallmadge began his speech with an interesting argument concerning the power of Congress and the president. He noticed the different terms that the Constitution used for providing powers to the two important masters of the bureaucracy. In the Constitution, the executive and judicial powers are "vested," whereas the legislative power is said to be "herein granted." That difference,

²⁵⁰ Harvard Law Review Association, "Developments in the Law—Public Employment [Part 1 of 2]," 97 *Harvard Law Review* 1611 (May 1984), p. 1624.

²⁵¹ 22nd Congress, 1st Session (January 24, 1832).

²⁵² It is not well-known, though, that in 1856 Senator Marcy, as the Secretary of State, suggested a statute requiring *examination* when hiring public officials. See Hoogenboom, p. 9.

he claimed, originated from the fact that the power of the federal government came from that of the states. The federal government possesses no power except what is derived from the states. Tallmadge argued that although the states were the source of the federal government's power, once the states' power was given to the federal government, that part of the power no longer belonged to the states. The states' power is confined to the residuals of their original power that has been "granted" to the United States. That, according to Tallmadge, is why the Constitution uses "granted" when prescribing Congress's power.²⁵³

In contrast, the executive and judicial powers automatically follow from the grant of legislative power, because they are powers necessary to fulfill the granted legislative power. Therefore, the executive and judicial powers require no specific grant of power. In its stead, it was enough to be "vested." "For when the States parted with a certain portion of legislative power by specific grant, they also, by the same act, parted with enough of executive power to expound and enforce that grant."²⁵⁴ For Tallmadge, this "vested" power of the executive branch is beyond Congress's responsibility. Once vested by the Constitution through the grant by the states, Congress cannot interfere with the executive power. A possible conclusion from his argument is that "The President's power is absolute," and turning him into a single master of the bureaucracy is an inevitable outcome of the conclusion.

Tallmadge added several practical reasons to bolster his constitutional argument. In his view, the Tenure of Office Act was enacted when the memories of the framers' intentions were clearer than now. Repealing the politically important law under fierce

²⁵³ *Register of Debates in Congress*, Vo. XI, pp 1665-82 (February 20, 1835). Unlike other Senate debates, it was published, as an addendum, at the end of the records of House debate on that day.

²⁵⁴ *Ibid*, p. 1668-9.

party warfare “when times are out of joint” is not appropriate. When secrecy for national security or privacy for public officers is required, the president needs to become the sole master of the bureaucracy. Rotation in office is a republican principle older than the Constitution itself and the principle is adopted by every state. What is interesting to us is the fact that neither of Tallmadge’s argument relates to the stability of public administration.

The Jacksonians’ view of the Tenure of Office Act was clearly in favor of the president as the sole master of the bureaucracy. What was missing from their view was the multiple masters perspective that both the Federalists and the Anti-Federalists shared during the Founding era. Furthermore, while arguing for the expansion of the law, the Jacksonians paid attention to elections and parties, but rarely paid attention to the stability and expertise of public service, which in fact was one of the most important factors for Publius as discussed in the previous chapter.

4.3.3. Senator Benton’s Report²⁵⁵

The first systematic report that attacked the spoils system was made three years before President Jackson was inaugurated—ironically by one of the Jacksonians. In 1826 Senator Thomas Benton from Missouri submitted a report on the patronage of the government, in which he found, contrary to what Jefferson and Madison expected, that the Tenure of Office Act contributed to making the president the sole master of the bureaucracy. The problems that he found were important, but the prescriptions he

²⁵⁵ The official title of the report was “The Proposition to Inquire into the Expediency of Reducing the Patronage of the Executive Government of the United States” 19th Congress, 1st Session (May 4, 1826).

proposed were partisan at best, completely missing the importance of stable public administration emphasized by Publius.

Benton first noticed that the delicate balance between the president and Congress provided by the framers through the Appointing Clause did not work. He found that the president by and large became more powerful than the Senate, and that the Tenure of Office Act played a critical role in making the president the sole master of bureaucracy. As a compound effect of the growing revenue of the federal government, the president's appointing power would grow "geometrically." Benton's biggest concern about the growing presidential power, however, was not the stability of government but the election result. The president can distort elections because he has, the report read,

"power" over the "support" of all these officers, and they again have "power" over the "support" of debtor merchants...and over the daily support of an immense number of individuals, professionals, mechanical, and day-laboring, to whom they can and will extend or deny a valuable private as well as public patronage...The President want MY vote, and I want HIS patronage; I will VOTE as he wishes, and he will GIVE me the office I wish for.²⁵⁶

Benton claimed that with the president's power of unlimited patronage, the government would become "the government of *one* man" (emphasis original), which was far from what the framers had intended. To him, as "the King of England is the fountain of honor," "the President of the United States is the source of patronage."²⁵⁷

The Benton Report proposed six bills to fix the possible problems that the spoils system might pose: 1) A bill to regulate the publication of the Laws of the United States, and of public advertisements: This bill granted the power to select newspapers for the publication of the laws to the Senators and Representatives from each state; 2) A bill to

²⁵⁶ The Benton Report, p. 7 and p. 10.

²⁵⁷ The Benton Report, p. 9.

secure in office the faithful collectors and disbursers of the revenue, and to displace defaulters: This bill required the president to submit the accounts of all offices responsible for collection and disbursement of money and the reasons for removal of any officer to the Senate. In addition, the bill proposed to repeal the Tenure of Office Act; 3) A bill to regulate the appointment of Postmasters: This bill proposed making Senatorial confirmation mandatory for the appointment of postmasters with large emoluments; 4) A bill to regulate the appointment of cadets: The bill required one cadet from each congressional district; 5) A bill to regulate the appointment of midshipmen: Similar to the appointment of cadets, one midshipman of the Navy should be appointed from each congressional district; 6) A bill to prevent Military and Navy Officers from being dismissed from service at the pleasure of the president: This bill forbade the president from removing Army or Navy officers except in pursuance to the sentence of a Court Martial.

The Benton Report was right in recognizing the danger of making the president become the single master. Despite this recognition, the report failed to emphasize the multiple masters perspective that the framers underscored. In all, these bills attempted to move part of the appointing power from the president to Congress: a complete transfer of power for the first bill, and to a lesser degree for the other bills. As White wrote, Benton proposed “to transfer this patronage, with all the baneful influence that he had so eloquently described, to Congress.”²⁵⁸ In other words, the Benton report, rather than devising a system restoring the framers’ intent, simply opposed making the president a sole master of the bureaucracy and in its stead wanted to make Congress another sole

²⁵⁸ L.D. White, *The Jeffersonians: A Study in Administrative History, 1801-1829* (NY: Macmillan, 1951), p. 392.

master of the bureaucracy. What had occupied Benton's attention was not primarily the civil service, but the election: his first object was not to secure good government but to reduce the power of the president and to win the upcoming election.

When in 1835 the Jacksonians were in power and the Whigs attacked the evils of the spoils system by relying on none other than the Benton Report, Senator Benton failed to present a plausible response.²⁵⁹ His change of opinion before and after the seizure of power was due to his lack of understanding about public administration. When election and party are the concerns, it becomes easy to change opinions once his party wins the election. Had Benton and the Jacksonians had a clearer view of the stability of public administration, it would have not been so easy to wear different clothes after the election victory.

4.3.4. Senator Clay on the Act

One year before the debate of 1835, Senator Henry Clay delivered an important speech about public patronage while proposing four resolutions of the Senate. After a lengthy argument about the illegitimacy of the Decision of 1789, Clay nicely summarized the Jackson administration's personnel policy as follows:

The doctrines of the present administration ... maintain that all persons employed in the Executive Department of the Government, throughout all its ramifications, are bound to conform to the will of the president, no matter how contrary to their own judgment that will may be.²⁶⁰

²⁵⁹ In fact, Benton's response was so inappropriate that it caused in turmoil in the Senate. The Chairman had to call order several times. The phrase Benton used to rebuke Calhoun was "a direct attack upon truth," which aroused a heated debate between the Jeffersonians and Whigs as to whether to take it off the record.

²⁶⁰ *Register of Debates in Congress* (March 7, 1834), pp. 334-6.

In other words, Clay saw in President Jackson's personnel policy the danger of making the president the single master of the bureaucracy, which would eventually lead to "despotism." Clay then explained his concern about the stability of the government and the reliability of public servants. "If greater stability can be conferred on the tenure by which public offices are held, the functionary will be rendered less dependent on the capricious pleasure of one man."

Clay proposed four resolutions. First, he claimed that "the Constitution does not vest the President power to remove *at his pleasure* officer" of the government. There should be reasonable ground to dismiss public officers. Second, he maintained that Congress was authorized by the Constitution to prescribe the tenure, terms, and conditions of the appointment of public officers. Third, he moved that the power of removal should be exercised only in concurrence with the Senate. And finally, Clay proposed that all deputy postmasters, whose annual emoluments exceeded a prescribed amount, should be appointed with the advice and consent of the Senate. He seriously and solemnly believed that the accomplishment of the purpose contemplated by the resolutions, in some way or other, was essential to the purity and durability of the Government.

Clay differed from Benton on several points. Unlike Benton, he did not overtly argue for Congress as the single master of the bureaucracy. Instead, Clay wanted to restore "just equilibrium" between Congress and the president. Furthermore, the main reasoning behind his opposition to President Jackson's patronage was a concern about the stability of public service and the durability of the government. He held the bureaucracy

perspective as well as the multiple masters perspective, which was hard to find in the era of party warfare.

4.3.5. Senator Calhoun's Report

The Calhoun Report was a comprehensive response from the Whigs to Jackson's aspiration to expand the Tenure of Office Act.²⁶¹ The incident that sparked the Calhoun Report originated from the removal of Treasury Secretary William Duane.²⁶² This removal produced an extended debate over the president-Congress relations regarding who would become the master of the bureaucracy. As the debate was as important as the "Decision of 1789," it was dubbed the "Debate of 1835."²⁶³ While discussing Duane's removal Congress decided to establish a Senate select committee,²⁶⁴ headed by Calhoun, to investigate the executive patronage. Calhoun's committee reported its findings on February 9, 1835, and this report, together with the Benton Report was ordered printed for public as well as legislative distribution. In this report, Calhoun lamented the extension of presidential power and its influence as exerted through the patronage. His suggestions in brief were that (1) a constitutional amendment be written to secure the distribution of the surplus; (2) banks be charged interest on the national money left with them on deposit—measures intended to cut down the patronage; (3) the Tenure of Office Act be repealed; (4) the accounts of all disbursing officers be periodically laid before the

²⁶¹ Another report by the Whigs was the Morehead Report of 1844. 28th Congress, 1st Session (June 15, 1844).

²⁶² For detail of the removal from public administration's perspective, see John Rohr, *The President and the Public Administration* (Washington DC: American Historical Association, 1989), pp. 32-6.

²⁶³ Van Riper, p. 39.

²⁶⁴ The official name of the committee was the Select Committee Appointed to Inquire into the Extent of the Executive Patronage, which submitted its report during the 23rd Congress, 2nd Session on February 9, 1835.

Senate; (5) the fact of a removal be stated to the Senate with a statement of the reasons for such removal.²⁶⁵

The bill that accompanied the Calhoun Report passed the Senate by a vote of thirty-one to sixteen, but Jackson was determined to ignore it because he knew that the House would be in his favor. As Jackson envisioned, the bill, after passing the Senate, slept for a year, and then was killed by the House in committee of the whole. What concerns us is not the fate of the bill but the discussion that surrounded the bill. On February 9, the report was submitted and a heated debate occurred in the Senate on the 13th and 20th of the month.

On the 13th of February, Calhoun delivered an initial speech by summarizing the Benton Report. He first pinpointed the fact that the Benton Committee was composed of many prominent Jacksonians then in power, and asked why they failed to fulfill their pledges to end the patronage which they denounced so fiercely in the Benton Report—a painful strike on the soft spot of the Jacksonians. Calhoun stated that “All these pledges have been forgotten. Not one has been fulfilled. And what justification, I ask, is offered for so gross a violation of faith?”²⁶⁶ Calhoun thought the bill that he proposed was an opportunity for the Jacksonians to prove that their pledges were not mere “electioneering tricks, devoid of sincerity and faith.”²⁶⁷

After Calhoun’s brief speech, Senator Samuel Southard took the floor and raised the issue of the intention of the lawmakers back in 1820. He maintained that the true intention of Congress was to allow corrupt or incapable officers to be removed every four years. It was never intended that “an officer who had fairly disbursed the public money

²⁶⁵ Fish, p. 141.

²⁶⁶ *Register of Debates in Congress*, Vol. XI (February 13, 1835), p. 420.

²⁶⁷ *Register of Debates in Congress*, Vol. XI (February 13, 1835), p. 422.

and faithfully discharged the duties of his office” should be dismissed “to make room for a political partisan.”²⁶⁸ The Calhoun Report similarly stated,

So long as offices were considered as public trusts, to be conferred on the honest, the faithful, and capable, for the common good, and not for the benefit or gain of the incumbent or his party, and so long as it was the practice of the Government to continue in office those who faithfully performed their duties, its patronage, in point of fact, was limited to the mere power of nominating to accidental vacancies or to newly created offices, and could, of course, exercise but a moderate influence, either over the body of the community, or of the office-holders themselves.²⁶⁹

To allow that power would make “the whole band of office-holders servile suppliants” or “corrupt sycophants” of the president, which will inevitably end up with despotism. As the report wrote, it would “convert the entire body of those in office into corrupt and supple instruments of power, and to raise a host of hungry, greedy, and subservient partisans, *ready for every service, however base and corrupt*” (emphasis added). Put differently, Congress’s intention was never to make the president the sole master of the bureaucracy that would establish subservient bureaucrats and eventual despotism.

Southard then moved on to claim that the Senate, as the “co-ordinate appointing power,”²⁷⁰ should be involved in the proper management of the bureaucrats. For this end, the Senate needed to be informed of the accounts of all disbursing officers and the reasons for removal each time it occurred. Southard wanted to see both the Senate and the president as dual masters of the bureaucracy.

Like Benton, Calhoun also envisioned the problem of patronage by the president becoming bigger and bigger as the revenue surplus of the government grew, giving the president discretion to hire more and more public officers. For Calhoun, some measures

²⁶⁸ Ibid.

²⁶⁹ The Calhoun Report, p. 3.

²⁷⁰ *Register of Debates in Congress*, Vol. XI (February 13, 1835), p. 423.

to stop the growing problem were urgent. One of the measures was to get rid of the surplus—a financial source of growing patronage. That was why Calhoun proposed Constitutional amendment to distribute surplus to the states. He believed that the amendment was “peaceful and quiet means of reform.”²⁷¹

Calhoun later went on to discuss the growing amount of surplus in detail, during which Benton raised objections to the truthfulness of the numbers. Despite these lengthy debates, however, what was missing from their conversation was a concern about the stability of the public administration—one that both Publius and Clay emphasized. Calhoun’s protracted argument focused solely on the increase of presidential power and paid no attention to the workings of the government. Clay’s concern about the “durability of government” disappeared in the Calhoun Report. Calhoun remained within the master perspective and never gained the bureaucracy perspective.

Like the Benton Report, the Calhoun Report wanted to repeal the Tenure of Office Act. Unlike the Benton Report, however, the Calhoun Report did not attempt to overtly confer some appointing powers on Congress. Instead, it wanted to restore the subtle balance between the president and Congress. Yet unlike Clay, Calhoun did not pay attention to the stability of public administration. This lack of concern proved to be detrimental when the Whigs gained the White House in 1841. The Whigs’ previous denunciation of Jacksonian patronage did not deter them from adopting the spoils system. As Hoogenboom wrote, “those who opposed spoils practices were usually out of power, but once these ‘outs’ were ‘in’ the evils of the system seemed to vanish.”²⁷² The transformation of policy was due to a lack of understanding about the importance of the

²⁷¹ *Register of Debates in Congress*, Vol. XI (February 13, 1835), p. 425.

²⁷² Ari Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement, 1865-1883* (Urbana, IL: Univ. of Illinois Press, 1961), p. 7.

stability of public administration. As in Benton's case, the lack of concern about the public administration enabled the Whigs to abandon their pledges against the patronage.

While President Jackson and Senator Tallmadge viewed the president as the sole master of the bureaucracy, Senator Benton saw Congress as the sole master of the bureaucracy. They all lacked the idea of multiple masters of the bureaucracy that the framers had in mind. Senators Clay and Calhoun had opinions akin to the framers. They saw the merits that the multiple masters scheme could provide. Especially for Clay, the "durability of public administration" provided the strongest foundations for his argument against the presidential patronage. This concern, however, was missing from the Calhoun Report and the Debate of 1835. This deficiency provided an easy transformation of pledges once the Whigs occupied the White House.

Chapter 5: Masters in History III: The Republican Era (1869-1901)

In the previous chapter, I discussed the Jacksonian era, during which the old system of spoils turned into an official policy of office rotation. President Jackson was responsible for the introduction of this policy, but contrary to popular belief, he did not sweep the “Adams and Clay men” from the government. Later presidents from Martin Van Buren to Rutherford Hayes enjoyed the fruits of the spoils system that Jackson planted.

As the assassination of President Garfield by a disappointed office-seeker vividly and painfully illustrated, the spoils system raised as many issues as it developed. Among them, two key problems were apparent: frequent rotation failed to guarantee enhanced efficiency, and political assessments induced widespread corruption. Facing the dual problems, efforts to reform the civil service system accelerated. During the Republican era, two bills, the Tenure of Office Bill and the Civil Service Bill, were widely considered measures for reforming the civil service.²⁷³ The Tenure of Office Bill attempted to manage the removal of civil servants, while the Civil Service Bill aimed to control entrance to the civil service. The *Congressional Globe* records fruitful but lengthy Congressional debates concerning the two bills. This chapter will discuss the debates with a view to finding out who the political leaders of the day thought the masters of the bureaucracy should be.

²⁷³ *The New York Times*, p.4, c.4 (03/04/1867).

5.1. The Tenure of Office Act of 1867

The Tenure of Office Act of 1867 provided that no federal official whose appointment required Senate confirmation could be removed without the consent of the Senate. When the Senate was not in session, the act allowed the president to suspend an official so long as he reported the reasons to the Senate within twenty days of the Senate's return to session. If the Senate, when convened, refused to concur, the suspended official must be returned to his position. This act severely limited the president's removal power, which after the "Decision of 1789" had been widely accepted and repeatedly practiced without the Senate's approval. As the *New York Times* wrote, "By this measure the appointing power of the Executive is greatly circumscribed."²⁷⁴

The same newspaper, however, also saw the act as a potentially useful law for restoring the "stability" of the bureaucrats, making them less likely to turn into "objects of Executive caprice" and able to secure "more independence." With a statesmanlike view, the *New York Times* read,

The entire uncertainty of tenure which has been the prevailing rule of official life in the United States, has worked greatly to the detriment of the Government service as well as the general interests of the country. It has not only prevented many of our best men from accepting offices for which they were eminently fitted, but it has decreased the devotion and the feeling of responsibility of those who did accept civil office.²⁷⁵

Because the law reversed the old convention initiated by the Decision of 1789, the debates during its passage provide interesting insights for our purpose of searching for the bureaucracy's masters. Not surprisingly, the passage of the law was far from smooth.

²⁷⁴ *The New York Times*, p.4, c.4 (03/04/1867).

²⁷⁵ *The New York Times*, p.4, c.4 (03/07/1867).

One of the hottest issues in the debate was whether the act applied to the heads of departments. The bill's sponsor, Senator George Edmonds, thought that cabinet members were confidential advisors of the president, and thus should be exempted from the senatorial confirmation for removals. Senator Timothy Howe, on the contrary, believed that cabinet members should not be exempted, because just like other bureaucrats, "they are the servitors of the country," and "are placed there for the benefit of the people."²⁷⁶ In Howe's view, the bureaucrats' real master should be the people, on whose behalf they work. To preserve that noble purpose, great prudence should be exercised by making both Congress and the president collaborate when removing officials. With Senatorial confirmation required for appointment as well as for removal, cabinet members would realize that, in addition to the public in general, they had dual masters to serve in particular: the president and the Senate. Howe claimed that if the framers intended to make cabinet members serve only the president, the Constitution would have provided that "the President may select for his confidential advisers such men as he pleases." If that were the case, the Senate should refrain from being involved with the confirmation of cabinet members even though they might become "the echo of the president."²⁷⁷ But because the Constitution does not make such a provision, the Senate should engage in the removal of cabinet members.

In the House, similar debates were held. On February 1st, 1867, Representative Thomas Williams, the primary sponsor of the act in the House, proposed an amendment that would require Senatorial confirmation for removals of department heads. Williams believed that if the department heads were to be removed by the president at will, they

²⁷⁶ *Congressional Globe*, 39th Congress 2nd Session, p. 382.

²⁷⁷ *Ibid*, p.386.

would become “sycophants who live on the breath of” the president. Like the Senate debate, one of the strongest arguments against the amendment was that the department heads were personal advisors of the president and thus should be removed at the president’s pleasure. For instance, Representative Frederick Woodbridge maintained that the cabinet members were “the confidential agents of the President.”²⁷⁸ Williams countered that the only “advisory council known to our Constitution” was the Senate. In other words, department heads as an advisory council to the President were not known to the Constitution.²⁷⁹ Although unknown to the Constitution, Williams continued, if the department heads were to be true advisors, they should be “independent” from the president. Otherwise, they would not be able to give impartial advice. Instead, their advice would merely be either compulsory or obsequious. Williams was arguing that a certain degree of independence was a necessary condition for department heads to be true advisors to the president. What about the bureaucrats? Do they also need similar independence in order to play their anticipated roles in running a government? Although that issue was never brought up during the Congressional debate, it would not be difficult to surmise that Williams would have claimed that bureaucrats needed a similar degree of independence, if not more, because he wanted to avoid making any public official (including cabinet members) “sycophants” of the President.

At the end of his proposal for the amendment, Williams offered another very interesting argument—that is relevant to our purpose of searching for the masters of the

²⁷⁸ *Congressional Globe*, 39th Congress 2nd Session, p.938.

²⁷⁹ Williams’ argument reminds us of George Mason’s during the Constitutional Convention. Mason saw the Senate as a close partner of the president and was afraid of Senate-president conspiracies against the people. As a remedy, Mason proposed an executive council to check the president within the executive branch. See John Rohr, *To Run a Constitution* (Lawrence, KS: Univ. of Kansas Press, 1986), pp. 29-30.

bureaucracy. He maintained that the department heads were created by the Constitution to serve neither the president nor Congress alone, but to serve both of them. He asked:

Have the heads of Departments no duties to perform except such as are assigned to them by the Executive himself? The Congress of the United States is expressly authorized by the terms of the Constitution to lodge with them the power of appointing to all inferior offices. We do invest them with other powers, and we impose upon them other duties in almost every day and hour of our legislative experiences. Are these men not officers of the Government, but the mere agents and servants of the Executive?²⁸⁰

After lengthy debates that covered more than one hundred pages of the *Congressional Globe*, the Senate finally rejected the amendment excluding heads of departments from the coverage of the act by a vote of twenty-seven to thirteen with twelve absent.²⁸¹ A majority of Senators seemed to believe that the president should have a cabinet of his own to execute the laws faithfully. In contrast, a majority of Representatives acceded to Williams' position and struck the Senate's exception for cabinet members by a vote of eighty-two to sixty-three.²⁸²

The conference committee on the Act reached a compromise that substituted a somewhat ambivalent provision for the Senate's exception. Before prescribing that exception, Section 1 of the compromised act articulated the general rule requiring Senate confirmation.

That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is, and shall be entitled

²⁸⁰ *Congressional Globe*, 39th Congress 2nd Session, p.937; The same argument dated back to the 1838 Supreme Court decision. In *Kendall v. Stokes* (12 Pet. 522), Justice Smith Thompson stated, "[I]t would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President." See John Rohr, *The President and the Public Administration* (Washington DC: American Historical Association, 1989), pp. 39-40.

²⁸¹ *Congressional Globe*, 39th Congress 2nd Session, p.548.

²⁸² *Ibid*, p.969-70.

to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided.²⁸³

The Act then read,

That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney-General, shall hold their offices respectively for and *during the term of the President by whom they may have been appointed* and for one month thereafter, subject to removal by and with the advice and consent of the Senate (emphasis added).²⁸⁴

This provision later led to the impeachment trial of the president. A literal reading of the provision seemed to require senatorial confirmation when removing cabinet members, but only for those whose appointments were made during the term of the incumbent president. In other words, the provision did not apply to those who were appointed by a former president but remained in the cabinet.²⁸⁵

The provision was interpreted somewhat differently by the Senate and the House of Representatives. Senator John Sherman, head of the Senate conferees, told the Senate that “its language is so framed as not to apply to the present President” and that “it would not prevent the present President from removing the Secretary of War, the Secretary of Navy, and the Secretary of State.”²⁸⁶ Based on this understanding, the Senate passed the conference report by a vote of twenty-two to ten. In the House, however, the Representatives construed the provision as requiring the president to remove any cabinet member regardless of which president had appointed him. The House passed the provision by a vote of one-hundred-eleven to forty-one. After the compromise bill had

²⁸³ The Tenure of Office Act of 1867, Section 1, paragraph 1.

²⁸⁴ The Tenure of Office Act of 1867, Section 1, paragraph 2.

²⁸⁵ Secretary War Edwin Stanton happened to fall into this category. Although he served in President Johnson’s cabinet, he had been appointed by the late President Lincoln.

²⁸⁶ Ibid, p.1516.

passed both Houses of Congress, it was sent to the president for consideration. Thus, the president received a bill that reversed the Decision of 1789 with an unclear provision as to whether senatorial approval was required to remove cabinet officials appointed by a former president.

Not surprisingly, President Johnson vetoed the bill. He claimed that “the power of removal is *constitutionally* vested in the President of the United States” (emphasis added), and that after the Decision of 1789 that practice of the government had been “confirmed in all cases” leaving *no question at all*. President Johnson’s claim of “constitutionally” vested power of removal without “question at all” was not entirely correct. As I discussed in Chapter 3, there is no express provision in the Constitution for the power of removal. Apparently, realizing the lack of constitutional provision, the president’s veto message heavily relied on the Decision of 1789. His assertion that the removal power had been clearly vested in the president after the Decision of 1789 anticipated Chief Justice Taft’s opinion in *Myers v. United States*.²⁸⁷ In that case, the Supreme Court rejected Myers’ argument and decided that the provision of the Tenure of Office Act of 1867 was “in violation of the Constitution and invalid.” In his opinion for the Court, Chief Justice Taft stated that it was “very clear,” and there was “not the slightest doubt” that the removal power was vested in the president alone. However, as John Rohr explains, the Decision of 1789 was neither “very clear” nor beyond “the slightest doubt.”²⁸⁸ In Congress, the vote was tied and the decision was able to pass only by the Vice President casting his vote in support of having the president alone remove the secretary. Therefore, the Decision was never supported by a clear majority of lawmakers.

²⁸⁷ 272 US 52 (1926).

²⁸⁸ John Rohr, *The President and the Public Administration* (Washington DC: American Historical Association, 1989), p.17.

Furthermore, the Decision referred to cabinet members but not other inferior officers who might have been appointed by and with the advice and consent of the Senate.

Considering these limitations of the act, President Johnson’s veto targeting removal of any public official appointed with senatorial consent was too strong. He might have better confined his argument to the removal of cabinet members only. That way, he could have made a stronger link to the Decision of 1789.

What implications, if any, did the debate on the Tenure of Office Act pose for non-cabinet level officials? For an answer to the question, we first need to recall that not all public officials whose appointment requires senatorial confirmation are cabinet members. There are a number of non-cabinet officials whose appointments require senatorial confirmation. During the enactment of the Tenure of Office Act, the Senate debate focused on the cabinet members’ removal, leaving non-cabinet officials behind. Likewise, the House debate spent much time on cabinet member’s removal, leaving non-cabinet officials intact. The conference committee made a compromise only on the removal of cabinet members, again implicitly acknowledging that non-cabinet officials’ removal would need the Senate’s approval.

Table 1: Congressional Debate on the Tenure of Office Act

	Cabinet Members	Non-cabinet Officials
Senate	Exempt from Senatorial confirmation	Required Senatorial confirmation
House of Representatives	Required Senatorial confirmation	Required Senatorial confirmation
Conference Committee	compromised	No Debate
Tenure of Office Act	Section 1, Paragraph 2	Section 1, Paragraph 1

As the table above shows, the conference committee debated and compromised on the removal of cabinet members. Yet they did not debate the removal of non-cabinet but Senate-confirmed officials, because both Houses of Congress already agreed on the way to remove non-cabinet officials—by and with the advice and consent of the Senate.

There remained nothing to compromise as far as non-cabinet officials were concerned!

By making it clear that the disagreement remained over the removal of cabinet members, the two Houses implicitly agreed that non-cabinet officials appointed with Senatorial confirmation should be removed with senatorial approval. This agreement can be interpreted as evidence that Congress thought that at least some important public officials should be controlled by the collaboration of the president and the Senate. On March 2, Congress passed the bill over the president's veto without debate,²⁸⁹ reaffirming that every public official, including cabinet members, appointed with the advice and consent of the Senate, should be equally controlled by both the president and Congress.

An important outcome of the law relates to the failed impeachment trial of President Johnson. The root of the impeachment trial lurked in the compromise language on which the two Houses of Congress agreed. As is well-known, President Johnson removed Secretary of War Edwin Stanton during the Senate's recess. The president first sent a letter to Stanton saying "public considerations of a high character constrain me to say that your *resignation* as Secretary of War will be accepted."²⁹⁰ To this letter Stanton responded that "public considerations of a high character ... constrain me not to resign

²⁸⁹ The House voted 133 to 37 to override the president's veto. *Congressional Globe*, 39th Congress., 2nd Session, p. 1739 (1867). The Senate vote was 35 to 11. *Ibid.*, p.1966.

²⁹⁰ Letter from Andrew Johnson to Stanton (August 5, 1867); James Richardson (ed.), *Compilation of the Messages and Papers of the Presidents, 1789-1897* (Washington DC: Government Printing Office, 1897), p.3782.

the office of Secretary of War *before the next meeting of Congress*²⁹¹ (emphasis added), indicating that he would serve Congress as one of his masters. Stanton's view of Congress can also be found in his letter, which says,

Under a sense of public duty I am compelled to deny your right under the Constitution and laws of the United States, *without the advice and consent of the Senate* and without any legal cause, to suspend me from office as Secretary of War²⁹² ... (emphasis added).

Stanton's refusal to resign forced Johnson to send a second letter to Stanton suspending him from office and transferring power to a new Secretary of War, Ulysses Grant. On January 3rd, 1868, Congress met and refused to concur in the removal of Stanton. The president, however, refused to accept the Senate's decision, arguing that "the President is the responsible head of the Administration, and when the opinions of a head of Department are irreconcilably opposed to those of the President in grave matters of policy and administration there is but one result which can solve the difficulty, and that is a severance of the official relation."²⁹³

On February 21, 1868, President Johnson appointed General Lorenzo Thomas as the new War Secretary. The Senate instantly sent a letter to the president saying that "Under the Constitution and laws of the United States the President has no power to remove the Secretary of War and designate any other officer to perform the duties of that office *ad interim*." The impeachment proceedings began soon after the letter was sent. On February 22, 1868, President Johnson sent a protest letter to the Senate. He attempted to defend his decision by claiming that removal of Stanton neatly fitted the provisions of the Tenure of Office Act. To do that, however, the president had to make excruciating

²⁹¹Letter from Stanton to Andrew Johnson (August 5, 1867); Ibid, p 3782.

²⁹²Letter from Stanton to Andrew Johnson (August 12, 1867); Ibid, p 3784.

²⁹³Ibid, p. 3787.

concessions. First, he had to abandon his position articulated in his veto message. He acknowledged that the power of removal was no longer “constitutionally vested” in the president. Having conceded a lack of constitutionally granted power, President Johnson then came down to the Act and attempted to make his case. Yet, he had to offer additional concessions as to the provisions of the Act. He acknowledged that, under the Section 1, Paragraph 1 of the Act, he did not possess the removal power as to non-cabinet officers appointed with senatorial confirmation. He also accepted that, under Section 1, Paragraph 2 of the Act, he could not remove his cabinet members if they were appointed by him. All these concessions were made to save just one provision of the Act that if any cabinet member was not appointed by him—as in the case of Stanton—the incumbent president could still remove him without Senatorial approval. A literal reading of the Act would support President Johnson’s interpretation. However, Congress would not buy the interpretation.

Of most important to our purpose, however, is the fact that the sitting president conceded that he could not remove officers he had appointed with the consent of the Senate. Desperate to defend his decision, Johnson wrote in his protest letter to the Senate,

We find in all that portion of the first section which precedes the proviso [that he can remove a cabinet member if he was not appointed by him] that *as to civil officers generally the President is deprived of the power of removal* (emphasis added).²⁹⁴

The president is deprived of removal power as to civil officers generally? It should be made clear that in the context Johnson meant not all civil officers but some high ranking officers that he appointed with Senatorial confirmation. Nevertheless, it simply was a

²⁹⁴ Andrew Johnson’s protest letter to the Senate (February 22, 1868), in James Richardson (ed), *Compilation of the Messages and Papers of the Presidents, 1789-1897* (Washington DC: Government Printing Office, 1897), p. 3821.

stunning statement. Facing an impeachment, President Johnson gave up his removal power, making the Senate the single master of the bureaucracy.

In all, the Tenure of Office Act of 1867 required senatorial confirmation for the removal of certain public officers—those who were appointed by the president with senatorial confirmation. Although at first there were differences among the opinions of the two Houses of Congress and the president, they finally agreed that public officers appointed with senatorial confirmation should be removed with the same procedure applied when appointments were made—by and with the advice and consent of the Senate. The only officers that the president alone could remove were those appointed by a former president. Reversing the Decision of 1789, the Tenure of Office Act of 1867 proclaimed that public officials should be controlled by the collaboration of the president and the Senate. Once again, civil servants would serve their dual masters.

5.2. The Civil Service Act of 1883

The Civil Service Act of 1883, popularly known as the Pendleton Act after its sponsor in the Senate, was one of the two laws that were considered vital civil service reform measures during the late 19th century. The crux of the act was the introduction of open, competitive examination for entrance into the public service. It established a bipartisan Civil Service Commission of three members appointed by the president with senatorial consent but subject to removal by the president. The law apportioned the civil service among the states equitably “upon the basis of population at the last preceding

census.” It also introduced a period of probation before formal appointment. Finally, the act prohibited political assessments and coerced political activities.

The Congressional debate concerning the Act was lengthy, covering nearly two hundred pages of the *Congressional Record*. Scholars of civil service had different opinions on the quality of the debate. On the one hand, Carl Fish, author of *The Civil Service and the Patronage*, described the debate as “entirely unworthy of the occasion, hardly touching any of the serious considerations involved.”²⁹⁵ On the other, Paul Van Riper, author of *History of the United States Civil Service*, saw it quite differently. In his view, the debate was “detailed and exhaustive” and “to the point” about the “effects of the proposed legislation upon the constitutional position of the President and Congress.”²⁹⁶ Having read the entire debate, I agree with Van Riper and found it useful for our purpose of searching for bureaucrats’ masters.

There were conspicuous differences between the perspectives of President Arthur and Senator Pendleton, the primary sponsor of the bill in the Senate. Not surprisingly, the president defended the single master perspective, whereas Pendleton defended a multiple masters perspective. Furthermore, the president failed to show his concern about the bureaucracy, while Pendleton and the civil service reformers placed the bureaucracy front and center. The remainder of the chapter will briefly review the history of the law’s passage, then move on to President Arthur’s view, and conclude with an analysis of the position of Senator Pendleton and the reformers.

²⁹⁵ Carl Fish, *The Civil Service and the Patronage* (New York: Russell & Russell, 1963), p. 218.

²⁹⁶ Paul Van Riper, *History of the United States Civil Service* (Evanston, IL: Row, Peterson, 1958), p. 97.

5.2.1. Passage of the Act

The reform movement began around the close of the Civil War.²⁹⁷ In 1864 Senator Charles Sumner introduced his civil service reform bill, which became the first of a twenty-year series of sixty-four reform bills aimed at creating a merit system to replace the spoils system. Thirty-seven of the bills were introduced by Republicans and twenty-seven by Democrats.²⁹⁸ Unlike the Whigs who preferred to control the removal of civil servants, Republicans and Democrats approached the problems of the spoils system by revamping the way the appointments of civil servants were made. As Van Riper aptly described it, the reformers preferred screening the “front door” to closing the “back door.”²⁹⁹ Screening the “front door,” however, would take considerable selling to convince the public who had been assured by the Jacksonians that the spoils system and the rotation of office were epitomes of democratic government. President Garfield’s assassination in 1881 helped influence public sentiment and provide momentum for reform.³⁰⁰

Stephen Skowronek maintains that the passage of the Civil Service Act of 1883 “amounted to nothing less than recasting of the foundations of national institutional power.”³⁰¹ If the reform movement was important, was there an ulterior motive of the major players behind the movement? Different answers have been proposed from different perspectives—economic, political, and sociological. Matthew Josephson, for

²⁹⁷ David Rosenbloom, *Federal Service and the Constitution: The Development of the Public Employment Relationship* (Ithaca, NY: Cornell Univ. Press, 1971), p. 70.

²⁹⁸ Sean Theriault, “Patronage, the Pendleton Act, and the Power of the People,” *The Journal of Politics* 65:1 (February 2003), p.55.

²⁹⁹ Paul Van Riper, *History of the United States Civil Service* (Evanston, IL: Row, Peterson, 1958), p.66.

³⁰⁰ The role of President Garfield’s assassination is often overrated. As will be discussed later, both the Democrats and the Republicans had their own reasons to pass the law. The assassination played to cure the public opinion only. See Paul Van Riper, *ibid*, p. 98.

³⁰¹ Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge: Cambridge Univ. Press, 1982), p. 67.

instance, sees it from an economic perspective. He believes that the civil service reform movement was a businessman's movement intended to eliminate political assessments of the bureaucrats and to make the parties "dependent upon contributions from businessmen and amenable to the business point of view."³⁰²

In contrast, Johnson and Libecap view the passage of the Act from a political perspective. They argue that the politicians' motives for passing the Act lay, as is usually the case for politicians, in their desire for reelection.³⁰³ In contrast to the popular understanding that the civil service reform hampered lawmakers' reelection because of the lost spoils, Johnson and Libecap suggested that because politicians were able to protect the tenure of their appointees who had already settled down in the government, they could secure sustained support from their appointees.³⁰⁴ Another political perspective is offered by E. E. Schattschneider. He sees the reform as a presidential initiative used in the struggle with political bosses. According to him, the presidents had been "forced to prostitute the public services for the advantage of the local bosses"³⁰⁵ to get legislative support for their programs. The Act would enable presidents to "cut off the flow of patronage to the local bosses."³⁰⁶

Borrowing from Richard Hofstadter's view of the progressive reformers as socially "displaced class," Ari Hoogenboom suggests his scheme of "outs" versus "ins."

³⁰² Matthew Josephson, *The Politicos, 1865-1896* (New York, 1938), pp. 276-7; quoted in Ari Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement, 1865-1883* (Urbana, IL: Univ. of Illinois Press, 1961), p. vii-viii.

³⁰³ This assumption is a typical one for public choice theorists. As discussed in chapter 2, Morris Fiorina deployed his argument on this assumption. See Morris Fiorina, "Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power," *Journal of Law, Economics, & Organization* 2 (1986): 33-51; "Congressional Control of Bureaucracy: A Mismatch of Incentives and Capabilities," in Lawrence Dodd & Bruce Oppenheimer (eds.), *Congress Reconsidered*, 2d ed., (Washington DC: CQ Press, 1981).

³⁰⁴ Ronald Johnson & Gary D. Libecap, *The Federal Civil Service System and the Problem of Bureaucracy: The Economics and Politics of Institutional Change* (Chicago: The Univ. of Chicago Press, 1994).

³⁰⁵ *Ibid*, p. 139.

³⁰⁶ E. E. Schattschneider, *Party Government* (New York: Holt, Rinehart and Winston, 1942), p.137.

In his view, the civil service reform movement was always popular with the “outs” and never with the “ins.”³⁰⁷ In a recent article, Sean Theriault maintains that “public pressure” played a crucial role in the adoption of the Pendleton Act. The politicians did not want to enact the law but were forced to do so “against their will by the pressure of public opinion.”³⁰⁸

As will be discussed later, a close review of the congressional debate reveals that each player had a different motive that can partially be accounted for by various perspectives. President Arthur’s stance is perhaps best explained by Schattschneider’s. The Republicans’ position may best be illustrated by Johnson and Libecap’s perspective. In contrast, the Democrats’ viewpoint may partly be explained by Hoogenboom’s “outs” insight, but it seems that statesmanship also accounted for the Democrats’ opinion.

5.2.2. President Arthur’s Single Master Perspective

Before assuming the presidency of the United States, Chester Arthur served as the Collector of Customs of New York. Arthur extensively marshaled his appointing power on behalf of Roscoe Conkling's Republican machine. Together with Conkling, Arthur was considered one of the key players of the spoils system.

When Arthur in his first annual message endorsed civil service reforms, it came as a pleasant surprise to many. He supported “ascertained fitness” for appointment, “stable” tenure of office, and above all competitive tests. In addition, he asked for an appropriation of \$25,000 to reactivate the first Civil Service Commission created under

³⁰⁷ Ari Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement, 1865-1883* (Urbana, IL: Univ. of Illinois Press, 1961), p. ix.

³⁰⁸ Sean Theriault, “Patronage, the Pendleton Act, and the Power of the People,” *The Journal of Politics* 65:1 (February 2003), p. 65.

President Grant.^{309 310} In his second annual message, Arthur also endorsed a ban on political assessment and expressed his support for the Pendleton bill.³¹¹

Reinforced by Arthur's background as a spoilsman and the Republican defeat in the 1882 mid-term election, casual reading of his annual messages suggests that the president's endorsement of the civil service reform was an inevitable but reluctant compromise for the sake of his party. As Milkis and Nelson explain, "Arthur quickly realized that for him not to support civil service reform would jeopardize the dominant political position that the Republican Party had enjoyed since the Civil War."³¹² Justus Doenecke also says that Arthur "most reluctantly" signed the bill.³¹³

A careful reading of his annual messages, however, reveals an entirely different story. It seems legitimate to say that Arthur did not whole-heartedly endorse the civil service reform *bills* originally proposed by Pendleton on May 15, 1882. It seems equally legitimate, though, to say that Arthur signed the bill enthusiastically on January 16, 1883. In any event, Arthur's conversion is remarkable and demands some explanation, which I will now proceed to offer.

From the outset, Arthur made clear his opposition to some of the provisions of the bill. Often his opposition was buried under his ostensible endorsement of the reform, and was considered of minor importance. Arthur praised *in principle* the success of the civil

³⁰⁹ Richardson, pp.4648-50.

³¹⁰ Paul Van Riper implies that the first Civil Service Commission is more important than the second Civil Service Commission. The first Civil Service Commission, also known as the Grant Commission, was created by the rider of March 3, 1871. Van Riper recommends Lionel Murphy's "The First Federal Civil Service Commission: 1871-1875," *Public Personnel Review* III (January, July, and October, 1942) as the best piece on the first Civil Service Commission. See Paul Van Riper, *History of the United States Civil Service* (Evanston, IL: Row, Peterson, 1958), p. 68-9.

³¹¹ Richardson, pp.4732-4.

³¹² Sidney Milkis & Michael Nelson, *The American Presidency: Origins and Development* (Washington DC: CQ Press, 1999), p.179.

³¹³ Justus Doenecke, *The Presidencies of James A. Garfield and Chester A. Arthur* (Lawrence, KS: Regents Press of Kansas, 1981), p. 101.

service system of Great Britain, but emphasized that “certain features of the English system” did not fit the American system.³¹⁴ The president endorsed *stable* tenure of office but opposed *life* tenure of office. He supported competitive tests but objected to limiting entrance to the civil service at the lowest grade, and in a similar vein opposed promotion of all officers from a lower grade. Arthur believed “an infusion of new blood ... into the middle ranks of the service”³¹⁵ was necessary and beneficial. The president did not agree with the British system of age-limit that restricted entry to people who were no older than twenty-five. Arthur from time to time attempted to ameliorate suspicions about his true intention by saying, for instance, “These suggestions must not be regarded as evincing any spirit of opposition to the competitive plan,”³¹⁶ or “If Congress should deem it advisable at the present session to establish competitive tests for admission to the service, no doubts such as have been suggested shall deter me from giving the measure my earnest support.”³¹⁷

Despite these ameliorations, it seems that Arthur’s “suggestions” were aimed in a certain direction. He seemed to oppose the measures that would curtail the president’s power as the master of the bureaucracy. Arthur’s preference for *stable* tenure rather than *life* tenure reveals his desire to restore presidential power of appointment and removal, which had been by that time almost exclusively controlled by Congress. As the passage of the Tenure of Office Act of 1867 indicates, after the Civil War and Lincoln’s assassination, the power to appoint and remove was shared by Congress and the president

³¹⁴ Richardson, p.4647.

³¹⁵ Ibid, p.4647.

³¹⁶ Ibid, p.4648.

³¹⁷ Ibid, p.4650.

at least in law. But in practice it was dictated by Congress, as Senator John Sherman indicated during the debate:

Nine out of ten of the removals without cause are made because there is a pressure brought upon members of Congress to induce removals, and demands are made by members of Congress, both Senators and Representatives, upon the President and heads of Departments to appoint men for them to office.³¹⁸

Being well aware of the problem, Arthur wanted to restore the mastery over the bureaucracy. His objection to the lowest grade entrance can be understood in the same vein. If every bureaucrat began his or her career from the bottom of the ladder, the presidential appointing power would be substantially curtailed. His well-versed belief in the “infusion of new blood” also shows his intention to use the presidential appointing power when necessary. Arthur’s opposition to the British age restriction can also be viewed in the same context. In other words, he wanted to use his appointing and removal power with as few restrictions as possible.

Arthur’s opinion was well represented during the congressional debate. The entrance from the bottom and the promotion from the lower class were seriously debated and several amendments were offered. Senator Joseph Brown, for instance, while asking “Why should not a person occupying no position under the Government, who is eminently qualified, have a right to apply for a vacancy in a higher class?” wanted to “let every citizen who feels that he has claims superior to an inferior man now in position go and compete for the prize.”³¹⁹ Similarly, Senator James George also opposed the system by maintaining that the lowest entrance system would result in “the baneful principle of

³¹⁸ *Congressional Record*, 47th Congress 2nd Session (December 16, 1882), p. 363.

³¹⁹ *Ibid* (December 14, 1882), p. 280.

promotion by seniority without reference to merit.”³²⁰ After the debate, the provision was simply removed.³²¹ As these two measures were eliminated, life tenure and age limitation, which was not explicitly in the bill, lost their support.

In addition, the bill supplied Arthur with the power to remove any commissioner of the Civil Service Commission without the advice and consent of the Senate.³²² As the Tenure of Office Act was still alive and as the commissioners were appointed with senatorial confirmation, this clause was much in favor of the president.³²³ Besides, the Pendleton Act granted the president the power to decide how broad the coverage should be, thus providing Arthur another tool to control the system with his discretion.³²⁴ Considering these circumstances, there was nothing for the president to lose. Therefore, there came to be no reason for Arthur not to accept the Act. In fact, when the bill was presented to the president, it did not take long for him to sign it.³²⁵

As Van Riper noted, as a result of the Pendleton Act, “the removal power of the president was left largely untouched,”³²⁶ and “The Act of 1883 left the president in control of his own household as far as the power to fire was concerned.”³²⁷ This power was confirmed at the end of the Congressional debate. Senator Warner Miller stated in the Senate that “The bill, instead of creating a life tenure, leaves it entirely within the

³²⁰ Ibid (December 15, 1882), p. 321.

³²¹ The two provisions were included in the Section 2 of the bill as the third and fifth paragraph. In the Act, the first part of the third paragraph disappeared leaving apportionment close alone to constitute the paragraph. The entire fifth paragraph has been discarded making the original sixth paragraph fifth paragraph in the Act that passed Congress.

³²² Section 1, Paragraph 2 of the Pendleton Act.

³²³ Other acts such as the so-called National Currency Act required senatorial approval for removals. The act provided that “He [The Chief Officer] shall be appointed by the President ... by and with the advice and consent of the Senate ... removed by the President, by and with the advice and consent of the Senate.” Section 1 of the Act to Provide a National Currency (February 25, 1863).

³²⁴ Section 6, Paragraph 3 of the Pendleton Act.

³²⁵ Van Riper, Ibid, p. 94.

³²⁶ Van Riper, Ibid, p. 102.

³²⁷ Van Riper, Ibid, p. 103. He found in the passage of the Pendleton Act a reaffirmation of the Decision of 1789.

power of the President or of the Secretaries or heads of Departments to remove officers even at will.”³²⁸ Near the end of the debate, Senator Francis Cockrell similarly maintained that “it [the Pendleton Act] leaves the President with full power to turn out anybody.”³²⁹ Steven Calabresi and Christopher Yoo have the same view of the act. They write,

And most importantly, the revised act deleted all restrictions on the president’s removal power, thus preserving, as Arthur noted, a power essential for ensuring presidential control of all officials in policymaking and political positions. ... His subsequent approval of the legislation is thus fully consistent with the view that Arthur did not acquiesce in any congressionally imposed limitations on the president’s power to control the executive branch.³³⁰

Unlike the standard argument that Arthur, reluctantly and for the benefit of his party, accepted the Pendleton bill, I have argued that Arthur intentionally attempted to strengthen the president’s single mastery over the bureaucracy. Though sometimes obscured by ameliorating words, a careful reading of the president’s messages reveals that he kept a single master’s perspective and attempted to restore the presidential mastery over the bureaucracy that was then in the hands of Congress. His attempt proved to be a success and was reflected in the Act. With that success in mind, Arthur accepted the bill which assured him the control over the bureaucracy.

³²⁸ *Congressional Record*, 47th Congress 2nd Session (December 15, 1882), p. 316.

³²⁹ *Congressional Globe*, 47th Congress 2nd Session (December 21, 1882), p. 507.

³³⁰ Steven Calabresi & Christopher Yoo, “The Unitary Executive During the Second Half-Century,” 26 *Harvard Journal of Law & Public Policy* 667 (Summer 2003), p. 789.

5.2.3. Senator Pendleton's Multiple Masters Perspective

In contrast to President Arthur's view, Senator Pendleton's was based on the multiple masters perspective with a deep concern about the stability and high principles of the bureaucracy.

Pendleton originally introduced his civil service reform bill (S. 2006) on December 15, 1880. When Dorman Eaton brought a bill written by the legislative committee of the New York Civil Service Reform Association, Pendleton substituted his bill with Eaton's, which then became Senate Bill 133.

Pendleton submitted two reports to the Senate accompanying each bill. Throughout the reports as well as during the congressional debate on the bills, Pendleton's view was significantly different from that of President Arthur. The first report begins with a quotation from Eaton: "With the *greater ability and higher character* which such improved methods would bring into the public service, its *self-respect* and its public estimation could not fail to be enhanced"³³¹ (emphasis added). With a Federalist-like concern which Postmaster McLean shared,³³² Pendleton attempted to emphasize the importance of public service. He made it clear that the motivation for the bill was not political parties but the greater ability, higher character, and self-respect of the bureaucracy. Pendleton retained the bureaucracy perspective.

In his second report to the Senate, Pendleton, this time borrowing from the late President Garfield's language, again made it clear that his intention in introducing the reform bill was to enhance the qualities of the bureaucrats and the public image of the bureaucracy:

³³¹ The Pendleton Report I, Senate Report No. 872 (February 16, 1881), p.1.

³³² See Chapter 4.

it [the spoils system] degrades the civil service; ... it repels from the service those high and manly qualities which are so necessary to a pure and efficient administration; and finally, it debanches the public mind by holding up public office as the reward of mere party zeal.³³³

These concerns about the ability, morality, and character of the bureaucracy were common in prominent civil service reformers' minds. Carl Schurz argued that reformers wanted "to restore ability, high character, and true public spirit once more to their legitimate spheres in our public life, and to make active politics once more attractive to men of self-respect and high patriotic aspirations."³³⁴

In a Senate hearing on January 13th, Eaton claimed that "The system of competition opens the government offices ... to everybody on equal terms, and hence is based on common justice." This claim could be read as if it were President Jackson's statement, were it not accompanied by the following phrase: "so far as they are within the range of competition."³³⁵ In the same hearing, Eaton made it clear that the Civil Service Commission should serve both masters, Congress and the president, while also implying that the bureaucrats thus appointed by the Commission should serve the same dual masters as the Civil Service Commissioners. He stated:

A civil service commission represents Congress in the matter, as whatever rules Congress may lay down, a civil service commission is bound to see that they are faithfully carried out. Whatever directions the Executive may give in accordance with any law of Congress, the civil service commission would be bound to see carried out.³³⁶

³³³ The Pendleton Report II, Senate Report No. 576 (May 15, 1882), p. 7.

³³⁴ Carl Schurz, *Harper's Weekly*, XXXVII (July 1, 1893), p. 614; quoted in David Rosenbloom, *Federal Service and the Constitution: The Development of the Public Employment Relationship* (Ithaca, NY: Cornell Univ. Press, 1971), p. 72.

³³⁵ The Pendleton Report I, p. 16.

³³⁶ *Ibid*, p. 17.

On the other hand, Pendleton and other reformers seemed to believe that in order for the bureaucrats to work efficiently, it was necessary to achieve political neutrality by ending recruitment based on political contribution and affiliation. As George Curtis wrote, they believed that “the essential point is not to find coal-heavers who can scan Virgil correctly, but coal-heavers who, being properly qualified for heaving coal, are their own masters and not the tools of politicians.”³³⁷ During the Congressional debate, Senator Joseph Hawley made it clear that political neutrality was the most important aspect of the civil service reform bill. He stated,

the men who would then enter the service would say: “I came in on my examination before a commission where my name was not known; I was number 1 or 2; I was A, B, C, or D; I passed the examination; I am here by virtue of that. There is no guarantee that I shall stay beyond my good behavior; I will take care of that part of it; I am here thanks to no politician; I am here as an American, by virtue of my brains and my character; I won in honest competition, and I dare look any man in the face.”³³⁸

It seems that the civil service reformers’ sense of political neutrality falls short of the conceptions of Daniel Carpenter’s “bureaucratic autonomy” or John Rohr’s “balance wheel.” The reformers might have anticipated a somewhat active role of the bureaucracy as Carpenter and Rohr would later propose explicitly, but evidence tells us that the reformers focused on the potential first step toward an active role for bureaucracy—political neutrality. Nevertheless, Pendleton, Curtis, Schurz, and others kept a multiple masters perspective, and made it come alive during the American civil service reform movement.

Although Senator Pendleton was a Democrat, his bill was supported unanimously by the Republicans. When put to the vote, the bill was mostly supported by the

³³⁷ George Curtis, *The Year's Work in Civil Service Reform* (New York: NCSRL, 1884), p. 16.

³³⁸ *Congressional Globe*, 47th Congress 2nd Session (December 13, 1882), p.244.

Republicans. Among the thirty-five Senators who supported the bill, only fourteen were Democrats; the other twenty-three were Republicans.³³⁹ In contrast, five Senators who opposed the bill were all Democrats.³⁴⁰ The Republicans made a very “rational” choice. Facing a great possibility of losing the coming presidential election, Republicans simply wanted to “freeze” or “blanket-in” their appointees already in the government.³⁴¹ It, however, was not achieved by an explicit provision of the Pendleton Act. What Republicans believed was that if the “front door” was controlled by the merit system, the incentive for the next president—possibly a Democratic president—to remove Republicans from the government would disappear. That is, because of the newly established merit system, vacancies made by removal would not necessarily belong to the president as spoils. As Schattschneider explains, the Republicans’ primary intention was to secure their reelection. Democrats were divided. Those who opposed the bill or who did not attend the voting did so because they expected to win the coming presidential election, after which they could quench long-awaited thirst of patronage. One of the outspoken Democrats who opposed the bill was Senator Joseph Brown. Brown recommended his fellow Democrats wait until they won the election. He reminded them that the Pendleton bill would force them to tell the people “that all the offices that amount to anything ... are already disposed of.”³⁴² With what amounts to Everett’s remark³⁴³ in

³³⁹ The remaining one Senator who supported the bill was Senator David Davis of Illinois, who was an Independent at that time. He originally was a Republican, being appointed by President Lincoln to be an Associate Justice of the Supreme Court.

³⁴⁰ Fourteen Democrats were absent on the day of the vote.

³⁴¹ After the vote to pass the Pendleton bill, Senator Brown moved to replace the title of the bill with “a bill to perpetuate in office the Republicans who now control the patronage of the Government,” which caused loud laughter by Senators. *Congressional Globe*, 47th Congress 2nd Session (December 27, 1882), p. 661.

³⁴² *Congressional Globe*, 47th Congress 2nd Session (December 11, 1882), p. 173.

³⁴³ Recall that in 1828 Edward Everett, in his correspondence with the Postmaster General John McLean, claimed that the victorious party in the presidential elections should be granted comprehensive power to remove all the officers who served in the previous administration and to appoint the friends of the victors.

the previous chapter, Brown insisted that parties which fight for office would not work with the same zeal if offices could not be doled out to party loyalists. From a political perspective, Brown's argument made perfect sense. He stated,

I prefer to wait now until after the next Presidential election before action on the subject, and let us see whether we can not have a better civil-service bill passed by a Democratic Congress, and a Democratic president. ... It may be wise on the part of the Republican leaders to do all in their power to secure the passage of a law to retain Republican office-holders in office after the people have commanded a change of administration. ... When we have inaugurated a Democratic President and secured a fair share of the offices to the Democrats it will be the proper time to consider and act upon civil-service measures.³⁴⁴

Pendleton responded to Brown's argument by saying that his approach to civil service reform was based on far more than "mere partisan spirit." He saw the imminent danger, which, if left alive, would be "destructive of republicanism" and would "end in the downfall of republican government." In a similar vein, Senator Warner Miller requested "patriotic concessions upon all sides":

The Republican party, which has had the control of this patronage so long, must give it up in the future if it hopes to live; and the Democratic party on the other hand must also be willing to give up any anticipation of ever controlling it as it has been controlled in the past.³⁴⁵

Hence, the intentions of Pendleton, Miller, and other reformers should be considered a manifestation of pure statesmanship rather than "rational choice" based on party interest.

During the Republican era discussed here, two acts were introduced for civil service reform purposes. The Tenure of Office Act, reversing long-standing convention initiated by the Decision of 1789, emphasized the collaboration of the president and

³⁴⁴ Ibid, p. 173.

³⁴⁵ Ibid, p. 317.

Congress in removing bureaucrats who were appointed by and with the advice and consent of the Senate. The act attempted to control the “back door” of the civil service. The Pendleton Act introduced open, competitive examination to secure political neutrality of the civil service. In contrast to the Tenure of Office Act, the Pendleton Act sought to manage the “front door” of the civil service. Reformers thought that by focusing on the “front door,” the dual problems of the civil service (inefficiency and corruption) would be curtailed. Unlike President Arthur who sought to regain the presidential power which was severely restricted after the Civil War, Pendleton and other reformers sought political neutrality which would allow the bureaucrats to serve the dual masters of the president and Congress with balance.

The analysis of the congressional debates concerning the two acts reveals that the old perspective of multiple masters of the bureaucracy was still alive in lawmakers’ minds. Although they did not explicitly articulate a more active role for bureaucrats to act as a “balance wheel” between the dual masters, they nonetheless were aware of the danger that subservient bureaucrats might cause. Senate approval for removals and the political neutrality of the bureaucrats can serve as a starting point for the bureaucrats to play a more enhanced role.

Chapter 6: Masters in History IV: The Civil Service Reform Act of 1978

In the previous chapter, I discussed the congressional debate concerning the passage of the Tenure of Office Act of 1867 and the Civil Service Act of 1883. We have seen an ebb and flow of the two masters of the bureaucracy—Congress and the president. In the Tenure of Office Act, the Senate claimed its power to approve all the removals of federal officials whose appointment required Senate confirmation, thus making the Senate a master of the bureaucracy. In contrast, President Arthur recovered some of the president’s mastery over the bureaucracy by effectively restricting Congressional influence with the inception of the merit system.

This chapter deals with another civil service reform that happened almost one hundred years after the Pendleton Act: the Civil Service Reform Act of 1978. Like previous chapters, this chapter will explore the congressional debate in 1978 and figure out what the politicians of the day had to claim regarding the master of the bureaucracy.

6.1. Context for 1978 Reform

Ninety-five years after the Pendleton Act was passed, “the first comprehensive reform” of federal personnel systems, the Civil Service Reform Act of 1978 (CSRA, hereafter), was attempted. Although there were important subsequent civil service reforms such as the Classification Act of 1923, the Hatch Act of 1939, and the Ramspeck Act of 1940, they were by no means as comprehensive as the Civil Service Reform Act.

After the Civil Service Act of 1883, a federal civil service system was successively established to insulate the bureaucracy from political excesses by thwarting the spoils system. Despite the success, criticism of the federal government and its bureaucracy increased. The criticism came from at least three sources: the public, managers inside the national government, and politicians. Firstly, the public was concerned about the ever-increasing size and cost of the government. Political turmoil during the 1960s and 1970s including the Great Society, the Vietnam War, and Watergate³⁴⁶ contributed to a negative public perception of the bureaucracy. An often-cited 1978 Roper poll found that 90 percent of Americans believed that the government was not free of corruption; only 18 percent believed that the government attracted the best people possible; and only 25 percent thought that the government was an exciting place to work.³⁴⁷ As will be discussed later, President Carter and Alan Campbell, the last Chairman of the Civil Service Commission and the first Director of OPM, also shared this belief with the public and used this sentiment strategically to pass the act with a detrimental long-term effect on the bureaucracy. Secondly, criticism also came from inside the government. While patronage had gradually declined, the rules and regulations to protect the merit system—the so-called “baggage” of the system—had become too burdensome. There were regulations covering every possible aspect of personnel

³⁴⁶ Watergate exposed a problematic relationship between the president and the responsive bureaucracy. It was an irony, however, that only a short while after Watergate, the bureaucracy rather than politicians were described as problem and enhanced responsiveness was considered a solution to that challenge. This issue was raised during the House hearing on April 11, 1978, when the President of the National Federation of Federal Employees stated, “Now, a scant 4 years after a President of the United States was forced to resign in disgrace and a large number of the President’s closest advisers were sent to prison, this committee is considering a bill which would seriously destabilize and politicize the bureaucracy.” US House of Representatives, *Civil Service Reform: Hearings before the Committee on Post Office and Civil Service*, 95th Congress, 2nd Session, p. 278.

³⁴⁷ Quoted in Patricia Ingraham & David Rosenbloom (eds.), *The Promise and Paradox of Civil Service Reform* (Pittsburgh, PA: Univ. of Pittsburgh Press, 1992), p.23; also quoted in Patricia Ingraham, *The Foundation of Merit: Public Service in American Democracy* (Johns Hopkins Univ. Press, 1995), p. 74.

administration. Gradually, managers found it hard to manage. As Campbell pointed out, the complex rules, regulations, and procedures caused “semi-paralysis in administration” by “imped[ing] the ability of top political appointees to select, motivate, and manage their staffs.”³⁴⁸ Lastly, presidents and their political parties became more and more concerned about their ability to direct the bureaucracy toward their election mandate. The hard-won neutrality of the bureaucrats was in conflict with the belief that “A political leader—legitimized by a popular election—must be on top of the bureaucratic structure and provide the policy leadership for government administration.”³⁴⁹ The dilemma of how to reconcile bureaucratic neutrality with responsiveness to political leaders was a challenge that was not fully addressed by the Civil Service Act of 1883. In other words, the merit system established by the Pendleton Act contained the seed of a dilemma that could be raised any time. As Patricia Ingraham aptly describes, how “to guarantee that the service is still responsive” under the merit system has been a perennial question for both practitioners and scholars of public administration.³⁵⁰ In this sense, the seed of the Civil Service Reform Act of 1978 (CSRA, hereafter) was planted almost 100 years earlier in the Civil Service Act of 1883.

The CSRA emerged from these criticisms of the Pendleton Act. Jimmy Carter was the first president in American history to campaign with civil service reform at the top of his policy agenda.³⁵¹ Not surprisingly, government reform was one of the top priorities in his inaugural address. In his address, he stated that “Our government must at

³⁴⁸ Alan Campbell, “Civil Service Reform: A New Commitment,” *PAR* 38:2 (March/April 1978), p.101.

³⁴⁹ Donald Devine, “Political Administration: The Right Way,” Robert Rector and Michael Sanera (eds.), *Steering the Elephant: How Washington Works* (New York: Universe Books, 1987), p. 129.

³⁵⁰ Patricia Ingraham, *The Foundation of Merit: Public Service in American Democracy* (Johns Hopkins Univ. Press, 1995), p. xix.

³⁵¹ Patricia Ingraham, “The Reform Game,” in Ingraham, Patricia & David Rosenbloom(eds.), *The Promise and Paradox of Civil Service Reform* (Pittsburgh, PA: Univ. of Pittsburgh Press, 1992), p. 11.

the same time be both competent and compassionate” and he hoped that when his term as the president ended people might say “we had enabled our people to be proud of their own Government once again.”³⁵² In his 1978 State of the Union address as well, President Carter articulated Americans’ concern that “the Government has almost become like a foreign country, so strange and distant that we’ve often had to deal with it through trained ambassadors.” He then claimed that the government can only be “as effective as the people who carry out its policies,” and declared that the civil service reform was “absolutely vital.”³⁵³ Similarly, in his National Press Club conference announcing the CSRA’s proposal to Congress, Carter made it clear that civil service reform would be the “centerpiece” of his agenda during his term of office.³⁵⁴

The bill, thus proposed and passed, was long and complex, encompassing nine titles and fifty-five sections. As Ingraham and Rosenbloom note, it was “comprehensive, ... but much more confusing.”³⁵⁵ Mark Huddleston saw that the bill’s key feature, the SES, contained a “kaleidoscope of images”: from congeries of agency specialists, to a European-style elite corps, to a political machine promoting responsiveness, and to corporate managers adopting business practices.³⁵⁶

The reform encompassed two different yet related aspects of the bureaucracy: one was structural and the other conceptual. Most structural changes were achieved through

³⁵² President Carter’s Inaugural Address; Jimmy Carter, *A Government as Good as Its People* (New York: Simon and Schuster, 1977), pp. 259-62.

³⁵³ President Carter, State of the Union Address (January 19, 1978).

³⁵⁴ President Carter, Federal Civil Service Reform Remarks Announcing the Administration’s Proposal to the Congress (March 2, 1978).

³⁵⁵ Patricia Ingraham & David Rosenbloom, “The State of Merit in the Federal Government,” in Patricia Ingraham and Donald Kettl (ed), *Agenda for Excellence: Public Service in America* (Chatham, NJ: Chatham House, 1992), p.291.

³⁵⁶ Mark Huddleston, “To the Threshold of Reform: The Senior Executive Service and America’s Search for a Higher Civil Service,” in Patricia Ingraham & David Rosenbloom (eds.), *The Promise and Paradox of Civil Service Reform* (Pittsburgh, PA: Univ. of Pittsburgh Press, 1992), pp. 178-85.

Reorganization Plan No. 2. The Civil Service Commission, one of the cornerstones of the Pendleton Act, was abolished. Instead, the CSRA established the Office of Personnel Management (OPM), Merit Systems Protection Board (MSPB), Office of Special Counsel (OSC), and Federal Labor Relations Authority (FLRA). In addition to the new organizations, the Senior Executive Service (SES) was introduced “to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation.”³⁵⁷ The SES was deemed by many scholars the keystone of the act. In addition to the structural changes, the act contained provisions for new values and concepts. The principle of merit was first explicitly articulated in the act. A pay-for-performance concept was introduced, and whistle blowers were protected. Federal affirmative action was adopted and the federal labor-relations program got a statutory basis for the first time.

Among these changes, one of the most conspicuous was the acknowledgement of the president as the master of the bureaucracy. As Chester Newland described, “The principal thrust of the 1978 reorganization plan was to authorize direct political control of civil service operations by the president.”³⁵⁸ Several provisions of the law reinforced the position, but the most important were those of the OPM and SES.³⁵⁹ The creation of the OPM was proposed to improve the efficiency and productivity of the federal bureaucracy. The OPM director was to be appointed by the president with the advice and consent of the Senate. Despite senatorial consent, the director was considered an agent of the

³⁵⁷ 5 U.S.C. 3131 (P.L. 95-454).

³⁵⁸ Chester Newland, “The Politics of Civil Service Reform,” in Patricia Ingraham & David Rosenbloom (eds.), *The Promise and Paradox of Civil Service Reform* (Pittsburgh, PA: Univ. of Pittsburgh Press, 1992), p. 67.

³⁵⁹ Frank Thompson, “Political Responsiveness and Merit Systems: An Overview,” *Review of Public Personnel Administration* 8 (Spring 1988), p. 1.

president. This understanding is quite different from the framers' understanding of the Senate's approval power. As discussed in Chapter 3, the framers viewed the Senate's approval as a vitally important power to check presidential power, but after 189 years, Congressmen and scholars saw the power as almost meaningless. This transformation seems to be the result of a gradual accumulation of frustration by the Senate in using the power. For instance, Ingraham simply ignores the Senate's involvement and views the president's appointing power as a tool that "absolutely ensured that the central personnel agency would be more responsive to political direction and control."³⁶⁰ Similarly, Ronald Sylvia maintained that "the 1978 act sharply increased the managerial authority of the president by making the OPM directly responsible to the president."³⁶¹

Although the SES had many goals, enhanced responsiveness to the president was one of the most important ones.³⁶² Provisions concerning the SES helped the president become the master of the bureaucracy. For the first time in American history, political appointees were included in the same personnel system as career senior executives.³⁶³ Ten percent of the SES positions were reserved for political appointees.³⁶⁴ Senior executives could be transferred to other agencies or reassigned to other positions with just fifteen days' written notice.³⁶⁵ Performance appraisal of senior executives was done by political appointees. In addition, when that performance evaluation resulted in two unsatisfactory ratings in any five consecutive years or two less than fully successful

³⁶⁰ Ibid, p.77.

³⁶¹ Ronald Sylvia, "Merit Reform as an Instrument of Executive Power," *American Review of Public Administration* 17 (Summer/Fall 1983), p. 115.

³⁶² Patricia Ingraham & Guy Peters, "The Conundrum of Reform: A Comparative Analysis," *Review of Public Personnel Administration* 8 (Summer 1988), p. 6.

³⁶³ Compare it to President Eisenhower's Schedule C, which was a separate personnel system from the career bureaucrats; system.

³⁶⁴ 5 USC 3134.

³⁶⁵ 5 USC 3395.

ratings in any three consecutive years, the senior executives could be removed from the SES.³⁶⁶

There were safeguards to protect the bureaucracy from excessive presidential influence. Dwight Ink, the Executive Director of Federal Personnel Management Project, emphasizing that the proposed SES should “result in less pressure for politicizing than we now have,” enumerated several measures including a 10% limit on non-career positions, the existence of MSPB and OSC, the 120-day bar to reassignment, and further training opportunities.³⁶⁷ Campbell underlined the codification effect by claiming that the merit principle, having been “placed in statute” and become the “law of the land” for the first time in American history, would prohibit political influence on the bureaucracy.³⁶⁸

Despite the safeguards advocated by proponents of the CSRA, the potential danger of politicization of the SES was recognized by many. In fact, Dwight Ink himself later admitted that his “assurances to Congress that the CSRA safeguards would be effective were overly optimistic.”³⁶⁹ The reformers seemed to have been naïve enough to believe in the practicality of the safeguards. *US News and World Report*, however, quite legitimately reported:

No one alleges that Jimmy Carter lusts after power. But his reforms would enable any future political director to reach down through the levels and take the whole organization captive. Members of the SES would work close to the administration. In turn 72,500 intermediate managers, the GS-13s, 14s, and 15s, bereft of automatic raises, would depend largely on SES review for their rewards. And the lower grade, finding appeal

³⁶⁶ 5 USC 4314.

³⁶⁷ Dwight Ink’s testimony on May 3, 1978, *US Senate, Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings before the Committee on Government Affairs, 95th Congress, 2nd Session*, p. 1133.

³⁶⁸ Allen Campbell’s testimony on April 6, 1978, *Ibid.*, p. 32.

³⁶⁹ Dwight Ink, “What was behind the 1978 Civil Service Reform?” in James Pfiffner & Douglas Brook (eds.), *The Future of Merit* (Washington DC: The Woodrow Wilson Center Press, 2000), p. 54.

more difficult than at present, would have to please the middle managers in whatever shades of political control the managers transmit.³⁷⁰

During the Senate hearing, these thoughts were echoed by Vincent Connery, a representative of the National Treasury Employees Union, when he testified that “This may not come about under President Carter or even his successor, but sooner or later, it is very likely that a Chief Executive would again adopt the philosophy” of politicizing the bureaucracy.³⁷¹

That foresight was confirmed when Donald Devine, Reagan’s OPM director, wrote,

Fortunately for the Reagan Administration, tools for controlling policy-making and administration in the government already existed in Jimmy Carter’s legacy to the nation, the CSRA of 1978. ... the CSRA also allows the political manager to reward and motivate those civil servants who perform well with substantial bonuses, to reassign those who need different working environments to be effective team members, and to discipline those who perform poorly or who will not follow policy directives. It was left to the Reagan Administration to implement these new tools in 1981.³⁷²

Thus, a Democratic Congress ironically prepared useful tools for a Republican president to play an effective role as the master of the bureaucracy.

This seemingly legitimate concern about the politicization of the bureaucracy under the CSRA, however, received an entirely different interpretation by some scholars, including Donald Devine and Michael Sanera. Because they deploy such a strong, yet ill-directed argument, it is worth reiterating their arguments here in some detail.

³⁷⁰ *US News and World Report* (08/28/1978).

³⁷¹ Vincent Connery’s testimony on May 5, 1978, *US Senate, Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings before the Committee on Government Affairs, 95th Congress, 2nd Session*, p. 1307.

³⁷² Donald Devine, “Political Administration: The Right Way,” Robert Rector and Michael Sanera (eds.), *Steering the Elephant: How Washington Works* (New York: Universe Books, 1987), p. 129-30.

At the outset, Devine differentiates between “conservative” public administration and “liberal” public administration. For him, all the concerns about the CSRA come from the so-called “liberal myth” about what government should be and how government should operate. In his view, those who are enchanted with the liberal myth and advocate bureaucratic neutral competence have a hidden intention to allow the bureaucrats to hold the real power to decide public policies. The liberal myth is an illegitimate and “vain attempt to escape from politics.” What the attempt really meant and still means is that the policy decision-making power that inherently exists in the management of government operations was given to nonelected bureaucrats to be exercised beyond direct popular control. According to Devine, a conservative public administration, which is more legitimate, should realize that

A political leader—legitimized by a popular election—must be on top of the bureaucratic structure and provide the policy leadership for government administration. The skill and technical expertise of the career service must be utilized, but it must be utilized under the direct authority and personal supervision of the political leader...³⁷³

In this context, Devine claims that a “right” public administration should embrace the fact that the president “who remains a true political administrator must ... be *confident in the knowledge that he has the legal right to act: he is the boss*” (emphasis original).³⁷⁴ In contrast, Larry Lane maintained that “The major focus of Devine’s agenda was to replace OPM’s traditional management operation with an unswerving emphasis on responsiveness of the public service to political direction from within the executive branch.”³⁷⁵

³⁷³ Ibid, p. 129.

³⁷⁴ Ibid, p. 131.

³⁷⁵ Larry Lane, “The Office of Personnel Management,” in Patricia Ingraham & David Rosenbloom (eds.), *The Promise and Paradox of Civil Service Reform* (Pittsburgh, PA: Univ. of Pittsburgh Press, 1992), p. 109.

Michael Sanera, a onetime OPM political appointee, similarly states that, “success in public-sector management is not dependent on good business management of existing government operations, but rather on managing the President’s political philosophy and values.”³⁷⁶

6.2. Congressional Debate

Congressional consideration of the bill was at best modest. Most of the provisions submitted by the Federal Personnel Management Project were passed intact. In the Senate, only one day was spent on the “real” discussion of the bill,³⁷⁷ and the House spent only four days³⁷⁸ on the “real” consideration of the bill. Nevertheless, both the Senate and the House had lengthy hearings. At least two interesting features were found in the debates and hearings. First, most of the debates and hearings were spent on interest-group related issues such as labor-management and veterans’ preference. Second, compared to other reform era debates, the 1978 debates were relatively quiet about constitutional issues such as the shared powers of government. Instead, many assumed that the president was unquestionably the master of the bureaucracy. The blatant claim of many lawmakers that only the president should control the bureaucracy was quietly accepted. That claim, however, would have been fiercely rebutted in other reform eras by those who advocate legislative supremacy, or by those who believed that the bureaucracy should serve the dual masters of Congress and the president.

³⁷⁶ Michael Sanera, “Paradoxical Lessons from ‘In Search of Excellence,’” Robert Rector & Michael Sanera (eds.), *Steering the Elephant: How Washington Works* (New York: Universe Books, 1987), p. 177.

³⁷⁷ August 24, 1978.

³⁷⁸ August 11, September 7th, 11th, and 13th of 1978.

The legislative debates focused on three issues that are important to this project: OPM, MSPB, and SES. In a Senate hearing, Senator Charles Mathias expressed his concern about the proposed OPM. He pointed out that even the bipartisan CSC had been subject to political pressure from the president. How, he asked, could the director of OPM, who would serve “at the pleasure of the President” and would be “removable at any time by the President,” possibly escape the presidential mastery?³⁷⁹ Campbell emphasized the need for “a management tool for a President to run” the bureaucracy and claimed that denying the presidential power would be “the worst of all possible management.”

A similar concern was raised on May 5th by Vincent Connery from the National Treasury Employees Union. His prepared statement is as follows,

The bill would concentrate tremendous power in the newly-created OPM whose Director, under the direct control of the President, would literally become the personnel czar of the entire Federal government. Through the broad discretion granted to him in the bill, the Director of the OPM could manipulate the Federal workforce like a puppet, directing the various pieces to follow the commands of the President.³⁸⁰

Yet another similar concern was raised by Senator Theodore Stevens, who maintained that the bureaucracy would “be exposed to a higher degree of political influence in the name of efficiency and responsiveness,” because the OPM would support “the pursuit of political goals” of the president.

³⁷⁹ Senator Mathias’ question to Campbell on April 6, 1978, *US Senate, Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings before the Committee on Government Affairs*, 95th Congress, 2nd Session, p. 50.

³⁸⁰ Vincent Connery’s testimony on May 5, 1978, *US Senate, Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings before the Committee on Government Affairs*, 95th Congress, 2nd Session, p. 1313. He gave similar testimony in the House committee hearing. See US House of Representatives, *Civil Service Reform: Hearings before the Committee on Post Office and Civil Service*, 95th Congress, 2nd Session, p. 171-4.

During the House debate, an interesting amendment was submitted by Representative Newton Steers. Based on his fear of the OPM director serving the president only, Representative Steers offered to make OPM just like the old CSC, composed of three bipartisan commissioners. That way, he believed, Americans could avoid making the federal bureaucracy to serve only the president. Representative Benjamin Gilman agreed with the amendment and stated,

The most serious weakness in the administration's proposals to reform the civil service is that it increases the possibilities for manipulating the civil service for personal or political favoritism. Instead of having personnel policy made by a bipartisan body, it would be made by an administrator serving at the pleasure of the President.³⁸¹

Proponents of the bill clearly refuted these concerns and amendments. Representative Edward Derwinski replied,

I think it borders on infringement of the constitutional rights of the President. ... And I am saying that the President will now have control over this Agency through appointment. What the gentleman, I think, approaches is diluting Presidential control.³⁸²

This statement was one of a few that mentioned the Constitution. Unfortunately, however, the Constitution was construed in a quite different way from what the framers and other reform leaders had understood.

Both Campbell's assertion and Derwinski's statement would have met strong rebuttal from the Whigs (were it for the Tenure in Office Act of 1820) or the framers (had they happened during the Convention debate), who would have argued that public personnel administration should not be managed by the president only. During the

³⁸¹ *Congressional Record*, 95th Congress, 2nd Session (1978), p. 28714.

³⁸² *Ibid*, p. 28716.

hearing, however, no Senator raised an argument against Campbell, and the Steers Amendment was simply rejected.

Another important debate relates to the proposed MSPB. Representative Gilman proposed an amendment that required the MSPB to submit its budget requests simultaneously to the *Congress and the President*. Gilman maintained that without this amendment, the MSPB would be “little more than a one-eyed watchdog tied by a very short leash to the White House.”³⁸³ Gilman’s amendment attempted to restore the dual masters scheme through congressional budgetary power.

Under the proposed bill, the chairman of the MSPB would be appointed from time to time by the president, by and with the advice and consent of the Senate.³⁸⁴ Representative Herbert Harris, recognizing that Senate confirmation had not worked as the Framers intended, proposed an amendment of the section. He wanted the chairman to have a fixed term of two years and to be elected by the board members. Representative Derwinski retorted that “this amendment takes the bill away from its main thrust. It ties the President’s hands in an appointment area.”³⁸⁵ Representative Stephen Solarz also remarked that “This amendment constitutes a gratuitous slap at the President.”³⁸⁶ After the debate the amendment was rejected.

Representative Harris proposed another amendment, which he suggested include a provision to require one of the MSPB members to come from career service. The sponsor of the bill, Representative Morris Udall, stated, “to suggest on all occasions and at all times there must be someone to meet that particular qualification ties the hands of

³⁸³ Ibid, p. 28720.

³⁸⁴ Title 2, Section 1203.

³⁸⁵ *Congressional Record*, 95th Congress, 2nd Session (1978), p. 28719.

³⁸⁶ Ibid, p. 28719.

the President.”³⁸⁷ As discussed in earlier chapters, during other reform eras, regulating conditions of federal appointment—while conferring the appointment power on the president—was within the purview of Congress. However, during the 1978 debate, that tradition disappeared and the president’s single mastery over the bureaucracy—at least through the appointment of important civil service management agency’s board members—was accepted as natural.

In addition to the problems of OPM and MSPB, opponents of the bill were deeply concerned about the proposed SES. During the Senate hearing, Vincent Connery saw in the SES the greatest potential for presidential abuse. He rightly maintained that the president, through the Director of OPM, would have “*unfettered control* over the entire SES,” and “*political loyalty* would become the basis for entry into and retention in an executive position” (emphasis added).³⁸⁸

Similarly, Ralph Nader saw a danger in the proposed SES. Although he did not consider all politicization necessarily bad, Nader was concerned about the presidentialization of the bureaucracy. In the hearing, Nader stated,

[The] SES proposal could, theoretically, convert all supergrades into, in effect, *Presidential personal staff*. While only ten percent of the SES can be political, non-career appointments, every career official will know that his/her best chance for advancement, pay bonuses, and interesting work is by being very cooperative with the White House. This could mean that these senior executives will start doing *special favors of the President’s favorite* interest groups and performing political jobs *to help the President win reelection*. If Richard Nixon had had the SES at his disposal, the effects of Watergate would have been far more widespread.³⁸⁹

³⁸⁷ Ibid, p. 28714.

³⁸⁸ Vincent Connery’s testimony on May 5, 1978, *US Senate, Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings before the Committee on Government Affairs, 95th Congress, 2nd Session*, p. 1307.

³⁸⁹ Ralph Nader’s prepared testimony on April 10, 1978, Ibid, p. 427.

In the House hearing, James Peirce, President of the National Federation of Federal Employees (NFFE), testified that “the SES executive will always be looking over his shoulder, always willing to do the bidding of his political bosses in order to retain his position.”³⁹⁰ Quoting Campbell’s testimony, Peirce added,

In testimony before the House Post Office and Civil Service Committee, Alan Campbell, the Chairman of the Civil Service Committee said, “There are no absolute guarantees against politicization of any public employment system.” The SES, however, absolutely guarantees the politicization of the system by removing, imperfect though they may be, all existing safeguards against politicization.³⁹¹

Reflecting these concerns, Senator Mathias warned that many bureaucrats “in and just below the SES” would use their official discretion “in subtle ways to serve partisan and special interests.”³⁹² In the House debate, Representative Gilman expressed a very similar concern, and predicted the restoration of “patronage system at the upper levels of Federal management.” He stated,

Significant numbers of noncareer appointees will be encouraged and some, unfortunately, will be tempted to use their official discretion in subtle ways to serve partisan and special interests, rather than the public interest, in hopes of being looked on favorably as they seek advancement in the SES.³⁹³

Because of these concerns about the potential danger of the SES, Representative Steers proposed an amendment that would require a two-year sunset review on the SES. Mark Huddleston called it “the only tense moment in the legislative process.”³⁹⁴ Without

³⁹⁰ US House of Representatives, *Civil Service Reform: Hearings before the Committee on Post Office and Civil Service*, 95th Congress, 2nd Session, p. 280.

³⁹¹ *Ibid*, p. 281.

³⁹² *Congressional Record*, 95th Congress, 2nd Session (1978), p. 27561.

³⁹³ *Ibid*, p. 28778.

³⁹⁴ Mark Huddleston, “To the Threshold of Reform: The Senior Executive Service and America’s Search for a Higher Civil Service,” in Patricia Ingraham & David Rosenbloom (eds.), *The Promise and Paradox of Civil Service Reform* (Pittsburgh, PA: Univ. of Pittsburgh Press, 1992), p.194.

much debate, however, the amendment was deleted in the House-Senate conference committee.

Proponents of the bill dismissed these concerns from the bureaucrats, experts, Senators, and Representatives. In the Senate debate, Senator James Sasser maintained that the SES was “absolutely essential to assuring each President that he [would] be able to run the bureaucracy effectively.”³⁹⁵ During the House debate, Representative Derwinski argued that the SES was intended “to strengthen the hands of the President as the Chief Executive of the Federal Government,”³⁹⁶ and proposed not to forget “the noble goal ahead of us,” which was “to give the President of the United States a legitimate reform of the civil service.”³⁹⁷ Representative James Hanley went further and wanted Congress to be able to tell the president, “All right, Mr. President, here is the tool you have asked for. We are providing it for you in this 95th Congress.”³⁹⁸

Once again, when Congress debated the proposed SES, louder voices in favor of presidential power dominated the debate, while almost completely ignoring the principle of shared power of Congress and the president over the civil service system. That was a great departure from the earlier view of presidential responsibility, which held that the president, in joint oversight with Congress, runs the Constitution.³⁹⁹

In the House hearing, there was one extended debate between Congressman Leo Ryan and the representatives of the NFFE. Although rather lengthy, it is worth quoting

³⁹⁵ Congressional Record, p. 27458.

³⁹⁶ Ibid, p. 28702.

³⁹⁷ Ibid, p. 28442.

³⁹⁸ Ibid, p. 28443.

³⁹⁹ Patricia Ingraham & David Rosenbloom (eds.), *The Promise and Paradox of Civil Service Reform* (Pittsburgh, PA: Univ. of Pittsburgh Press, 1992), p. 64.

because it vividly shows what the Congressman had in mind about the masters of the bureaucracy.

Mr. Ryan: Yes. How is the President appointed?

Mr. Peirce: The President is elected.

Mr. Ryan: By whom?

Mr. Peirce: By the people.

Mr. Ryan: For what? For what reason?

Mr. Peirce: To carry out the functions of Government.

Mr. Ryan: As who sees it? The career employees?

Mr. Peirce: As the President sees it.

.....

Mr. Ryan: Isn't the career employee required to take orders from a person who has been appointed by the President?

Mr. Peirce: Very definitely, but the thing that we pointed out here is that with the approach that is revealed in this SES system, we would most surely have employees that are sitting in the system that would be afraid to give an opinion based on their expertise and background.

.....

Mr. Ryan: What is right? What the people want as expressed through their elected officials, or the career employee who doesn't necessarily feel compelled to respond to the sense of the people?

.....

Mr. Ryan: Should they be responsive to political appointees?

Mr. Peirce: Certainly they should, but I think they should also have the opportunity to bring to the surface different ideas, or ideas which might oppose, without fear of recrimination. ...

Mr. Ryan: I couldn't disagree with you more, because I get elected and you don't.

Mr. Wolkomir: Are you saying the President, just because he has been elected, just because he is elected ...

Mr. Ryan: Sir, there is nothing more important in the whole world. That is what free Government is all about.

.....

Mr. Wolkomir: ... Are you saying because he is a Federal employee he should keep quiet and just follow orders, because the President was elected?

Mr. Ryan: *He must follow orders of the President and his surrogates in the various departments at the top; you are darn right* (emphasis added).⁴⁰⁰

In the debate, Mr. Peirce seemed to focus on the bureaucrats' freedom of expression. This is an important issue, but it would have been better for him to raise the issue of multiple masters of the bureaucracy. That is, he should have asked Congressman Ryan what the bureaucrats were expected to do when there were differences between the orders of the president and the Congress as reflected in the law.

⁴⁰⁰ US House of Representatives, *Civil Service Reform: Hearings before the Committee on Post Office and Civil Service*, 95th Congress, 2nd Session, p. 282-3; part of the exchange is shown in Huddleston, Mark, "To the Threshold of Reform: The Senior Executive Service and America's Search for a Higher Civil Service," in Patricia Ingraham & David Rosenbloom(eds.), *The Promise and Paradox of Civil Service Reform* (Pittsburgh, PA: Univ. of Pittsburgh Press, 1992), pp. 189-90.

6.3. “Natural Outcome” or Tactic?

I have argued that, despite some debates based on the principle of multiple masters and shared powers, the general tendency during the 1978 civil service reform was to ignore other constitutional players and to consider the president as the single master of the bureaucracy. As we have seen in the previous chapters, there were active debates in Congress about the multiple masters of the bureaucracy. After almost 100 years, why and how did Congress stop discussing this grave constitutional issue? Was it simply a consequence 95 years of lapse had brought? Was it because of Congressional structure? Or was it a result of tactical maneuver by the proponents of the bill? Or, was the result caused by a combination of the three?

Chester Newland advocates the “natural outcome” hypothesis. In his view, the shared power of Congress and the president gradually lost its ground and yielded to the single master scheme of the presidency.⁴⁰¹ In other words, a slow but steady transfer of power from Congress to the president accumulated enough to result in the loss of the multiple masters scheme. As Ingraham aptly summarizes, Newland argues that “the CSRA was the natural outcome of longer-term changes in the relationship between the president and the Congress; formally making the shift from the view that the president was responsible for seeing that laws were faithfully executed, sharing oversight with Congress, to a policy of political control of the civil service by the president.”⁴⁰² In this view, aggrandizement of presidential power became an irreversible force in American

⁴⁰¹ Chester Newland, “The Politics of Civil Service Reform,” in Patricia Ingraham & David Rosenbloom (eds.), *The Promise and Paradox of Civil Service Reform* (Pittsburgh, PA: Univ. of Pittsburgh Press, 1992): 63-89.

⁴⁰² Patricia Ingraham, “The Reform Game,” in Patricia Ingraham & David Rosenbloom (eds.), *The Promise and Paradox of Civil Service Reform* (Pittsburgh, PA: Univ. of Pittsburgh Press, 1992), p. 13.

politics. Evidence of this theory was that the act was approved with overwhelming support from newspapers, various interest groups, scholars of public administration, and Congressmen.

In contrast, Ingraham finds that Congressional committee structure is responsible. She claims that different structures of the Senate and House committees led to the different result: the lack of debate in the Senate and the diversion of topic in the House. According to Ingraham, because the Senate committee was new, the Senators simply did not have a chance to accumulate history, knowledge, and predisposed principles. In contrast, the House Post Office and Civil Service Committee, and especially the Civil Service Subcommittee, had long-standing and strong ties to organized labor. Those ties led to a lengthy debate on the management-labor relations proposed in the legislation, leaving the constitutional issue of shared powers behind.⁴⁰³

Both the natural evolution and committee structure hypothesis account for some of the story. However, there seems to be much evidence that the congressional focus on the mechanics of merit, rather than on constitutional issues including the multiple masters of the bureaucracy, was the result of tactics by the proponents of the bill.

A tactical scheme was first proposed by President Carter. In his speech announcing the administration's proposal to Congress, Carter adopted two approaches. The first was "bashing bureaucracy." In his press conference announcing the bill's proposal to Congress, Carter put civil service reform as the "centerpiece of Government reorganization." At the same time, he castigated the bureaucracy claiming that "the public suspects that there are too many Government workers, that they are underworked,

⁴⁰³ Patricia Ingraham, "The Civil Service Reform Act of 1978: The Design and Legislative History," in Patricia Ingraham, & Carolyn Ban (eds.), *Legislating Bureaucratic Change* (Albany, NY: State Univ. of New York Press, 1984), p. 22.

overpaid, and insulated from the consequence of incompetence.”⁴⁰⁴ This approach effectively divided American society into two blocs: the public and its enemy—the bureaucracy. This approach helped pass the bill, but with the substantial long-term cost of public distrust in government and declining morale of the bureaucracy. What is important to us, however, is that the tactic effectively blurred the issue of shared power between the president and Congress, because both the president and Congress were positioned in the same block, the opposite side from the bureaucracy.

The second tactic Carter’s team adopted was to make the civil service reform a very technical issue, intentionally avoiding the constitutional power issue. In the same speech, President Carter presented three core propositions of the bill. The first proposition was that “There is not enough merit in the merit system.” He hastily clarified the meaning, by adding that our system had “too few rewards for excellence and too few penalties for unsatisfactory work.” Carter’s second proposition was that “Employees still have too little protection for their rights” and added the creation of three entities of OPM, MSPB, and the Office of Special Counsel, as if OPM had nothing to do with power but just protected the federal bureaucracy. The president’s third proposition was the creation of FLRA to remedy unfair labor practices within the government. None of his three major propositions, however, include the issue of power transfer from Congress to the president. The bill was presented as dealing with production, efficiency, and merit, leaving the issue of power behind.

⁴⁰⁴ President Carter, Federal Civil Service Reform Remarks Announcing the Administration’s Proposal to the Congress (March 2, 1978).

Alan Campbell deployed similar tactics. Following Carter, Campbell adopted a “weed-out-inefficiency-and-mismanagement” approach in public speeches and writing.⁴⁰⁵ For instance, Campbell wrote “it[the government] had grown unwieldy and unresponsive” in recent decades.⁴⁰⁶ When mentioning a “taxpayers’ revolt,” Campbell wrote, “the programs are not run well, that they[the bureaucrats] are inefficient, and that the funds do not go to the people who need them most.”⁴⁰⁷ Campbell had other tactics as well. He tended to emphasize the MSPB and OSC, while keeping the OPM in the background. In an early 1978 article, Campbell explained the MSPB and the Special Counsel before briefly mentioning the OPM.⁴⁰⁸ The order seems odd when we consider the fact that in the bill, the OPM (section 201) came ahead of the MSPB and the OSC (section 202). This tendency of emphasizing the MSPB and OSC more than the OPM is consistent in Campbell’s works. In his prepared testimony before the Senate hearing, Campbell’s explanation of the MSPB occupied three pages enumerating the board’s twenty-two functions.⁴⁰⁹ In contrast, his explanation of the OPM took only one short paragraph of four sentences, followed by a three paragraph explanation of the FLRA.⁴¹⁰ This pattern was repeated in Campbell’s testimony before the House hearing on March 14, 1978.⁴¹¹ In January 1980, the OPM published a booklet, reporting on the Civil Service Reform during the first year. In this report, Campbell again hid the OPM behind

⁴⁰⁵ Patricia Ingraham, *The Foundation of Merit: Public Service in American Democracy* (Johns Hopkins Univ. Press, 1995), p. 82.

⁴⁰⁶ US OPM, *Civil Service Reform: A Report on the First Year* (January 1980), p. 2.

⁴⁰⁷ Alan Campbell, “Civil Service Reform as a Remedy for Bureaucratic Ills,” in Carol Weiss & Allen Barton (eds.), *Making Bureaucracy Work* (Beverly Hills, CA: Sage, 1980), p.154.

⁴⁰⁸ Alan Campbell, “Civil Service Reform: A New Commitment,” *PAR* 38 (March/April 1978), p. 100.

⁴⁰⁹ See pages 92-94 of US Senate, *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings before the Committee on Government Affairs*, 95th Congress, 2nd Session.

⁴¹⁰ See pages 94-95 of US Senate, *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings before the Committee on Government Affairs*, 95th Congress, 2nd Session.

⁴¹¹ See pages 24-27 of US House of Representatives, *Civil Service Reform: Hearings before the Committee on Post Office and Civil Service*, 95th Congress, 2nd Session.

the FLRA and MSPB.⁴¹² When discussing the SES, Campbell also used this tactic, misleading the public. In his early 1978 article, Campbell wrote,

The key feature of the SES is that grade and rank for both career and noncareer executives would be assigned to persons rather than to positions, much like in the military and foreign service system.⁴¹³

What Campbell claimed was that the most important characteristic of the SES was not the Constitutional issue of shared power between the president and Congress, but a technical issue of rank-in-person vs. rank-in-position system.

Dwight Ink followed suit. In his testimony before the House committee, Ink emphasized “the bewildering array of complex protective procedures,” “time-consuming and confusing red tape,” and the practice of “form over substance.”⁴¹⁴ Then, when Ink began to talk about the reorganization plan, he started with the MSPB, stressing it “as the cornerstone” of the reform. He then moved on to talk about the OPM—a tactic similar to Campbell’s.⁴¹⁵

The three key persons for the enactment of the CSRA used dual tactics of bureaucracy bashing and issue technicalization. These tactics were effective in securing public support and passing the bill, but they were costly. Their bureaucracy bashing reflected and contributed to lowered commitment, declining competence, wide-spread distrust in government, and fewer applications for government jobs. Their technicalization influenced a lack of constitutional debates, which had been a great

⁴¹² U.S. OPM, *Civil Service Reform: A Report on the First Year* (January 1980), pp. 2-3.

⁴¹³ Alan Campbell, “Civil Service Reform: A New Commitment,” *PAR* 38 (March/April 1978), p. 101.

⁴¹⁴ US Senate, *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings before the Committee on Government Affairs*, 95th Congress, 2nd Session, p. 1123.

⁴¹⁵ *Ibid*, pp. 1125-30.

tradition in Congress during past civil service reforms. In this sense, the 1978 reform was a break from America's reform tradition.

As discussed in Chapter 4, the idea of forcing the bureaucracy to serve the president as a single master dated back to the claim of President Jackson and his colleagues that "The President's power is absolute." It also resembles, as discussed in Chapter 1, the Brownlow report, whose often-quoted phrase, "The separation of powers places in the President, and in the President *alone*, the *whole* executive power of the Government of the United States" was echoed in the debates concerning the CSRA. As John Rohr articulated, however, the report made a fundamental error by transforming the *chief* executive into a *sole* executive.

The CSRA also related to the infamous Malek Manual. In the March 20, 1978 issue of the *Federal Times*, the author of the Malek Manual is quoted as saying:

I congratulate President Carter on his proposed civil service reforms. It was exactly to that kind of result that my manual was written. There are many ideas in this legislation that resemble the May Manual.⁴¹⁶

According to James Peirce, the author of the Manual boasted to a reporter that several members of the Carter administration had contacted him to express interest in the ideas in the Malek Manual and to praise it. Whether the boast is true or not, it is clear that the CSRA was in line with Jacksonian presidential supremacy, the Brownlow report's sole executive, and the Malek Manual's spirit, in that all attempted to make the president a single master of the bureaucracy.

⁴¹⁶ Quoted in US House of Representatives, *Civil Service Reform: Hearings before the Committee on Post Office and Civil Service*, 95th Congress, 2nd Session, p. 278.

If President Arthur attempted to restore some of the presidential power by passively restricting congressional involvement, President Carter tried to enhance the power by proactively increasing its power just as Moe would predict. Whether it was due to “natural evolution,” “congressional structure” or “presidential tactic,” the proponents of the bill succeeded in passing the bill and declaring that the president was the single master of the bureaucracy, while effectively restricting Constitutional debate of who the bureaucracy’s masters were.

Chapter 7: Conclusion

The previous chapters covered congressional debates on the federal bureaucracy's masters during key civil service reform eras. This chapter summarizes the major points of the previous chapters and deduces some overall implications. The dissertation concludes with a consideration of its limitations and a future research agenda that could follow from the work done here.

The Founding Era

Under the Articles of Confederation, the legislative branch held the power to appoint public officers. Under the Constitution, however, that power was transferred to the president. Although this change was dramatic, it was not hotly debated in the 1787 Constitutional Convention. The reasons for the modest debate over this transfer of power are clear. The general defects of the Articles of Confederation and, in particular, its lack of an “energetic” executive, were widely accepted. Reflecting this prevailing public sentiment, both the Virginia Plan and the New Jersey Plan framed the debate by vesting the power to appoint public officials solely in the executive. Thus, both the Articles of Confederation and the two initial plans that served as a foundation for the 1787 Convention debate upheld a single master perspective.

It was Alexander Hamilton who first proposed a multiple masters scheme during the Convention. Hamilton's proposal contained two different approaches based on the level of appointment. Hamilton wanted to vest in the president the sole appointing power

of the heads of departments. At the same time, he proposed requiring the Senate's approval for all other officers. Hamilton argued that while the heads of departments should maintain their responsiveness to the president at all times and serve the president as their single master, other bureaucrats should serve both the president and the Senate as their dual masters.

Hamilton's idea of the collaboration of the president and Congress was not initially accepted by the Convention, but was later revived during committee proceedings. On August 6, the Committee of Detail proposed two important changes in the Appointment Clause: (1) the president shall appoint "officers" instead of "to Offices"; (2) the Treasurer shall be appointed not by the president but by the "Legislature of the United States." James Madison opposed the first proposition. He claimed that if the Constitution allowed the president to appoint "officers" instead of "to offices," the provision might open a path to interpretation that the president could appoint officers even when the offices had not been created by Congress. Madison pressed his case that the creation of offices was Congress' responsibility, while the appointing power should be vested in the president. As such, both Hamilton and Madison held for a dual master scheme in which a delicate balance between Congress and the president was to become a principle of the Constitution.

On September 4, the Committee of Eleven offered a system of dual masters, reviving Hamilton's idea when it inserted "by and with the advice and consent of the Senate" in the Appointment Clause. Although the advice and consent can now be taken for granted in many circumstances, it was a crucial invention by the framers to address

their concerns about possible tyranny either by the president or the Senate. To avoid potential despotism, the framers chose a dual masters system.

During the ratification debate, the Federalists and Anti-Federalists had very different views of the Appointment Clause and Excepting Clause of the proposed Constitution. Many Anti-Federalists opposed the Constitution because they saw the possibility of dictatorship by either the president or the Senate. Luther Martin, for instance, held concerns about the president's dominating power over Congress. In contrast, Federal Farmer saw a threat from the Senate, which might become a body "to order and dictate." The Federalists supported the proposed Constitution because they viewed the proposed scheme as necessary to prevent dictatorship by either branch of the government. Publius strongly endorsed the cooperation of the Senate and the president in the appointment of officers as a means to produce a stable public administration and overall good government.

Despite differences between the Anti-Federalists and the Federalists, they had one critical point in common: Neither of them wanted a government controlled solely by one branch. Thus, through the Convention debate as well as the Ratification debate, the framers advocated a scheme that was based on the principle of the multiple masters of the Federal bureaucracy.

The Jacksonian Era

The Tenure of Office Act of 1820 codified that officers concerned with the collection or disbursement of money should be appointed for fixed terms of four years.

In 1835, the Senate debated at length whether to expand or repeal the Act. As the debate was recognized as holding as much importance as the “Decision of 1789,” it was dubbed the “Debate of 1835.” Yet this debate has been essentially ignored by public administration scholars. During the debate, Senator Nathaniel Tallmadge, representing President Jackson’s view, argued for expanding the Act. Tallmadge noticed the textual difference between the “granted” power of Congress and the “vested” power of the president. In his view, the source of the federal government’s power was the states’ power, which was “granted” to Congress. The executive power, however, did not need to be granted, because it automatically followed from the grant of legislative power. Once vested by the Constitution, Congress cannot interfere with the executive power, and thus “[t]he president’s power is absolute.” To Tallmadge’s way of thinking, as a tool suitable for the absolute presidential power, the act should be expanded to apply to other public officers that were not originally included in the act. This, in turn, would clearly provide the president with greater mastery over the bureaucracy.

In contrast, Senators Thomas Benton and John Calhoun wanted to repeal the Tenure of Office Act, which played a critical role in making the president the sole master of the bureaucracy. Benton proposed transferring the power simply to Congress, thus establishing Congress as a sole master of the bureaucracy. Unlike Benton, Calhoun wanted to refresh the subtle balance between Congress and the president by requiring the president to submit reasons for removal each time the process occurred, thereby reinstating the Senate as the “co-ordinate appointing power.” Once again, the framers’ scheme of multiple masters was reinforced in the Senate debate in 1835. Benton and Calhoun, however, did not emphasize the stability of the government. Their aim was

focused on winning the upcoming election rather than on the larger importance of securing stable government.

Senator Henry Clay recognized and overcame that shortcoming. Clay saw in President Jackson's personnel policy the danger of making the president the single master of the bureaucracy, which he worried might eventually lead to tyranny. He hoped to restore "just equilibrium" between Congress and the president. In addition, he assiduously cared for the stability of public service and durability of the government. Clay not only held a multiple masters point of view, he also exhibited the bureaucracy perspective.

The Republican Era (1869-1901)

During what Leonard D. White called the Republican era, the Tenure of Office Act of 1867 and the Pendleton Act of 1883 were the landmark measures for reforming the bureaucracy. The Tenure of Office Act of 1867 provided that no federal official whose appointment required Senate confirmation could be removed without the consent of the Senate. The act severely limited the president's removal power, which after the "Decision of 1789" had been widely accepted. Although at first there were differences of opinion among the two Houses of Congress and the president, it was finally agreed that public officers could be removed after the collaboration of the president and the Senate—except in the case of cabinet members who had been appointed by a former president. In a stunning caving of a sitting president, Andrew Johnson agreed, as part of an attempt to escape impeachment, that he could not remove officers he had appointed if those

appointments had been made with the consent of the Senate. This contributed much to a period in which the Senate could be considered the single master of the bureaucracy.

The Pendleton Act of 1883 introduced an open, competitive examination for entrance into the public service and further established a bipartisan Civil Service Commission of three members. In contrast to the Tenure of Office Act of 1867, the Pendleton Act sought to manage the “front door” of the civil service. As part of enacting the law, President Arthur hoped to restore presidential powers limited in 1867. Arthur also opposed several key features of the much admired British system, including lowest grade entrance, promotion from a lower grade, and age restrictions. Arthur’s opinions were reflected in the act. In addition, he was provided the discretion to decide how broad the coverage should be. Through the enactment, the president restored his mastery over the bureaucracy at least in terms of removal power.

The bill’s sponsor, Senator Pendleton, held a different view. Together with civil service reformers such as Dorman Eaton, Carl Schurz, and George Curtis, Pendleton sought to emphasize political neutrality that would allow the bureaucrats to serve the dual masters of the president and Congress with greater balance. An analysis of the congressional debates concerning the two acts reveals that the old perspective of multiple masters of the bureaucracy was a priority in lawmakers’ minds. Although legislators did not explicitly articulate that bureaucrats should serve as a “balance wheel” between dual masters, they nonetheless were plainly aware of the dangers that too subservient bureaucrats might present. As such, they held in principle the view that Senate approval for removals as well as the political neutrality of bureaucrats might serve as a starting point for a nobler and more balanced role for the bureaucracy.

The Civil Service Reform Act of 1978

The Civil Service Reform Act of 1978 was considered “the first comprehensive reform” of federal civil service system after the passage of the Pendleton Act. The act created mainstays of modern federal personnel management including the OPM, MSPB, OSC, and FLRA. In addition to these important organizational changes, the act established the Senior Executive Service in order to secure greater responsiveness of high ranking officials to the president’s agenda. After the events of almost a hundred years, the neutrality of the bureaucracy emphasized in the Pendleton Act gave way to responsiveness to the president. Despite the significance of this change, congressional consideration of the bill was modest. The Senate spent only one day in full discussion of the bill, and the House spent only four days. The 1978 debate was comparatively silent on constitutional issues such as shared powers of the government. Instead, it appears most legislators simply assumed that the president was unquestionably the master of the bureaucracy. There were some debates regarding the problems the creation of the OPM, MSPB, and SES might represent. These arguments, however, were much weaker in tone and content than those of other reform eras, and were also forcefully rebutted. To many lawmakers, the act was “absolutely essential” to assuring presidents of their mastery over the bureaucracy. The Senate’s vote tally of eighty-seven to one is a telling indicator of the lawmakers’ perception of the need for greater presidential authority.

Considering the fierce debates during the previous civil service reform era, the limited debate on constitutional issues and quiet acceptance of presidential mastery over the bureaucracy represented an astonishing change in how members of Congress and the

citizenry view the bureaucracy in modern times. Scholars of public administration were left to sort out the drivers behind this obvious change. Chester Newland maintained that the slow but steady transfer of power from Congress to the president had accumulated enough to result in the acceptance of the single master perspective. Patricia Ingraham suggested that congressional committee structure was responsible for the lack of debate. The Senate Governmental Affairs committee was new and did not have accumulated knowledge. The House Post Office and Civil Service Committee, largely because of its long-standing ties with organized labor interests, moved the issue of the debate from constitutional shared power to management-labor relations.

This dissertation has argued that the tactics the reformers adopted also partly accounted for the lack of debate. They heavily relied on bureaucracy bashing, contributing to the long-term cost of public distrust in government and decreasing morale of the bureaucracy. Another tactic adopted by the Carter administration was to make the reform a very technical issue, intentionally avoiding constitutional issues. Relying on these tactics, the proponents succeeded in passing the bill and firmly established the president as the single master of the bureaucracy.

Comparing the Debates

In comparing these various civil service reform debates, there are several conspicuous differences. First, the depth of broad-based deliberation has decreased. During the founding era, Hamilton's original proposal went through the Committee of Eleven and the Committee of Detail accompanying numerous deliberations and debates

on the appointing power. Initial indifference and opposition to Hamilton's idea ultimately transformed to the current system by unanimous agreement. In addition, the framers discussed and accepted the Excepting Clause during the final days of the Convention. In fact, the entire four months of the Convention contained serious deliberations concerning who controls the bureaucracy. Further during the Ratification debate, the Federalists and the Anti-federalists aired many concerns on the appropriateness of the proposed Constitution with regard to powers over the bureaucracy. These thoughtful deliberations gave us invaluable wisdom on how to "run" the Constitution. Likewise, during the Debate of 1835, Senators Benton, Calhoun, Clay, and Tallmadge debated fiercely regarding the Tenure of Office Act of 1820. Though the act was a short one composed of only four sections, the debate among them was intense accompanying long speeches and three different committee reports. During the enactment of the Tenure of Office Act of 1867 and the Pendleton Act of 1883, Senators and Representatives debated hotly, as indicated by nearly one hundred and two hundred pages of the *Congressional Globe*, respectively. In contrast, in consideration of the CSRA of 1978, the Senate debated only one day and the House allotted just four days—despite the fact that the provisions of the CSRA were much longer and more complicated than previous civil service reform bills.

Second, not only has the amount of time spent on deliberation decreased, but debates on constitutional issues have also been de-emphasized. The debate during the Convention was, of course, centered on constitutional issues. Later in the Debate of 1835, Senators Tallmadge and Clay did express constitutional arguments that held enough weight for later scholars to consider. Still, Senators Benton and Calhoun had much less

discussion concerning constitutional matters in their respective reports than they might have provided. In 1883, civil service reformers, while advocating neutrality of the bureaucracy, paid little attention to constitutional grounds. They were interested in the ability, mobility, and character of the bureaucracy, but fell short with regard to constitutional debate. The trend accelerated when Congress enacted the CSRA of 1978. Reference to the Constitution was minimal, and technical aspects of the bureaucracy including efficiency and responsiveness were overwhelmingly emphasized. Although the discussion of responsiveness to the president would naturally suggest a constitutional debate, lawmakers chose not to take that direction.

Third, the degree of acceptance of the president as the single master of the bureaucracy has intensified. During the Founding era, the framers were very concerned about a possible tyranny either at the hands of the president or by the Senate. They envisioned a delicate balance between two masters of the bureaucracy when they devised a system of collaboration in the process of appointing officers. During the Debate of 1835, there was a push by Senator Tallmadge to empower the president as the single master, yet at that juncture there were still strong counter-arguments to Tallmadge's position in favor of Congress as the master. By 1883, despite the civil service reformers' balanced view of dual masters, President Arthur was able to restore a strong presidential perspective. And by 1978, all the arguments in favor of Congress had virtually disappeared, with the president widely accepted as the single master of the bureaucracy.

Fourth, the bureaucracy perspective—a point of view that puts the bureaucracy front and center—paled as the Republic grew older. In the Founding era, Publius clearly advocated the stability of the bureaucracy in order to assure good government as well as

the success of the new Constitution. Moreover, in 1835, Senator Clay emphasized the importance of the bureaucracy. In 1883, the reformers refreshed the importance of the bureaucracy and advocated its neutrality. But ninety-five years later, the congressional debate on the proposed CSRA almost entirely ignored the importance of the bureaucracy. The proponents of the bill applied a tactic of bashing the bureaucracy, contributing to a long-term negative impact on the stability and trust of the bureaucracy.

When Theories Meet History

The acceptance of the president in the 1978 congressional debate offers support to theories that view the president as the single master of the bureaucracy. These works were introduced in Chapter 1: Nathan's administrative presidency, Burke's institutional presidency, and Moe's politicized presidency. However, with regard to David Rosenbloom's theory of "legislative-centered public administration," there seems to be a serious anomaly. Rosenbloom argues that subsequent to the APA of 1946, the legislative branch had repositioned itself to regain its mastery over the bureaucracy. Congress successfully extended legislative values to administrative agencies, adjusted itself structurally, and furthermore conceptualized "executive" agencies as "extensions of Congress." If, as Rosenbloom claims, Congress consciously made these efforts in 1946 and in related subsequent legislation, why had Congress so gently conceded its power over the bureaucracy in 1978? Providing the president great tools to control the bureaucracy simply does not fit a portrait of Congress pressing a relentless effort to regain its control over the bureaucracy. Congress may, as Weingast and McCubbins et al.

claim, have adopted a “decibel meter” or a “fire-alarm oversight” strategy. If that is the basis of argument, Weingast, Moran, McCubbins, and Schwartz may be right in that Congress has, to some extent, re-asserted itself.

Primarily because this dissertation focused on congressional debates, scholarly opinion advocating the court as a master of the bureaucracy was not supported by this dissertation’s historical analysis. O’Leary and Wise, for instance, might suggest other cases to flesh out this perspective. From a methodological viewpoint, this certainly represents a “selection bias.” Nevertheless, if the courts can be demonstrated to be another master of the bureaucracy, this dissertation’s support of multiple masters theory will simply garner additional reinforcement.

Theories of bureaucratic autonomy were never fully embraced during the civil service reform debates. The closest case was the Pendleton Act of 1883. Political neutrality emphasized in the act, however, was never intended to present an opposing alternative to political masters’ thought and theory. In the research for this dissertation, no statement was found in the congressional debate that supported such a theoretical conception of bureaucratic autonomy. The views of Daniel Carpenter and Brian Cook were asserted but not supported—at least in the civil service reform debates.

In contrast, the multiple masters theories were strongly supported by the debates during the Founding era, the Debate of 1835, and the debate on the Pendleton Bill. Though weakened by the Senate’s eight-seven to one vote in 1978 in favor of the president, the multiple masters theory was supported in important congressional debates by leading politicians of the day. At least in terms of personnel policy, the historical roots of the president as the single master are disturbingly shallow. To be sure, President

Jackson claimed the “absolute power” of the presidency, but it met strong resistance from Congress. Only after the enactment of the CSRA of 1978 has the president as the sole master been widely accepted.

Limitations and Future Research

As this dissertation focused on civil service reforms, it did not attend to other relevant government reforms including budget reforms, deregulation, and reorganization plans. Should there be evidence to view the president’s single mastery based on these other areas, this dissertation is without doubt limited. That work remains to be done, and could be the basis for follow-up research.

The dissertation was limited in its scope not only related to government reforms in general, but also within civil service reforms. It could be reasonably argued that the ninety-five years between the Civil Service Act and the Civil Service Reform Act was too long a break in the cases reviewed. The changes between 1883 and 1978 were plainly dramatic. The striking changes may be smoothed if this work had included other research on civil service reforms such as the Classification Act of 1923, the Hatch Act of 1939, the Ramspeck Act of 1940, and the Veterans’ Preference Act of 1944, the Classification Act of 1949, the Intergovernmental Personnel Act of 1970. Had they been included, changes may appear to have been more gradual, perhaps providing support to Newland’s “natural outcome” theory. Including all cases of civil service reform as treated here was beyond the scope of any single dissertation. Exploring these excluded cases and working toward a more generalized theory should be part of future research.

Further, there were other civil service reforms before 1883 and after 1978. Examples include the Classification Act of 1853, the Act of 1871 (which created the first Civil Service Commission), President Eisenhower's Executive Order to create Schedule C positions, President Nixon's failed attempt to establish the Federal Executive Service, and the National Performance Review under President Clinton. These excluded reforms may pose the challenge of selection bias discussed in Chapter 1 of this dissertation. Again, full-treatment is beyond a reasonable scope, but should be a basis for further research.

Another limitation relates to the primary source that this dissertation used: the *Congressional Record*. One problem of the document is that congressmen were allowed to add or to revise their statements after the verbal debate ended. This so-called "revision privilege" is not authorized by statute but a matter of congressional tradition. Although many attempts have been made to limit any change of "substantive nature," there still remains a chance to abuse the privilege.⁴¹⁷ If, indeed, the privilege was abused, the texts that were analyzed in this dissertation might not accurate historical records.

Yet another limitation of the *Congressional Record* was the fact that courts were less significantly treated than the other two branches. As a result, despite the existence of theories supporting the judiciary as a master of the bureaucracy, the courts were not accorded attention in the dissertation. Extending the research should clearly entail consideration of a multiple masters scheme through analysis of Supreme Court decisions.

More generally, any kind of textual analysis has a potential weakness of the "span of inferential reasoning." That is, the analysis of written materials involves interpretation

⁴¹⁷ N. David Bleisch, "The Congressional Record and the First Amendment: Accuracy is the Policy," 12 *Boston College Environmental Affairs Law Review* 341 (Winter 1985).

by researchers, which may lack “objectivity.” As Marshall and Rossman articulate, “[c]are should be taken, therefore, in displaying the logic of interpretation used in inferring meaning from the artifacts.”⁴¹⁸

In addition, based on the historical findings of this dissertation, a next step for future research could be case studies of specific bureaucrats or agencies that struggled in the presence of multiple masters. As mentioned in Chapter 1, cases such as Edward Sylvester of the Department of Labor, Eileen Claussen of the EPA, and the attorneys in the Justice Department in the late 1960s present excellent candidates for further research.

A final limitation (and opportunity for future research) relates to cross-national analysis. Other countries’ experiences under similar separation of powers systems as the United States would be of great interest. As a field, public administration should clearly devise theories not limited to experiences in the U.S. environment alone. Studies of European countries including France, United Kingdom, and Germany as well as Asian countries such as Korea, China, and Japan will contribute to a more thorough understanding of the field—particularly for American scholars.

⁴¹⁸ Catherine Marshall & Gretchen Rossman, *Designing Qualitative Research*, 3rd ed. (Thousand Oaks, CA: Sage, 1999), p. 117.

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Appendix

1. The Tenure of Office Act of 1820
2. The Tenure of Office Act of 1867
3. The Civil Service Act of 1883
4. The Civil Service Reform Act of 1978 (selected)

1. The Tenure of Office Act of 1820

An Act to limit the term of office of certain officers therein named, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That from and after the passing of this act, all district attorneys, collectors of the customs, naval officers and surveyors of the customs, navy agents, receivers of public moneys for lands, registers of the land offices, paymasters in the army, the apothecary general, the assistant apothecaries general, and the commissary general of purchases, to be appointed under the laws of the United States, shall be appointed for the term of four years, but shall be removable from office at pleasure.

Section 2. *And be it further enacted,* That the commission of each and every of the officers named in the first section of this act, now in office, unless vacated by removal from office, or otherwise, shall cease and expire in the manner following: All such commissions, bearing date on or before the thirtieth day of September, one thousand eight hundred and fourteen, shall cease and expire on the day and month of their respective dates, which shall next ensue after the thirtieth day of September next; all such commissions, bearing date after the said thirtieth day of September, in the year one thousand eight hundred and fourteen, and before the first day of October, one thousand eight hundred and sixteen, shall cease and expire on the day and month of their respective dates, which shall next ensue after the thirtieth day of September, one thousand eight hundred and twenty-one. And all other such commissions shall cease and expire at the expiration of the term of four years from their respective dates.

Section 3. *And be it further enacted,* That it shall be lawful for the President of the United States, and he is hereby authorized, from time to time as in his opinion the interest of the United States may require, to regulate and increase the sums for which the bonds required, or which may be required by the laws of the United States, to be given by the said officers, and by all other officers employed in the disbursement of the public moneys under the direction of the War or Navy Departments, shall be given; and all bonds given in conformity with such regulations shall be as valid and effectual, to all intents and purposes, as if given for the sums respectively mentioned in the laws requiring the same.

Section 4. *And be it further enacted,* That the commissions of all officers employed in levying or collection the public revenue shall be made out and recorded in the Treasury Department, and the seal of the said department affixed thereto; any law to the contrary notwithstanding: *Provided,* That the said seal shall not be affixed to any such commission before the same shall have been signed by the President of the United States.

APPROVED, MAY 15, 1820.

2. The Tenure of Office Act of 1867

An Act regulating the Tenure of certain Civil Offices.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is, and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided: *Provided,* That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney-General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

Section 2. *And be it further enacted,* That when any officer appointed as aforesaid, excepting judges of the United States courts, shall, during a recess of the Senate, be shown, by evidence satisfactory to the President, to be guilty of misconduct in office, or crime, or for any reason shall become incapable or legally disqualified to perform its duties, in such case, and in no other, the President may suspend such officer and designate some suitable person to perform temporarily the duties of such office until the next meeting of the Senate, and until the case shall be acted upon by the Senate, and such person so designated shall take the oaths and give the bonds required by law to be taken and given by the person duly appointed to fill such office; and in such case, it shall be the duty of the President, within twenty days after the first day of such next meeting of the Senate, to report to the Senate such suspension, with the evidence and reasons for his action in the case, and the name of the person so designated to perform the duties of such office. And if the Senate shall concur in such suspension and advise and consent to the removal of such officer, they shall so certify to the President, who may thereupon remove such officer, and, by and with the advice and consent of the Senate, appoint another person to such office. But if the Senate shall refuse to concur in such suspension, such officer so suspended shall forthwith resume the functions of his office, and the powers of the person so performing its duties in his stead shall cease, and the official salary and emoluments of such officer shall, during such suspension, belong to the person so performing the duties thereof, and not to the officer so suspended: *Provided, however,* That the President, in case he shall become satisfied that such suspension was made on insufficient grounds, shall be authorized, at any time before reporting such suspension to the Senate as above provided, to revoke such suspension and reinstate such officer in the performance of the duties of his office.

Section 3. *And be it further enacted,* That the President shall have power to fill all vacancies which may happen during the recess of the Senate, by reason of death or resignation, by granting commissions which shall expire at the end of their next session thereafter. And if no appointment, by and with the advice and consent of the Senate, shall be made to such office so vacant or temporarily filled as aforesaid during such next session of the Senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office.

Section 4. *And be it further enacted,* That nothing in this act contained shall be construed to extend the term of any office the duration of which is limited by law.

Section 5. *And be it further enacted*, That if any person shall, contrary to the provisions of this act, accept any appointment to or employment in any office, or shall hold or exercise or attempt to hold to or exercise, any such office or employment, he shall be deemed, and is hereby declared to be, guilty of a high misdemeanor, and, upon trial and conviction thereof, he shall be punished therefor by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court.

Section 6. *And be it further enacted*, That every removal, appointment, or employment, made, had, or exercised, contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment, shall be deemed, and are hereby declared to be, high misdemeanors, and upon trial and conviction thereof, every person guilty thereof shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding five years, or both said punishment, in the discretion of the court: *Provided*, That the President shall have power to make out and deliver, after the adjournment of the Senate, commissions for all officers whose appointment shall have been advised and consented to by the Senate.

Section 7. *And be it further enacted*, That it shall be the duty of the Secretary of the Senate, at the close of each session thereof, to deliver to the Secretary of the Treasury, and to each of his assistants, and to each of the auditors, and to each of the comptrollers in the treasury, and to the treasurer, and to the register of the treasury, a full and complete list, duly certified, of all the persons who shall have been nominated to and rejected by the Senate during such session, and a like list of all the offices to which nominations shall have been made and not confirmed and filled at such session.

Section 8. *And be it further enacted*, That whenever the President shall, without the advice and consent of the Senate, designate, authorize, or employ any person to perform the duties of any office, he shall forthwith notify the Secretary of the Treasury thereof; and it shall be the duty of the Secretary of the Treasury thereupon to communicate such notice to all the proper accounting and disbursing officers of his department.

Section 9. *And be it further enacted*, That no money shall be paid or received from the treasury, or paid or received from or retained out of any public moneys or funds of the United States, whether in the treasury or not, to or by or for the benefit of any person appointed to or authorized to act in or holding or exercising the duties or functions of any office contrary to the provisions of this act; nor shall any claim, account, voucher, order, certificate, warrant, or other instrument providing for or relating to such payment, receipt, or retention, be presented, passed, allowed, approved, certified, or paid by any officer of the United States, or by any person exercising the functions or performing the duties of any office or place of trust under the United States, for or in respect to such office, or the exercising or performing the functions or duties thereof; and every person who shall violate any of the provisions of this section shall be deemed guilty of a high misdemeanor, and, upon trial and conviction thereof, shall be punished therefor by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding ten years, or both said punishments, in the discretion of the court.

SCHUYLER COLFAX,
Speaker of the House of Representatives.
LA FAYETTE S. FOSTER,
President of the Senate, pro tempore.

IN THE SENATE OF THE UNITED STATES,

March 2, 1867.

The President of the United States having returned to the Senate, in which it originated, the bill entitled "An act regulating the tenure of certain civil offices," with his objections thereto, the Senate proceeded, in pursuance of the Constitution, to reconsider the same; and

Resolved, That the said bill do pass, two thirds of the Senate agreeing to pass the same.

Attest:

J. W. FORNEY,
Secretary of the Senate.

IN THE HOUSE OF REPRESENTATIVES U. S.

March 2, 1867.

The House of Representatives having proceeded, in pursuance of the Constitution, to reconsider the bill entitled "An act regulating the tenure of certain civil offices," returned to the Senate by the President of the United States, with his objections, and sent by the Senate to the House of Representatives, with the message of the President returning the bill:

Resolved, That the bill do pass, two thirds of the House of Representatives agreeing to pass the same.

Attest :

EDWD. McPHERSON,
Clerk.

3. The Civil Service Act of 1883

An act to regulate and improve the civil service of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three commissioners shall constitute the United States Civil Service Commission. Said commissioners shall hold no other official place under the United States.

The President may remove any commissioner; and any vacancy in the position of commissioner shall be so filled by the President, by and with the advice and consent of the Senate, as to conform to said conditions for the first selection of commissioners.

The commissioners shall each receive a salary of three thousand five hundred dollars a year. And each of said commissioners shall be paid his necessary traveling expenses incurred in the discharge of his duty as a commissioner.

Section 2. That it shall be the duty of said commissioners:

FIRST. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

SECOND. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

Third, appointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things, a statement, under oath, setting forth his or her actual bona fide residence at the time of making the application, as well as how long he or she has been a resident of such place.

Fourth, that there shall be a period of probation before any absolute appointment or employment aforesaid.

Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.

Seventh, there shall be non-competitive examinations in all proper cases before the commission, when competent persons do not compete, after notice has been given of the existence of the vacancy, under such rules as may be prescribed by the commissioners as to the manner of giving notice.

Eighth, that notice shall be given in writing by the appointing power to said commission of the persons selected for appointment or employment from among those who have been

examined, of the place of residence of such persons, of the rejection of any such persons after probation, of transfers, resignations, and removals, and of the date thereof, and a record of the same shall be kept by said commission. And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth in connection with such rules, and the reasons therefor shall be stated in the annual reports of the commission.

THIRD. Said commission shall, subject to the rules that may be made by the President, make regulations for, and have control of, such examinations, and, through its members or the examiners, it shall supervise and preserve the records of the same; and said commission shall keep minutes of its own proceedings.

FOURTH. Said commission may make investigations concerning the facts, and may report upon all matters touching the enforcement and effects of said rules and regulations, and concerning the action of any examiner or board of examiners hereinafter provided for, and its own subordinates, and those in the public service, in respect to the execution of this act.

FIFTH. Said commission shall make an annual report to the President for transmission to Congress, showing its own action, the rules and regulations and the exceptions thereto in force, the practical effects thereof, and any suggestions it may approve for the more effectual accomplishment of the purposes of this act.

Section 3. That said commission is authorized to employ a chief examiner, a part of whose duty it shall be, under its direction, to act with the examining boards, so far as practicable, whether at Washington or elsewhere, and to secure accuracy, uniformity, and justice in all their proceedings, which shall be at all times open to him. The chief examiner shall be entitled to receive a salary at the rate of three thousand dollars a year, and he shall be paid his necessary traveling expenses incurred in the discharge of his duty. The commission shall have a secretary, to be appointed by the President, who shall receive a salary of one thousand six hundred dollars per annum. It may, when necessary, employ a stenographer, and a messenger, who shall be paid, when employed, the former at the rate of one thousand six hundred dollars a year, and the latter at the rate of six hundred dollars a year. The commission shall, at Washington, and in one or more places in each State and Territory where examinations are to take place, designate and select a suitable number of persons, not less than three, in the official service of the United States, residing in said State or Territory, after consulting the head of the department or office in which such persons serve, to be members of boards of examiners, and may at any time substitute any other person in said service living in such State or Territory in the place of any one so selected. Such Boards of examiners shall be so located as to make it reasonably convenient and inexpensive for applicants to attend before them; and where there are persons to be examined in any State or Territory, examinations shall be held therein at least twice in each year. It shall be the duty of the collector, postmaster, and other officers of the United States, at any place outside of the District of Columbia where examinations are directed by the President or by said board to be held, to allow the reasonable use of the public buildings for holding such examinations, and in all proper ways to facilitate the same.

Section 4. That it shall be the duty of the Secretary of the Interior to cause suitable and convenient rooms and accommodations to be assigned or provided, and to be furnished, heated, and lighted, at the city of Washington, for carrying on the work of said commission and said examinations, and to cause the necessary stationery and other articles to be supplied, and the necessary printing to be done for said commission.

Section 5. That any said commissioner, examiner, copyist, or messenger, or any person in the public service who shall willfully and corruptly, by himself or in co-operation with one or more other persons, defeat, deceive, or obstruct any person in respect of his or her right of examination according to any such rules or regulations, or who shall willfully, corruptly, and falsely mark,

grade, estimate, or report upon the examination or proper standing of any person examined hereunder, or aid in so doing, or who shall willfully and corruptly make any false representations concerning the same or concerning the person examined, or who shall willfully and corruptly furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined, or to be examined, being appointed, employed, or promoted, shall for each such offense be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars, or by imprisonment not less than ten days, nor more than one year, or by both such fine and imprisonment.

Section 6. That within sixty days after the passage of this act it shall be the duty of the Secretary of the Treasury, in as near conformity as may be to the classification of certain clerks now existing under the one hundred and sixty-third section of the Revised Statutes, to arrange in classes the several clerks and persons employed by the collector, naval officer, surveyor, and appraisers, or either of them, or being in the public service, at their respective offices in each customs district where the whole number of said clerks and persons shall be all together as many as fifty. And thereafter, from time to time, on the direction of the President, said Secretary shall make the like classification or arrangement of clerks and persons so employed, in connection with any said office or offices, in any other customs district. And, upon like request, and for the purpose of this act, said Secretary shall arrange in one or more of said classes, or of existing classes, any other clerks, agents, or persons employed under his department in any said district not now classified; and ever such arrangement and classification upon being made shall be reported to the President.

Second. Within said sixty days it shall be the duty of the Postmaster-General, in general conformity to said one hundred and sixty-third section, to separately arrange in classes the several clerks and persons employed, or in the public service, at each post-office, or under any postmaster of the United States, where the whole number of said clerks and persons shall together amount to as many as fifty. And thereafter, from time to time, on the direction of the President, it shall be the duty of the Postmaster-General to arrange in like classes the clerks and persons so employed in the postal service in connection with any other post-office; and every such arrangement and classification upon being made shall be reported to the President.

Third. That from time to time said Secretary, the Postmaster-General, and each of the heads of departments mentioned in the one hundred and fifty-eighth section of the Revised Statutes, and each head of an office, shall, on the direction of the President, and for facilitating the execution of this act, respectively revise any then existing classification or arrangement of those in their respective departments and offices, and shall, for the purpose of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments not before classified for examination.

Section 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes; nor shall any officer not in the executive branch of the government, or any person merely employed as a laborer or workman, be required to be classified hereunder; nor, unless by direction of the Senate, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination.

Section 8. That no person habitually using intoxicating beverages to excess shall be appointed to, or retained in, any office, appointment, or employment to which the provisions of this act are applicable.

Section 9. That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any of said grades.

Section 10. That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or member of the House of Representatives, except as to the character or residence of the applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

Section 11. That no Senator, or Representative, or Territorial Delegate of the Congress, of Senator, Representative, or Delegate elect, or any officer or employee of either of said houses and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States.

Section 12. That no person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in this act, or in any navy yard, fort, or arsenal, solicit in any manner whatever, or receive any contribution of money or any other thing of value for any political purpose whatever.

Section 13. No officer or employee of the United States mentioned in this act shall discharge, or promote, or degrade, or in manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

Section 14. That no officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of the House of Representatives, or Territorial Delegate, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

Section 15. That any person who shall be guilty of violating any provision of the four foregoing sections shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding five thousand dollars, or by imprisonment for a term not exceeding three years, or by such fine and imprisonment both, in the discretion of the court.

Approved, January sixteenth, 1883.

4. The Civil Service Reform Act of 1978 (selected provisions)

An Act to reform the civil service laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1101. Office of Personnel Management

The Office of Personnel Management is an independent establishment in the executive branch. The Office shall have an official seal, which shall be judicially noticed, and shall have its principal office in the District of Columbia, and may have field offices in other appropriate locations.

Section 1102. Director; Deputy Director; Associate Directors

(a) There is at the head of the Office of Personnel Management a Director of the Office of Personnel Management appointed by the President, by and with the advice and consent of the Senate. The term of office of any individual appointed as Director shall be 4 years.

Section 3131. The Senior Executive Service

It is the purpose of this subchapter to establish a Senior Executive Service to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality.

Section 3134. Limitations of noncareer and limited appointments

(a) During each calendar year, each agency shall—

- (1) examine its needs for employment of noncareer appointees for the fiscal year beginning in the following year; and
- (2) submit to the Office of Personnel Management, in accordance with regulations prescribed by the Office, a written request for authority to employ a specific number of noncareer appointees for such fiscal year.

(b) The number of noncareer appointees in each agency shall be determined annually by the Office on the basis of demonstrated need of the agency. The total number of noncareer appointees in all agencies may not exceed 10 percent of the total number of Senior Executive Service positions in all agencies.

(c) Subject to the 10 percent limitation of subsection (b) of this section, the Office may adjust the number of noncareer positions authorized for any agency under subsection (b) of this section if emergency needs arise that were not anticipated when the original authorizations were made.

(d) The number of Senior Executive Service positions in any agency which are filled by noncareer appointees may not at any time exceed the greater of—

- (1) 25 percent of the total number of Senior Executive Service positions in the agency; or
- (2) the number of positions in the agency which were filled on the date of the enactment of the Civil Service Reform Act of 1978 by—

(A) noncareer executive assignments under subpart F of part 305 of title 5, Code of Federal Regulations, as in effect on such date, or

(B) appointments to level IV or V of the Executive Schedule which were not required on such date to be made by and with the advice and consent of the Senate.

This subsection shall not apply in the case of any agency having fewer than 4 Senior Executive Service positions.

(e) The total number of limited emergency appointees and limited term appointees in all agencies may not exceed 5 percent of the total number of Senior Executive Service positions in all agencies.

Section 3395. Reassignment and transfer within the Senior Executive Service

(a) (1) A career appointee in an agency—

(A) may, subject to paragraph (2) of this subsection, be reassigned to any Senior Executive Service position in the same agency for which the appointee is qualified; and

(B) may transfer to a Senior Executive Service position in another agency for which the appointee is qualified, with the approval of the agency to which the appointee transfers.

(2) A career appointee may be reassigned to any Senior Executive Service position only if the career appointee receives a written notice of the reassignment at least 15 days in advance of such reassignment.

(b) (1) Notwithstanding section 3394(b) of this title, a limited emergency appointee may be reassigned to another Senior Executive Service position in the same agency established to meet a bona fide, unanticipated, urgent need, except that the appointee may not serve in one or more positions in such agency under such appointment in excess of 18 months.

(2) Notwithstanding section 3394 (b) of this title, a limited term appointee may be reassigned to another Senior Executive Service position in the same agency the duties of which will expire at the end of a term of 3 years or less, except that the appointee may not serve in one or more positions in the agency under such appointment in excess of 3 years.

(c) A limited term appointee or a limited emergency appointee may not be appointed to, or continue to hold, a position under such an appointment if, within the preceding 48 months, the individual has served more than 36 months, in the aggregate, under any combination of such types of appointment.

(d) A noncareer appointee in an agency—

(1) may be reassigned to any general position in the agency for which the appointee is qualified; and

(2) may transfer to a general position in another agency with the approval of the agency to which the appointee transfers.

(e) (1) Except as provided in paragraph (2) of this subsection, a career appointee in an agency may not be involuntarily reassigned—

(A) within 120 days after an appointment of the head of the agency; or

(B) within 120 days after the appointment in the agency of the career appointee's most immediate supervisor who—

(i) is a noncareer appointee; and

(ii) has the authority to reassign the career appointee.

(2) Paragraph (1) of this subsection does not apply with respect to—

(A) any reassignment under section 4314 (b) (3) of this title; or

(B) any disciplinary action initiated before an appointment referred to in paragraph (1) of this subsection.

Section 3592. Removal from the Senior Executive Service

(a) Except as provided in subsection (b) of this section, a career appointee may be removed from the Senior Executive Service to a civil service position outside of the Senior Executive Service—

(1) during the 1-year period of probation under section 3393 (d) of this title, or

(2) at any time for less than fully successful executive performance as determined under subchapter II of chapter 43 of this title,

Except that in the case of a removal under paragraph (2) of this subsection the career appointee shall, at least 15 days before the removal, be entitled, upon request, to an informal hearing before an official designated by the Merit Systems Protection Board at which the career appointee may appear and present arguments, but such hearing shall not give the career appointee the right to initiate an action with the Board under section 7701 of this title, nor need the removal action be delayed as a result of the granting of such hearing.

(b) (1) Except as provided in paragraph (2) of this subsection, a career appointee in an agency may not be involuntarily removed—

(A) within 120 days after an appointment of the head of the agency; or

(B) within 120 days after the appointment in the agency of the career appointee's most immediate supervisor who—

(i) is a noncareer appointee; and

(ii) has the authority to remove the career appointee.

Section 4314. Ratings for performance appraisals

(a) Each performance appraisal system shall provide for annual summary ratings of levels of performance as follows:

(1) one or more fully successful levels,

(2) a minimally satisfactory level, and

(3) an unsatisfactory level.

(b) Each performance appraisal system shall provide that—

(1) any appraisal and any rating under such system—

(A) are made only after review and evaluation by a performance review board established under subsection (c) of this section;

(B) are conducted at least annually, subject to the limitation of subsection (c) (3) of this section;

(C) in the case of a career appointee, may not be made within 120 days after the beginning of a new Presidential administration; and

(D) are based on performance during a performance appraisal period the duration of which shall be determined under guidelines established by the Office of Personnel Management, but which may be terminated in any case in which the agency making an appraisal determines that an adequate basis exists on which to appraise and rate the senior executive's performance;

(2) any career appointee receiving a rating at any of the fully successful levels under subsection (a) (1) of this section may be given a performance award under section 5384 of this title;

(3) any senior executive receiving an unsatisfactory rating under subsection (a) (3) of this section shall be reassigned or transferred within the Senior Executive Service, or removed from the Senior Executive Service, but any senior executive who receives 2 unsatisfactory ratings in any period of 5 consecutive years shall be removed from the Senior Executive Service; and

(4) any senior executive who twice in any period of 3 consecutive years receives less than fully successful ratings shall be removed from the Senior Executive Service.

Author's Curriculum Vitae

SOO-YOUNG PARK

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Nationality: Korean
Gender: Male
Marital Status: Married with two sons

EDUCATION

Center for Public Administration and Policy, Virginia Tech **Blacksburg, VA**
(Fall, 2001-present)

Ph.D. majoring in public administration. Concentration topics include the relationship between the three constitutional masters and the bureaucrats, and government reform plans including organizational, budgeting and personnel management.

John F. Kennedy School of Government, Harvard University **Cambridge, MA**
(Fall, 1994-Fall, 1996)

Graduated with a Master's degree in Public Policy. Coursework included economics, econometrics, political theory, public management, American Presidency, business-government relationship, multi-national corporation, and privatization. Worked as a teaching assistant for Professor Pippa Norris in one of her courses: Democracy and Democratization. Served as the president of the Korean and Korean-American Students' Association of the John F. Kennedy School of Government. Recipient of the Korean government's long-term full scholarship with living allowances for two years.

MPP PAE: *Electoral System Reform in Korea*

Graduate School of Public Administration, Seoul National University **Seoul, Korea**
(Spring, 1986-Spring, 1988)

Graduated with a Master's degree in Public Administration. Concentrated on comparative administration and public policy. Took intensive courses on comparative administration, public finance, research methods, organization theory, personnel administration, and public policy. Worked as a research assistant for Professor Bark Dong-Suh, helping him with the publication of two books: Korean Administration, and Administration and Development. Honored as the recipient of one of the best dissertations of the year 1988.

MPA Dissertation: *The Relationship between Political Elites and Bureaucrats*

College of Law, Seoul National University **Seoul, Korea**
(Spring, 1982-Spring, 1986)

Graduated with an LLB degree. Coursework included various legal subjects such as constitutional law, torts, contracts, criminal law, and economic law. Also took variety of courses ranging from history, psychology to economic development. Founded and served as a vice-president of the Law & Economy Club at the Seoul National University. Recipient of the Seoul National University undergraduate scholarship for two years (1982 and 1985).

WORK EXPERIENCE

Civil Service Commission, Government of Korea **Seoul, Korea**
Director, Human Resources Information Division *May, 2000—November, 2001*
Being in charge of the huge IT project of the Commission to construct strategic infrastructure for the electronic management of the human resources within the government. Also responsible for stabilizing the National Human Resources Data Base (NHRDB) in order to accumulate personnel data of prominent experts from various fields of society in order to recruit them when necessary.

Civil Service Commission, Government of Korea **Seoul, Korea**
Policy Advisor to the Chairman *June, 1999-May, 2000*
Responsible for projects involving a variety of topics ranging from strategic planning of the Commission, to formulating personnel data base of government employees. Also in charge of the international relations of the Commission, including attending bilateral or international conferences with human resource managers from various countries and organizations such as Japan, China, France, World Bank, and the United Nations.

Planning and Budget Commission, Government of Korea **Seoul, Korea**
Team Leader, Government Reform Office *March, 1998-June, 1999*
Responsible for the public sector reform of the Korean government after the economic crisis in 1997, when Korea received relief fund from the International Monetary Fund. Worked on the project to streamline government departments and executive agencies. Prepared the second organizational reform plan of the government, which cut 20% of the number of the government employees. Also drafted a law entitled “Management of the Quasi-governmental Organization Law,” to systemize and promote privatization of the quasi-governmental organizations. Honored as the recipient of the “Government Reform Man of the Year 1998” through 360 degree evaluation by co-workers, subordinates, and supervisors.

Protocol Division, Ministry of Government Administration **Seoul, Korea**
Deputy Director *July, 1996-Feb., 1998*
Prepared the Presidential Inaugural Ceremony of the President Kim Dae-Jung (the recipient of the Nobel peace prize in 2000). Served as liaison officer between the Presidential Transition Committee and the Inauguration Preparation Committee. Coordinated exhibition of newly-designed products that incorporated national symbols such as the national flag or national flower. Prepared protocol for greeting heads of state visiting Korea.

Research Division, Ministry of Government Administration **Seoul, Korea**
Assistant Director *Feb., 1993-July, 1994*
Conducted extensive research on the functions of various departments and agencies. Published a couple of reports, entitled *Analysis of Government Functions* and *Analysis on the Relationship between the Functions of the Central and Local Governments*, which served as a key basis for the deregulation drive of the Korean government the following year.

Mayor’s Office, Seoul Metropolitan Government **Seoul, Korea**
Secretary to the Mayor *June, 1992-Feb., 1993*
Filtered major reports submitted to then-mayor Hon. Sang-bae Lee (currently, member of the National Assembly). Reviewed and revised all speeches of the mayor. Accompanied the mayor on his first-ever visit to the urban destitute areas of the Metropolitan Seoul. Involved in the successful management of the Presidential election process in 1992.

Minister's Office, Ministry of Government Administration **Seoul, Korea**
Secretary to the Minister *Dec., 1991-June, 1992*
Coordinated schedules for then-Minister Hon. Sang-bae Lee (currently, member of the National Assembly). Also served as an English interpreter for the Minister.

Personnel Planning Division, Ministry of Government Administration **Seoul, Korea**
Assistant Director *Aug., 1991-Dec., 1991*
Responsible for the enhancement of public awareness of the government and civil servants. Appeared on TV/radio programs to give explanation of the recruitment procedures. Traveled to many colleges and universities for recruitment fairs to promote employment. Collected and analyzed data on various factors of the civil servants, including age, sex, education, parents' occupation, etc..

Office of Research, Ministry of Government Administration **Seoul, Korea**
Assistant Director *May, 1989-Aug., 1991*
Actively participated in supporting the Administrative Reform Committee, an advisory group of scholars to the Minister. Coordinated the effort of seven divisions in reforming the Korean government. Concentrated efforts in the enactment of the Administrative Procedure Act.

Manpower Division, Seoul Olympic Organizing Committee **Seoul, Korea**
Assistant Director *June, 1988-Nov., 1988*
Involved in training and placement of 67,000 volunteers (which were one of the key factors that led to the success of the Olympic games) to appropriate sites of the games.

Central Officials Training Institute **Seoul, Korea**
Probationary Government Officer *April, 1988-June, 1988*
Took an intensive mandatory training program after passing the Higher Civil Service Examination, one of the most competitive tests in Korea, and which is a requisite to become a high ranking official.

BOOKS PUBLISHED

- *Benchmark Analysis for the New Century Region: Lessons from Benchmark Regions* (Virginia Tech Center for Regional Strategies, 2005)
- *Creating High-performance Government Organization* (translation: written by Mark Popovich, published by Samsung Economic Research Institute, 2000)

CONFERENCE PRESENTATION

- "The Man of Reason as an Icon of Governmental Legitimacy," presented at Conference on American Public Administration in a Global Context (VT/GW doctoral conference, November 2002)
- "Has the Last Stronghold Fallen? Budgetary Rationality at the Program/Technical Dimension," presented at High Table (April 2004)
- "Budgeting as Sense-making and Story-telling," (Co-author) presented at the Southeastern Conference of Public Administration (October 2004)

ACADEMIC AFFILIATION

- Member of the Korean Association of Public Administration
- Member of the board of the Korean Leadership Association
- Member of the board of the Korean-French Association