

ADMINISTRATIVE STATESMANSHIP IN A GOVERNMENT OF SHARED POWERS

by

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Dissertation submitted to the Faculty of the  
Virginia Polytechnic Institute and State University  
in partial fulfillment of the requirements for the degree of  
DOCTOR OF PHILOSOPHY  
in  
Public Administration and Public Affairs

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March, 1991  
Blacksburg, Virginia

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(ABSTRACT)

A normative theory of public administration grounded in the Constitution is examined in practice from individual, institutional and situational perspectives. This theory argues that public administrators should use their discretionary power in order to maintain the balance of powers among the three branches of government in support of individual rights. The role of serving multiple constitutional masters simultaneously is captured by the concept of subordinate autonomy.

The individual level of analysis describes the process by which a variety of public administrators at several levels of government have illustrated constitutional subordinate autonomy in their careers.

The institutional perspective examines how public administrators can be influenced by the agencies in which they operate, and how these factors interplay with the constitutional model.

The situational perspective presents classic dilemmas commonly faced by public administrators that are relevant to the constitutional model.

The case studies presented illustrate the usefulness and limitations of this normative theory by examining several factors which guide and restrain public administrators as they struggle with contentious issues and use their discretion to influence the direction of public policies and programs.

## ACKNOWLEDGEMENTS

To Sue for her unwavering inspiration and support; to my parents for providing the foundation for all that has followed; and to Connor and Casey for bringing light to every day of my life.

I am indebted to everyone who contributed to this document and offered comments and suggestions. I sincerely thank Dr. Robert Matthews, Dr. Gary Wamsley, Dr. Orion White and Dr. James Wolf, all of whom participated on my committee.

Special thanks go to Dr. John Rohr, my committee chair, for his ideas, constant support, and standards of excellence.

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## I.

### INTRODUCTION

In essence, we call for a renewed sense of commitment by all Americans to the highest traditions of the public service - to a public service responsible to the political will of the people and also protective of our constitutional values; to a public service able to cope with complexity and conflict and also to maintain the highest ethical standards; to a public service attractive to the young and talented from all parts of our society and also capable of earning the respect of all our citizens.

A great nation must demand no less.

- The National Commission on the Public Service

The above quote represents the central message of the recently published (1989) report by The National Commission on the Public Service, otherwise known as the Volcker Commission. In the spirit of the commission's effort, this dissertation focuses attention on an issue fundamental to the spirit and image of the public service: the legitimacy of the public administrator in our governance process.

As the problems confronting our government become increasingly complex and pressure mounts to do more with less resources, uncertainty about the role of the public administrator will become an increasing source of frustration and confusion for those both inside and outside of government. In his classic work, Government of Strangers, Hugh Heclo

states that the advent of modern public bureaucracies "...added the civil servant as an unexpected and insecurely placed participant to the original grand design of American government. Higher civil service officials are apt to find themselves in the middle - a part of the unitary executive branch under the President's guidance but also dependent on a Congress sharing important life and death powers over their work."<sup>1</sup> Heclo captures the issue nicely, but he does not go far enough. Public administrators are not merely "dependent" on Congress; in fact, they are responsible to Congress, as well as to the President and the Courts. Furthermore, within each of the three branches are a number of layers which do not always speak with one voice. A brief review of some recent examples in the news illustrates the point.

During the highly visible investigation of the Department of Housing and Urban Development (HUD), the Inspector General for HUD, Paul A. Adams, was severely criticized by members of Congress for not being "forceful or specific enough", despite years of reports by Adams citing the failure of HUD officials to adequately monitor participants in its programs, including lenders, brokers and grant recipients. Charles L. Dempsey, former HUD Inspector General, defended his record and Adams by saying the reports provided plenty of warning if Congress had chosen to pay attention. Rep. Bill Green (R-N.Y.), countered that the Inspector General

reports were not as probing as they should have been: "What never came through in those reports was a picture of the top management," said Green, who formerly served on the Housing Committee. "I did not come away from those reports with an impression that the IG was at war with" the agency's management. Dempsey agreed that the reports do not aggressively criticize top-level officials. He argued that the inspector general must "work with management...If you continue to go after them with a baseball bat...you're not going to get anywhere."<sup>2</sup>

Oliver North was convicted of obstructing Congress as a member of the executive branch. U.S. District Judge Gerhard A. Gesell stated, "I do not think...you were a leader at all, but really a low-ranking subordinate working to carry out initiatives of a few cynical superiors. You came to be a point man in a very complex power play developed by higher-ups." Gesell also noted that while he agreed that North was following the lead of higher-ups, he "responded willingly, sometimes even excessively to their requirements." During the trial, North testified that he was only doing the bidding of President Ronald Reagan and other top officials.<sup>3</sup>

William von Raab, Customs Commissioner, departed office blasting the senior Bush administration officials for failing to wage a truly tough war on drugs. His letter of resignation to Bush, charged that "political jockeying,

backstabbing and malaise" were undermining the antidrug effort. The letter is quickly derided by the Assistant Secretary of the Treasury for Public Affairs, stating that von Raab "...doesn't work for the president, he works for the Assistant Secretary of the Treasury."<sup>4</sup>

Finally, a senior Food and Drug Administration (FDA) official and two investigators from the staff of Rep. John D. Dingell (D-Mich.) squared off in the hallway in the FDA's Rockville headquarters. After a week of searching through the files of the agency's generic-drug division, the two investigators were walking out with documents they thought would help them in their probe of alleged corruption of FDA officials who review drugs for approval. But, according to the staffers, FDA Associate Commissioner Hugh Cannon angrily stopped them and said the documents contained information that they had no authority to remove.

Dingell charged that Cannon and FDA General Counsel Thomas Scarlett "attempted to deny [and] otherwise obstruct our inquiries into wrongdoing or incompetence at the FDA." Dingell's staffers estimated that this and other problems with the FDA delayed their investigation by at least six months. FDA officials responded that these criticisms were unjustified. Scarlett, for example, "attempted to deny Dingell access to internal FDA documents on the basis of a 1978 legal opinion by the U.S. Attorney General that it would

be a criminal offense for FDA officials to give outsiders documents containing trade secrets." "Scarlett was just doing his job", said one former FDA lawyer, who asked not to be identified.

Eventually Scarlett resigned under pressure after FDA Commissioner Young failed to defend him before Secretary of Health and Human Services, Louis Sullivan. William B. Schultz, an attorney with the Public Citizen Litigation Group, commented that he had never seen an agency in such turmoil, and expressed concern that "...public confidence in the agency will be weakened and that the employees will be demoralized."<sup>5</sup>

At the heart of each of these examples is the legitimacy of the role played by the public administrator. If the inspector general did not go far enough in his reports on HUD, how far should he have gone, and how far could he go and still be effective in the agency? Judge Gesell chastised North for responding to the lead of higher-ups "willingly, sometimes even excessively." Does this mean North would have been justified in following orders as long as it was with reservation and not excessive? If so, what is the definition of excessive? If Thomas Scarlett of the FDA was "just doing his job", why was he not defended by the HHS leadership? Why was he pressured to resign?

The answers to these types of questions will always be very difficult because of the ambiguous role of the public

administrator in those all too frequent situations where more than one master is being served. Absent a strong sense of legitimacy, these situations are a continuing source of confusion and frustration for public administrators, effectively undermining their morale and sense of professionalism. Ingraham and Rosenbloom note the following as they discuss the outlook for public administration:

As on many earlier occasions...the contemporary politics of the public service has the issue of legitimacy at its core. The federal system is now more representative, decentralized, and flexible. It is also more participatory and rights-oriented than in the past. However, the public service's longstanding problem of legitimacy remains. In the United States political culture, an administrative "fourth branch" will continue to be suspect until it is integrated fully into the nation's constitutional framework.<sup>6</sup>

"Bureaucrat bashing" demonstrates the suspect position of public administrators in our system of government. The media, Congress, the courts and the White House regularly accuse public administrators either of obstruction, or of irresponsibly pursuing their own agenda in place of the mandate of popularly elected officials.

#### An Answer: Constitutional Subordinate Autonomy

In To Run a Constitution, John Rohr answers the challenge by presenting a constitutional theory of public administration; that is, a normative theory of public administration grounded in the Constitution. Rohr argues that

a legitimate role for the public administrator can be derived from the founding fathers. He states,

The role of the Public Administration is to fulfill the objective of the oath of office: to uphold the Constitution of the United States. This means that administrators should use their discretionary power in order to maintain the constitutional balance of powers in support of individual rights. This, of course, is what the Congress, the president, and the courts are supposed to do as well. This unity of purpose is as it should be, because the Public Administration, like Congress, president, and courts, is an institution of government compatible with the constitutional design of the framers.<sup>7</sup>

Rohr explains that because public administrators are subordinate to all three branches of government, they have a degree of autonomy from any one branch. The public administrator demonstrates this role by choosing which of the three branches of government he/she will favor "...at a given time or a given issue in the continual struggle among the three branches as they act out the script of Federalist 51, wherein ambition counteracts ambition and the 'interests of the man...[is] connected with the constitutional rights of the place.'"<sup>8</sup>

The key point for this dissertation is that Rohr has carved out a legitimate role for the public administrator that is much more than that of a technocrat carrying out orders from the president. Yet Rohr stops short of a call for a fourth branch of government. Since most public administrators are members of the executive branch, they correctly presume

that their role is to support the policies and directives of the president; but this is a rebuttable presumption. The fulfillment of the oath of office taken by every public administrator requires an awareness of the constitutional context of his or her work. Administrators must be open to the possibility that at times fidelity to their oath of office may require them to balance presidential interests against other constitutional considerations. To strike this balance is what Rohr calls administrative statesmanship.

Furthermore, the subordinate but autonomous role is consistent with the reality of modern government: public administrators exercise discretion in their work, whether it is formally designated in statute or merely de facto. The president, the courts, or the Congress frequently do not provide clear directions on issues, or they rely heavily on public administrators for critical information. In either case, public administrators cannot avoid influencing the direction of public policy.

### The Theory in Practice

The purpose of this dissertation is to illustrate the constitutional theory of public administration in practice from several perspectives. Rohr makes a solid case for a normative theory based on a thorough examination of the development of the Constitution, but the concept needs further

development through in-depth analysis of the theory in different practical contexts.

The implications of the subordinate but autonomous role for the practicing public administrator are not trivial or obvious. According to the theory, the public administrator must determine when an action represents an imbalance in power between the branches of government.<sup>9</sup> This is a vague concept at best for top level public administrators who deal with the three branches of government on a daily basis, let alone mid-level careerists who rarely see the head of their own agency. The concept needs to be translated into terms meaningful to practice.

This approach is appropriate since the subject is normative rather than descriptive; it is an argument for the type of dialogue and reflection public administrators should engage in to ensure a constitutional government, i.e., a government of shared powers. There is no attempt to argue that the constitutional theory describes why things turn out the way they do, or that adherence to the theory will produce some predictable result. Rather, the dissertation examines whether the constitutional model promotes more prudent public administration. The concept of prudence is useful because it is tied to the practical world of uncertainty and change. In his discussion of the relationship between prudence and the law, Eugene Miller states,

Aristotle insists that there is no fixity in general matters pertaining to action and to what is advantageous to man, any more than there is fixity in matters pertaining to health, where the disposition of the body to be cured and the remedies used to effect a cure are changeable in many ways. It is for this reason that Aristotle, in his ethical treatises, does not formulate ethical maxims, or general rules of conduct. The judgement of particular cases in the sphere of practice will be left to the prudent man, who will take into account all of the circumstances, just as a doctor does in bringing about a cure or a captain steering a ship. Prudence enables a man to see what course of action to choose in these practical situations, where everything is contingent and uncertain.<sup>10</sup>

Prudence, however, assumes an individual has a worthwhile goal or end in mind (e.g., a healthy body or a safe course home). If one agrees that action consistent with constitutional principles is a worthy goal, then the "test" of the constitutional theory is whether it provides practicing public administrators with guidance or insight to negotiate the "contingent and uncertain" world of government work in a manner consistent with such principles as shared powers and due process.

John Burke anticipates the approach of this dissertation in his discussion of bureaucratic responsibility:

Analysis of the foundations of bureaucratic responsibility is useful as a guide for general principles, but one also needs to determine how these can be applied in particular circumstances. The organizational constraints upon street-level bureaucrats, administrative managers, agency heads...all differ...It is likely that general principles will apply across these different roles,

but particular justifications and excuses will certainly vary in their specifics, and we must determine how and in what ways.<sup>11</sup>

### A Constitutional Versus Corporate Government

The normative implications of the constitutional theory are particularly significant because of the current pervasiveness of the "CEO" model of government. The intellectual leaders of the Reagan Administration, for example, were outspoken proponents of the corporate model of government which assumes administrative power must be centralized in the Executive Office of the President. Under the CEO model, a responsible public administration takes its orders from and follows only the president. Although Rohr effectively argues that this model is a flawed interpretation of the Constitution, he is vulnerable to a basic question: if the public administrator's role is more than marching lock-step with the president, then what is the practical guiding force for the actions of the public administrator? On the surface, at least, the CEO model provides clear lines of control and direction of the government. Who is "guarding the guards" under the constitutional model?

Rohr argues that although his model implies independent judgement on the part of the public administrator, it also implies restraint in the exercise of this independence. He states,

The oath to uphold the Constitution can be seen not simply as a pledge to obey but also as an initiation into a community of disciplined discourse, aimed at discovering, renewing, adapting, and applying the fundamental principles that support our public order. The task is to see the oath more as an act of civility than submission. The word civility suggests both the independence and the self-restraint we look for in professionals.<sup>12</sup>

This dissertation examines the range of factors which guide or restrain practicing public administrators as they struggle with contentious issues and use their discretion to influence the direction of public policies and programs. These factors, derived from practice, are compared to the concept of the Constitution as a guiding force. The usefulness and limitations of this normative theory can only be learned by careful, reasoned dialogue around specific examples which illustrate the diverse and complex situations confronted by public administrators.

### Organization of the Dissertation

This dissertation is organized into six chapters. Chapter Two reviews the relevant literature on the legitimate role of the public administrator in the modern administrative state, and provides a context for the constitutional theory of public administration. This literature is usually organized around such topics as the presidency, the political/career interface, and the politics/administration

dichotomy. However, this dissertation approaches it from two different perspectives: the literature that portrays policy and administrative power focused in the Office of the President; versus the literature that portrays executive power as being shared with the Congress, the courts, and the agencies.

The constitutional theory of public administration is squarely in the "shared powers" camp. Chapter Two concludes with a review of the argument for the constitutional model, beginning with how the founding fathers viewed the administrative state and ending with the implications of a constitutional model for public administrators.

Chapter Three begins to illustrate the constitutional theory in practice by examining a variety of individual perspectives. The individual level of analysis describes the process by which a variety of public administrators have illustrated the constitutional theory (or the lack of it) in their careers. Two sources of information are used for this analysis: written information on three significant high-level public administrators and personal interviews with a variety of mid-level public administrators representing a cross-section of government. The three high-level administrators examined are Gifford Pinchot, Joseph Califano and James Landis.

Gifford Pinchot: Pinchot was director of the Forest

Service under Theodore Roosevelt and briefly under Taft. Considered to be the first American professional forester, he represents an unabashed zealot who clearly put his professional concerns for conservation before all else. His aggressive efforts to protect huge additional tracts of forest from development in the western United States made him a tremendously controversial figure. His tactics in dealing with Congress raise interesting questions over whether he went too far in pursuing his goals.

Pinchot is a classic example of a public administrator using every means at his disposal to promote his view of the public interest. The chapter examines whether he was a powerful bureaucrat running amok in narrow pursuit of his professional passion, as some claimed, or whether he was legitimately exercising his subordinate autonomy consistent with the constitutional theory.

Joseph Califano: As Secretary of Health, Education and Welfare under President Carter and Special Assistant for Domestic Affairs under President Johnson, Califano is an interesting figure because of his involvement from different perspectives in a wide range of difficult social policy issues. In his writings, Califano demonstrates a keen sense of what it means to be a "man in the middle" as a public administrator. For example, in the debate over public funding of abortions, he struggled as Secretary of HEW to reconcile

his personal beliefs with his obligation to enforce whatever law the Congress ultimately passed or the courts declared constitutional; in the civil rights arena, he negotiated with a "hypocritical" Congress which makes stirring proclamations for civil rights through authorizing statutes and then subverts the ability to enforce those rights through the appropriations process. In his reflections on his role as a special assistant to President Johnson and the implications of Watergate, he discusses the need for independent, effective institutions to temper the exercise of presidential power if we are to have an accountable, responsive government.

Califano is an excellent illustration of a modern public administrator who is very conscious of the responsibility inherent in being subordinate to all three branches of government; this responsibility requires a degree of independence from any one of the branches if the integrity of the administrator is to be upheld.

James Landis: Landis is an extremely attractive figure because of his close involvement in the government regulatory movement, as evidenced by the title of Donald Ritchie's biography: James Landis - Dean of the Regulators. He served as head of a variety of regulatory agencies under Franklin Roosevelt and Truman, and was commissioned by Kennedy to conduct a landmark study of the regulatory agencies. Initially, Landis was a champion of the regulatory agencies,

stating, "The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and legislative process", and is the result of "our effort to find an answer to those inadequacies by some other method than merely increasing executive power."<sup>13</sup> Later in his career, however, Landis expressed concern over the independent regulatory commissions' "rigid and unrealistic regulations, their susceptibility to political pressure, and their maddening bureaucratic inertia."<sup>14</sup>

The literature on Landis provides rich insights into the practical implications of the constitutional theory. Regulatory agencies and commissions are a classic setting for the struggle between the branches of government. Landis' career represents a public administrator attempting to negotiate that struggle.

Personal Interviews: The literature cited above provides practical examples from the careers of public administrators at the highest levels of government, where the relevance of the constitutional theory is most readily apparent. The more difficult, but equally important question is how the constitutional theory is meaningful to the more average public administrator - the mid-level bureaucrats who are key players in the governance process who may or may not be conscious of their constitutional role. What guides their actions, and what are the implications of the constitutional

theory for them?

These questions are addressed through personal interviews with mid-level public administrators from a variety of agencies representing a cross section of the federal government, including:

- Environmental Protection Agency
- Family Support Administration
- Department of Justice
- General Accounting Office
- Social Security Administration
- Federal Aviation Administration
- Department of Agriculture
- Office of Management and Budget
- Department of Interior

The dissertation discusses their response to questions concerning the factors that guide them in situations in their careers when they were "caught in the middle" or had significant discretion in developing a policy or implementing a program. The respondents also were asked to reflect on who or what they are responsible to in their work as civil servants. This section reveals both common threads and very different perspectives on the legitimate role of the public administrator from the eyes of those in the front lines of government.

Chapter Four examines literature on government agencies to provide an institutional perspective on the constitutional model. Since public administration is carried out in the context of institutions, it is essential to examine

how public administrators are influenced by the environment in which they operate. A reasonable question for a public administrator is: "But what does this constitutional theory mean for me at my particular agency?" An examination of three different types of institutions identifies organizational factors which influence the actions of public administrators (e.g., mission, culture, professional standards), and provides data for exploring how these factors interplay with the constitutional model.

The three agencies examined are the Department of Justice, the General Accounting Office (GAO) and the Office of Management and Budget (OMB). These agencies have been the subject of extensive analysis in the literature because of their interesting position in our government system.

The Department of Justice: This organization is of interest because it is an example of an executive branch agency whose members can be torn between their subordination to the president and their professional standards and responsibilities. On the one hand, the department serves as the principle law office for the government, giving legal advice to the president and the Cabinet. On the other hand, the Department is the administrative home to a large variety of bureaus, agencies and services which have something to do with law or the administration of justice and yet have very little to do with the traditional lawyerly functions of

litigating and counseling.<sup>15</sup> The presence of both of these functions exacerbates the tensions which "inevitably exist in some degree between the political interests of the President and the White House staff...and the professional concerns of the Attorney General and the Justice Department lawyers..."<sup>16</sup>

Examination of the tension between professional and political concerns in the literature on the Justice Department provides another useful perspective on the constitutional theory, for it applies to public administrators in many agencies. The professional culture of a government organization, whether it be legal, medical, scientific or tied to particular issues such as the environment or poverty, is a strong guiding force that must be reconciled with the practicing public administrator's subordinate but autonomous role under the constitutional model.

The GAO: In his writing on the GAO, Mosher points out how the agency's role has been hotly contested since its beginning in 1921, and outlines nine different roles played by a GAO employee (e.g., watchdog, bird dog, policy advisor, evaluator and critic, judge and rulemaker). The GAO is an excellent illustration of the constitutional theory by the very nature of its ambiguous position: at once accountable to Congress, but also an independent office of the United States, substantially independent of any branch. This status is representative of several regulatory commissions, whose

members are appointed by the president but are heavily tied to Congress. GAO is also interesting because its culture has changed significantly over the years, moving from a culture of auditing and control to one of evaluation and oversight.

OMB: This agency provides the third organizational context for public administrators that is highlighted in this chapter. A rich literature on the history of OMB and extensive testimony on OMB's role in the regulatory process that address the proper role for OMB and the public administrators who work in the agency. For example, Berman discusses the differences between the old Bureau of the Budget where neutral competence was the essence of professionalism among the staff, and the recent, more politicized environment.

Although OMB is somewhat unique in that it is part of the Executive Office of the President, the literature frames an issue which is at the heart of the constitutional theory: when has the president gone too far in trying to control the agencies and implement his will, and how does the public administrator make a reasoned judgement? OMB is also an appropriate subject because in many ways it "is" the president to many public administrators in the agencies, since legislative, budgetary and regulatory proposals must be approved by OMB. Many a public administrator has no doubt questioned the fairness of a governance process that allows an OMB official to sit on a regulatory proposal for months at

a time with no apparent good reason.

Examining OMB in light of the constitutional theory does not seek to define the proper role OMB should play in our government. Rather, this focus highlights the pressures placed on public administrators by their position in what can be highly politicized agencies, and the implications of the constitutional theory in such an environment.

Chapter Five examines case studies in public administration and related literature which highlight and provide insights into the practical implications of the constitutional model. Cases involve executive branch-legislative branch relations, relationships within the executive branch, and bureaucratic discretion in the interpretation of laws and policy. The cases are used to assess the actions and statements of public administrators who are to be subordinate, yet autonomous.

Chapter Six draws together the variety of perspectives examined in the dissertation to determine the extent to which the constitutional theory of public administration is relevant to practice. The chapter presents the types of ongoing questions and dialogue necessary to determine the constitutional context of a situation, and cites specific cases to demonstrate the parameters of subordinate autonomy in practice.

The concluding chapter also presents an expanded

model of constitutional subordinate autonomy which addresses the variety of factors which influence the exercise of administrative discretion, including personal beliefs, professional standards and interest groups.

## ENDNOTES

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4. Ibid, 1 August, 1989, p. A17.
5. Ibid, 16 August 1989, p. A1.
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7. John A. Rohr, To Run a Constitution (Lawrence, Kansas: University Press of Kansas, 1986) p. 181.
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10. Eugene F. Miller, "Prudence and the Rule of Law", The American Journal of Jurisprudence 24 (October, 1979): 195-196.
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12. Rohr, p. 192.
13. Donald A. Ritchie, James M. Landis - Dean of the Regulators, (Cambridge, MA: Harvard University Press, 1980) p. 4.
14. Ibid, p. 175.
15. Daniel J. Meador, The President, the Attorney General, and the Department of Justice, (Charlottesville, VA: White Burkett Miller Center of Public Affairs, University of Virginia, 1980) pp. 2-3.
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## II.

### A CONSTITUTIONAL THEORY OF PUBLIC ADMINISTRATION

In distinguishing between political duties and duties assigned by statute, the Court in *Kendall v. United States ex rel. Stokes*, rejected the "alarming" proposition "that every officer in every branch of (the executive) department is under the exclusive direction of the president...Such a principle, we apprehend, is not, and certainly cannot be claimed by the president."

- Morton Rosenberg

This dissertation organizes the literature on the role of the public administrator into the two camps framed in Kendall: the literature that portrays policy and administrative power as focused in the Office of the President; versus the literature that portrays executive power as being shared with the Congress, the courts, and the agencies. This chapter presents both arguments and concludes with a detailed review of the case for a theory of public administration based on a shared powers argument.

#### THE CASE FOR A UNITARY EXECUTIVE

The concept of a unitary executive is clothed in a number of terms, including the "administrative presidency", "managerial presidency", "presidential government", and the "CEO" model of government. The fundamental concept, regardless of the moniker, is that efficient, effective and

responsive government requires an executive branch under a strong president with clear lines of authority and tight control over the agencies and their administrators. A variety of presidential commissions over the years have supported this view of government. In March 1936, President Roosevelt appointed a Committee on Administrative Management headed by Louis Brownlow. Richard Nathan notes that the committee's report "emphasized that the theory of a strong executive in a democracy was the unique contribution of the Founding Fathers and urged changes to carry out this historic design."<sup>1</sup> Nathan further notes that the Brownlow Commission's views on presidential management were best expressed in the postwar period in the work of the first Hoover Commission on the Organization of the Executive Branch of Government in 1949. It stressed accountability, calling for a "clear line of command from top to bottom."<sup>2</sup> Nathan continues, "Like the Brownlow Committee, the Hoover Commission recommended expanding the president's staff and regrouping federal programs according to major functions under the direction of a small group of agency heads who they said should be regarded as the 'President's principal assistants.'"<sup>3</sup>

The concern with more centralized control over the government is a response to the typical frustration experienced by presidents as they try to implement policy and program changes. The Heineman task force appointed by

President Johnson put the issue bluntly:

Top political executives - the President and Cabinet Secretaries - preside over agencies which they never own and only rarely command. Their managerial authority is constantly challenged by powerful legislative committees, well-organized interest groups, entrenched bureau chiefs with narrow program mandates, and the career civil service.<sup>4</sup>

Under the unitary executive theory, public administrators in the agencies are solely responsible to the president and his appointed subordinates, in the same way employees of a corporation are responsible to the Chief Executive Officer (CEO). Career civil servants or political appointees in the agencies with ties to Congress, interest groups, and others outside the presidential camp are anathema to proponents of the unitary executive model, who argue that the president has a direct mandate from the people to implement his agenda. Resistance to this mandate, particularly from unelected administrators in the agencies, borders on subversion of the will of the people.

This viewpoint was very clearly in evidence in the Nixon and Reagan Administrations. In The Plot That Failed: Nixon and the Administrative Presidency, Nathan notes how Nixon realized that the way to achieve policy aims was to focus more on administrative action as opposed to difficult legislative change. The former would be accomplished by taking advantage of the wide discretion available to federal

officials under many existing laws. Instead of working with Congress and the bureaucracy, the strategy was to "take over" the bureaucracy and "take on" the Congress.<sup>5</sup> Nixon pulled in men of unquestioned loyalty without any national reputations of their own and planned to place them in direct charge of the major program bureaucracies of domestic government for the second term.<sup>6</sup>

### Main Themes

Several common themes are typically found in the unitary executive argument. Chief among them is distrust of the career experts in the agencies, whose loyalty to the president's agenda can be compromised by other interests. This was reflected by Frederic Malek, one of the major architects of Nixon's administrative presidency. Nathan states:

A tip-off regarding Malek's views came in an article he wrote in the Harvard Business Review in the fall of 1972. Malek wrote his article in the form of advice to business executives coming to Washington. He warned against putting specialists in charge of government programs - "on top instead of on tap" - and singled out social programs as a special problem area for new political appointees in government. Malek said many career officials of the social agencies face a "division of loyalties" and "are not reticent about going to the press or into print about their struggles against the unsympathetic or unresponsive institutional establishment."<sup>7</sup>

Since the career specialists in the agencies are often allied with the entrenched interest groups they serve, they are a

threat to democratic government. Power and authority must be concentrated within a tight group of trusted loyalists if the popularly elected president is to effect change.

Another related fundamental theme of the unitary executive camp is that the sole source of legitimacy flows from election to office. Under this viewpoint, the right to engage in policymaking rests either on direct elective status, or indirectly through appointment to office by an elected official. Career public administrators, since they are neither elected nor politically appointed, have no legitimate right to influence policy independently and should be restricted to implementation or administrative functions. Under the Reagan Administration, the Heritage Foundation was the most salient proponent of this point of view. In Steering the Elephant, Donald Devine, the first Director of the Office of Personnel Management under Reagan, articulates the position nicely:

Of course, the Reagan Administration would recognize that the line between policy and administration will always be blurred. The dictum that political appointees are "on top" is too simplistic - but it makes an important point. A political leader - legitimized by a popular election - must be on top of the bureaucratic structure and provide the policy leadership for government and administration. Without this, there is no legitimacy for the democratic regime. 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 who has the moral authority flowing from the people through an election - otherwise, "the whole

apparatus would fall to pieces." In many agencies and departments, career executives have forsaken responsibility and have fallen to the temptation of political power. They have established their own political agendas and pursue them in spite of the policy directives of political administrators. In these cases, political appointees have the legal and moral obligation not only to control policy-making but to control the detailed administration of the President's policies.<sup>8</sup>

Devine makes a strong case for the democratic character of the unitary executive model. The career civil servants in the bureaucracy are not directly answerable to the people, as are elected officials, and therefore need to be restricted in the exercise of their duties. Otherwise, democratic government can be subverted by invisible power brokers pursuing their own political agendas in the halls of every government agency. From the unitary executive point of view, the primary solution to this dilemma is to concentrate as much policy control as possible under the popularly elected president and his political appointees.

Finally, the unitary executive argument typically points to a constitutional interpretation. The first sentence of Article II in the Constitution provides that "The executive power shall be vested in a President of the United States." This language contrasts markedly with the opening words of Article I: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Rohr points out

that champions of a strong executive have always emphasized the absence of the qualifying words "herein granted" in Article II. The presence of "herein granted" in Article I means that the legislative powers of Congress are limited to those areas explicitly stated in the written Constitution. As Rohr notes, the Congress "may legislate only in those areas in which the Constitution permits it to do so."<sup>9</sup> Conversely, the absence of "herein granted" in Article II means that executive power (presumably all of it) is vested in the President.<sup>10</sup> Rohr further explains that this viewpoint has been the rationale for activist presidents like Theodore Roosevelt who believed that it was not only the president's right but his duty to take any action necessary to promote the public weal that was not explicitly forbidden by the Constitution or the laws of the United States.<sup>11</sup>

Although this constitutional argument is typically used to ward off perceived encroachment on the president's powers by Congress or the courts, it also has implications for the public administrators in the agencies. If all executive power is vested in the president, then administrators, whether political or career, have none and therefore have no right to any degree of autonomy.

## THE SHARED POWERS PERSPECTIVE

The shared powers argument sees the key to effective and responsive government resting on the shared nature of executive, legislative and judicial power between not only the three branches of government, but also with the administrators in the agencies where appropriate. This viewpoint is based on both theoretical and practical grounds.

### Theoretical Arguments

In an article which examines crucial Supreme Court decisions relevant to separation of powers, Morton Rosenberg argues that, although the unitary executive theory has no substantial basis, it was promoted by an aggressive president frustrated by his inability to push his agenda through Congress:

The thesis of this article is that the theory of the unitary executive is and always has been a myth concocted by the Reagan administration to provide a semblance of legal respectability for an aggressive administrative strategy designed to accomplish what its failed legislative agenda could not. The theory has no substantial basis in either our nation's administrative history or constitutional jurisprudence and subverts our delicately balanced scheme of separated but shared powers.<sup>12</sup>

Rosenberg makes two important points in his analysis. First, he makes the distinction between political and statutory duties, found in the 1838 case, Kendall v. U.S. ex rel. Stokes.<sup>13</sup> If an administrative officer in an agency is

performing political duties for the president, then he is acting by the president's authority and the discharge of those duties is under the direction of the president. However, Congress may also impose upon an officer statutory duties that "grow out of and are subject to the control of the law, and not to the direction of the president."<sup>14</sup> Although in practice the line between political and statutory duties is often difficult to define precisely, the Kendall Court left no doubt that subordinate administrators in the executive branch may serve Congress as well as the president.

A second crucial point by Rosenberg is that there is a rational basis for reconciling the Court's seemingly contradictory lines of argument in separation of powers decisions. Using Commodity Futures Trading Commission v. Schor as an illustration, he explains why the Court is sometimes rigid (formalist) and at other times more lenient (functionalist) in its treatment of separation of powers cases.<sup>15</sup> In cases involving direct confrontation between the three branches, in which there are questions of aggrandizement of power by one branch at the expense of another branch, the Court tends to take a formalist or rigid view of separation of powers. An example is the 1983 case, Immigration and Naturalization Service v. Chadha, in which the Court struck down the legislative veto as a violation of the separation-of-powers principle.<sup>16</sup> The Court viewed the legislative veto

as a direct aggrandizement of presidential power by Congress, and was therefore strict in its interpretation. However, in cases where the will of the President, Congress and the Judiciary is exercised through an administrative agency, the Court tends to be more lenient and focuses on whether the power inherent in the agency procedures in fact significantly violates the balance of powers among the three branches. Rosenberg states:

When an agency is involved, however, the analysis is more far-reaching; delving into the whole range of relationships within the agency and between the agencies, the President, Congress, and the Judiciary, and the impact the challenged arrangement will have on the balance of powers between the key constitutional actors and the performance of the core functions of each. In other words, a far broader, more lenient review is to be accorded in agency-specific situations.<sup>17</sup>

This more lenient standard is seen in Schor (1986), which involved the constitutionality of a congressional grant of adjudicative authority to the Commodity Futures Trading Commission, an independent regulatory agency. Although regulatory commissions have exercised adjudicative powers for many decades, this case involved fundamental questions of whether Article III of the Constitution required these matters to be settled in a federal court and not in an administrative agency. Rosenberg notes that the court rejected the use of rigid rules and upheld the congressional grant of powers that would ordinarily be exercised by an Article III court.

Instead, the Court considered a variety of factors in coming to its conclusion, "with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."<sup>18</sup> The Court held that any intrusion on the judiciary was minimal and therefore not a violation of the separation of powers doctrine.

Rosenberg's analysis is important for it means the Court recognizes that the administrative state requires the vesting of agencies with the necessary executive, legislative and judicial tools to carry out their assigned tasks. Although this situation results in a subtraction of absolute power from each of the three branches in their respective spheres of influence, it is acceptable to the Court as long as the "core function" of each branch is not impaired. This is a strong constitutional argument that challenges the unitary executive concept of absolute control of the agencies.

Literature in constitutional theory also disputes the concept that the election of a president translates into a mandate on specific policy issues. For example, James Ceasar states:

The Founders did not see elections as performing the role of instituting decisive changes in policy in response to popular demands. They did, however, recognize the need for a popular judgement of the performance of an incumbent, and the selection system was designed to be sufficiently democratic to register that kind of response."<sup>19</sup>

For Ceasar, the Heritage Foundation view that popular election

represents a policy mandate is not consistent with the Framers. In fact, the Framers were very concerned about the dangers of a president's claims to any sort of popular mandate. They viewed election as an endorsement of a man of virtue who had distinguished himself as a public servant. Ceasar suggests that the Framers intended the selection of the president to be based on "nonpartisan" statesmanship. Under this form of leadership, "the elevation of individuals to office should be the result of their having achieved a widespread reputation based on distinguished service to the state."<sup>20</sup> Ceasar also notes that one of the key functions of the presidential selection system designed by the Founders was to avoid a situation where the candidate would have to pose as a "friend" of the people and make specific policy commitments.<sup>21</sup> Once in office, a president's authority rested on the legal powers inherent in the institution, not on any "informal authority as a popular leader possessing a mandate."<sup>22</sup> The Framers feared that claims by the president to mandates from the people on specific issues would lead to manipulation of the citizenry and demagoguery.

Of course, Ceasar's argument must be put in perspective. Certainly, a newly elected president can reasonably claim a general mandate of some sort, given that the citizenry have expressed a preference for one candidate over another. However, Ceasar indicates it is going too far

to translate that general mandate into a "moral authority" that demands the exclusive presidential control of policymaking on specific issues for which Devine argues.

A final set of theoretical arguments that challenge the unitary executive model relates to the role of the career bureaucracy in the federal government. For example, Peter Woll argues that the bureaucracy should be highly involved in policymaking. The federal bureaucracy is "an independent force", a "powerful and viable branch of government", playing a political game to advance its own interest in legislative and judicial, as well as executive matters. It "cannot be dismissed as simply a part of the Executive branch of government controlled by the President or the Cabinet."<sup>23</sup> Similarly, Nathan notes how Norton Long, writing in 1952, argued that we should not only accept the bureaucracy for what it is, but that the bureaucracy should be independent. This should be so, according to Long, because the bureaucracy represents not just the special interests but the whole people better than any other of our political institutions. Based on what he called our "working constitution", Long contended that the bureaucracy has a substantial role as a "representative organ and source of rationality." The bureaucracy is "our great fourth branch of government." There should be, Long argued, a working interaction of the four, not the legal supremacy of any of them."<sup>24</sup>

Although Woll and Long may go too far in calling the career bureaucracy an independent branch of government, their view of the public administrator's role provides a useful contrast. Whereas the unitary executive proponents see the career bureaucrats as a significant threat to responsive government, Woll and Long see them as exactly the opposite: careerists promote responsive government by representing interests and a source of rational expertise that is otherwise missing from the interactions of the three great branches.

Richard Green provides a final theoretical perspective on the shared powers argument. He looks to Alexander Hamilton for insight on the proper role of the civil servant in our system of government. Green stresses that Hamilton espoused superior/subordinate relations in the public service based on expertise and experience rather than personal loyalty or attachment. Such professional relations entail some independence of judgement and insight, which is appropriate in a "constitutional republic among officials who swear an oath to uphold the Constitution."<sup>25</sup> The oath demands devotion to the Constitution first and foremost over any loyalty to a specific president or superior. Green suggests that "Given our current emphasis upon personal loyalty in the higher reaches of executive administration, Hamilton's standard provides relevant criticism and an alternative worth pondering."<sup>26</sup>

The conflict between loyalty to the president and the law can be a very real issue for practicing public administrators. Newland notes that "Primacy of loyalty to the president rather than law was stated confidently as accepted theory by several key officials in the executive branch in the Iran-Contra affair."<sup>27</sup> Although more skillful proponents of the unitary executive view would be unlikely to claim any theory in support of loyalty to the president over the law, the shared powers camp would argue that the focus on power and control in the presidency fosters a prevailing climate in the executive branch that can lead to the attitude expressed by the officials noted above.

These theoretical arguments challenge the unitary executive model of a president with total authority over an executive branch comprised of loyalists concerned only with implementing his will. In contrast, the shared powers viewpoint sees the president as one who "presides" over an executive establishment whose members assess the president's direction in the context of the laws and statutory responsibilities they administer.

### Practical Arguments

In addition to the theoretical argument, the shared powers camp also points to the realities of modern government. Heclo and Salamon argue persuasively that the "complexity-

coordination" problem in American government precludes central control of a unified executive branch. They note:

Presidential government is the idea that the president, backed by the people, is or can be in charge of governing the country. The President's national electoral mandate is translated into a superordinate responsibility over the machinery of government, and the president's job is defined as leading a followership. This is an 'illusion' in the fullest sense of the word, for it is based on appearances that mislead and deceive.<sup>28</sup>

For Salamon, it is not only pure folly to suggest that the answer to more effective and responsive government is more centralized control by the president, it is dangerous. The key question surrounding the presidential policy role today is how to "...avoid excessive centralization in the Executive Office of the President, and how to restore a meaningful policy role to the departments and agencies where most of the government's expertise and experience ultimately reside."<sup>29</sup>

Similarly, Louis Fisher suggests that administration has become the business of all three branches of government, for both constitutional and practical reasons. He notes how the Brownlow Committee correctly said, "The President needs help" to run the bureaucracy. However, the Committee neglected to point out that help can come from Congress:

The president needs the assistance of legislators. He cannot run the bureaucracy by himself. Even by adding fresh layers of White House staff, or by positioning his lieutenants in the agencies, it is impossible for a president to maintain control. Administration is not an executive monopoly. It never was; it never can be. The constitutional and

political responsibilities of Congress require its active and diligent participation in administrative matters.<sup>30</sup>

Like Salamon and Heclo, Fisher argues that the practical realities of modern government leave the president with no choice but to share executive power with Congress. However, although his argument challenges the unitary executive model by demonstrating the vital role of Congress in administration, he neglects to point out the role for the administrators in the agencies. The following section fills this gap by describing a legitimate role for the public administrator that is grounded in the Constitution.

#### CONSTITUTIONAL LEGITIMACY FOR THE PUBLIC ADMINISTRATOR

In To Run a Constitution, John Rohr develops an argument for a legitimate role for public administrators that puts him squarely in the shared powers camp. Although he rejects the concept of public administrators constituting a "fourth branch of government", as Woll and Long would have it, he sees them as much more than mere instruments of the president. Whereas Fisher points out that the president needs help from Congress to administer the government, Rohr would argue that all three branches need help from the public administrators in the agencies to run a constitutional government.

The remainder of the chapter summarizes Rohr's line

of argument to build a role for the public administrator that is grounded in the Constitution.

### Separation of Powers

One of the primary attacks on the legitimacy of the administrative state is that the combination of powers vested in administrative agencies violates the principle of separation of powers, particularly in the independent regulatory commissions. Consequently, Rohr begins by examining the framers' views on separation of powers.

Rohr argues that the Framers were concerned about the accumulation of all powers - executive, legislative and judicial - in the same hands; not about the partial sharing of these powers. He refers to the Federalist Papers, where Publius maintains that Montesquieu "did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other." Rather, Montesquieu meant, "no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted."<sup>31</sup>

To further support this view, he quotes Madison regarding why there was no particular danger in bringing the executive and judiciary together to check the legislature:

It was much more to be apprehended that

notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them. Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & suggested the necessity of giving every defensive authority to the other departments, that was consistent with republican principles.<sup>32</sup>

Rohr suggests that this passage goes to the heart of Madison's thinking on separation of powers. Madison was not interested in formal technicalities about the commingling of functions, but in the eminently practical task of preventing the tyranny that was likely to arise when the "whole power" of one department fell prey to another department.<sup>33</sup>

Given this relaxed view of separation of powers in the founding period, Rohr concludes that formalistic attacks on the administrative state that are aimed at the mere existence of a combination of executive powers in administrative agencies are off the mark.<sup>34</sup> A strict interpretation of the doctrine of separation of powers is warranted only when the whole power of one branch of government is delivered to a competing branch. Rohr notes that this has never happened with an administrative agency:

The powers of administrative agencies, unlike those of Congress, the president, and the courts, are always "partial," never "whole." They are partial because they are exercised over a narrowly defined scope of governmental activity - for example, TV licensing, railroad rates, food stamps, and so forth. Not only are these powers partial but - unlike those of Congress, the president, and

the courts - they are formally subordinated in their entirety to one or another of the traditional constitutional branches.<sup>35</sup>

### The Senate as Executive Establishment

After rebutting the argument against the administrative state based on separation of powers, Rohr takes the offensive and looks for evidence of a positive role for the administrative state in the minds of the framers. He suggests that the higher reaches of today's career civil service is a reasonable approximation of what the framers envisioned as the function of the Senate in the proposed regime.<sup>36</sup> He argues that the framers envisioned the Senate as part of an executive establishment, rather than as simply a legislative body vested with certain executive powers in order to hold the president in check.

To buttress his argument, Rohr describes how George Mason and the Anti-Federalists criticized the Constitution for failing to provide an executive council to the president:

The Senate, they maintained, would be a poor substitute. At the Virginia ratifying convention, George Mason, after noting his fear of Senate-president conspiracies against the people, proposed a remedy: "a constitutional council, to aid the President in the discharge of his office." The Senate should have the power to impeach the president and his council. "Then we should have real responsibility. In the present form, the guilty try themselves. The President is tried by his counsellors."<sup>37</sup>

Rohr notes that Mason's position on the executive council is

important, for it points out the need for a body that would not only assist the president but would check him as well. The idea of a council within the executive branch to serve as a check on the president "...suggests interesting parallels with the contemporary bureaucracy, which is often criticized (and sometimes praised) for frustrating the president's will."<sup>38</sup>

The critical issue for Rohr is that the Federalists did not contest this point; they granted it. Their argument was aimed at Anti-Federalist positions that found the Senate's role in executive matters dangerous, leading either to a "Senate-presidential cabal" or overwhelming power in the hands of the Senate.<sup>39</sup> The debate was over whether the Senate should have a role in executive matters, not whether the Constitution gave it such a role. He states, "...there was no dispute in 1787/88 over the fact that the Senate was intended to serve as part of the executive. The dispute centered on the propriety of the arrangement."<sup>40</sup>

After a thorough examination of what the Federalists and Anti-Federalists had to say about the proposed Senate, Rohr concludes that they had in mind an institution

1. in which legislative, executive, and judicial powers are combined;
2. which functions as part of an executive establishment, working (or conspiring) with the president and checking him as well;

3. whose members will serve for a long period and possibly for life or during good behavior;
4. whose members are expected to have a wisdom and expertise not found in the House of representatives;
5. whose members will have the institutional support to resist popular whims of the moment;
6. which could be constantly in session;
7. which may conduct its affairs in a place other than the legislative chamber;
8. which exercises some supervisory power over federal personnel matters; and
9. which expresses a permanent will and national character.<sup>41</sup>

It is important to understand that not all participants in the founding debate were happy with many of these characteristics. For example, the Anti-Federalists feared that long terms in office for many senators would lead to an American aristocracy; they also had concerns about the implications of a continuous body on the balance of powers.<sup>42</sup> Notwithstanding these misgivings, Rohr's point is that the characteristics of the Senate listed above approximate what the participants in the founding debate thought they would get if the Constitution should be approved. The Federalists liked what they saw, but the Anti-Federalists had serious misgivings. They were at one, however, in recognizing - for better or for worse - that the Senate would have executive powers.

In conclusion, Rohr points out that today's Senate

clearly does not resemble the institution described above. Rather, he claims, "The closest approximation to such an institution today is the career civil service, especially in its higher reaches", and therefore, "... there are aspects of the administrative state that roughly fulfill the vision of the framers. Today's Administrative State is fair game for criticism, but not on grounds of constitutional legitimacy."<sup>43</sup>

### Representation as a Constitutional Defect

In discussing representation, Rohr builds on Long's argument by citing another source of legitimacy for the administrative state: it provides representatives of ordinary citizens in the governance process. He suggests that the modern administrative state, with its involvement of millions of ordinary citizens in the systematic execution of public law, provides a balance or check against "... the likely excesses of a single executive prone to carry out his constitutional powers in a haughty or arrogant manner that offends republican principle."<sup>44</sup> Instead of viewing the career civil servants in the bureaucracy as a threat to responsive government, Rohr harkens back to George Mason's suggestion that because millions of relatively select persons comprise the bureaucracy, they are more in touch with how the average citizen thinks and feels. Mason concludes, "They need not be an embodiment of arbitrary power; they can be a

safeguard against it."<sup>45</sup>

### Legitimacy Without Election

It is not sufficient merely to proclaim a representative role for public administrators; a source of legitimacy for that role is necessary. Rohr challenges the argument that unelected public administrators lack legitimacy as representatives of the people because they are not elected. The cornerstone of his argument is popular sovereignty: it is the people who possess the ultimate power in our form of constitutional government, not the states, the legislature, the president, or the courts. He explains that what the sovereign people have chosen is "...not a group of legislators who will carry out their will. What the people have chosen is a constitutional order which balances the powers they have delegated to three equal branches."<sup>46</sup>

Since the sovereign people have "chosen a constitutional order," legitimacy flows from the Constitution, not from election. Rohr relies on Herbert Storing to support this point. In describing the legislature, Storing states that "the legislature is a body of constitutional officers, not a microcosm of the sovereign people." These officers, "like other officers of government, derive their authority from the Constitution, not from their election."<sup>47</sup> Storing argues that elections are "merely a method of choosing, not

a method of authorizing."<sup>48</sup> This distinction between "choosing" and "authorizing" is critical for Rohr's argument. The legitimizing act is the people's ratification of the various offices described in the Constitution. Whether these offices are filled by election or appointment has nothing to do with their connection to the people. Rohr notes:

The senators and representatives of article 1; the president, the department heads, and the inferior officers of article 2; and the judges of article 3 are all the objects of a popular choice that determined how each officeholder would be selected - some by popular election, some by indirect election, some by appointment. They are all equally the object of constitutional choice...<sup>49</sup>

However, Rohr is careful to point out that this reasoning does not mean that the inferior officers of Article II are equal to the president, the department heads, Congress or the courts in the scope and nature of their constitutional duties. The public administrators in the agencies are indeed subordinate to the three branches, but that subordination is grounded in constitutional legitimacy that is as valid as an elected official's. Furthermore, this legitimacy calls for a role involving more than simply taking orders from superiors. This chapter concludes with a discussion of what this role involves.

#### Constitutional Subordinate Autonomy

The concept of autonomy grounded in subordination

is fundamental to the role of the public administrator in our form of constitutional government. As noted in the introduction, Rohr states that a legitimate role for the public administrator is to uphold the Constitution of the United States, as stated in the oath of office. This means that administrators "...should use their discretionary power in order to maintain the constitutional balance of powers in support of individual rights."<sup>50</sup> The exercise of this heady discretion, however, is in the context of subordination to the three branches. Rohr notes,

"The Public Administration neither constitutes nor heads any branch of government, but is subordinate to all three of them. Like Congress, president, and courts, the Public Administration makes its distinctive contribution in a manner that is consistent with its peculiar place, which is one of subordination."<sup>51</sup>

The oath taken by the public administrator to uphold the Constitution is critical to Rohr's argument, for it reflects the tension between administrative autonomy and subordination:

...the oath to uphold the Constitution legitimates some kind of administrative independence; but precisely because it is an oath to uphold the Constitution, it has the potential to tame, channel, and civilize this independence in a way that will make it safe for and supportive of the founding principles of the Republic.<sup>52</sup>

Rohr points out how Chief Justice John Marshall, in Marbury v. Madison, used the idea of the oath to uphold the Constitution as part of an argument that interpreted the

Constitution as conferring on judges a professional independence that permitted them to sit in judgement on at least some acts of Congress.<sup>53</sup> However, Marshall "ignored the fact that the Constitution also imposes an oath 'to support this Constitution' upon the president, all members of Congress, all state legislators, and 'all executive and judicial Officers, both of the United States and of the several States.'"<sup>54</sup> If the oath confers some degree of independence on judicial officers, then similar claims can be made by the other groups listed above, including executive officers.

Rohr further explains the fundamental nature of an oath: it not only confers independence, but also restraint in the exercise of this autonomy. The negotiation of the tension inherent in the oath is the essence of what it means to be a professional public administrator, as opposed to a lobbyist or some other member of a private interest group pursuing his own agenda. Rohr notes that "Administrators do not differ from lobbyists in the sense that lobbyists are committed to causes and administrators are not. Administrators differ from lobbyists because administrators take an oath to uphold the Constitution, and lobbyists do not."<sup>55</sup>

### Subordinate Autonomy: Implications for Practice

What does autonomy grounded in subordination mean

in practice? Rohr notes that public administrators often practice this role without realizing it:

The normative theory that I am suggesting deals more directly with attitudes than with behavior. Administrative agencies often do choose among constitutional masters, but they usually do so as a matter of fact and seldom as a matter of constitutional principle. Their preoccupation with the low arts of organizational survival blinds them to the brighter angels of their nature. They should lift their vision to see themselves as men and women who 'run a Constitution.'<sup>56</sup>

Rohr suggests that the failure of public administrators and the public to think about administrative behavior in constitutional terms results in a narrow view of administration. Public administrators who put aside their personal policy preferences and fully support the president need not be looked upon as lackeys, nor should those who openly resist directives which they find questionable be shunned as obstructionists. Rather, he suggests that by "...grounding our thinking about the Public Administration in the Constitution, we can transform erstwhile lackeys, leakers, obstructionists and whistle blowers into administrative statesman."<sup>57</sup>

Constitutional subordinate autonomy, however, does not give a public administrator license to pursue his or her own policy agenda. Under the constitutional theory, there must be room for a wide variety of views on substantive policy issues. The Constitution does not tell us how much should be

done for the poor or whether we are doing enough to promote a nuclear freeze or protect the environment. The Constitution does provide the framework within which these worthy debates can occur in a manner consistent with a democratic government of shared powers. For those administrators who are strongly issue-oriented, Rohr suggests:

Administrators will not be without firm, perhaps passionate, convictions on matters of this sort. They should certainly use their discretion to favor those policies that they think are most likely to promote the public interest; but they should assess the public interest against the broad background of constitutional principle. The Constitution transcends a given tax policy, a weapons system, and food stamps.<sup>58</sup> It cannot be confined to any such particulars.

For example, a public administrator may exercise discretion to promote a policy direction in opposition to the White House, but the decision must be grounded in authoritative judicial opinions or acts of Congress, not merely in personal preference. For public administrators, according to Rohr,

...the Constitution is the cause above causes. In exercising discretionary authority to support this policy or that one, their judgement should be informed by the constitutional needs of the time, as well as the needs of the poor, the environment, the Air Force, the housing industry, the economy, the Third World, and the myriad other matters that clamor for the attention of the Public Administration.<sup>59</sup>

Rohr emphasizes that there is no straightforward formula for the public administrator to follow in the practice

of constitutional subordinate autonomy. When an administrator becomes involved in presidential activities that are legally or even constitutionally questionable, he must decide whether the right thing for him to do is to resist, support, or ignore the questionable activity. If he reflects upon his oath of office for guidance, he will find very little help because the case as described is too general to yield a sensible answer.<sup>60</sup> The key to understanding the implications of subordinate autonomy in practice lies in the close examination of specific cases. Rohr lists the following cases as an illustration:

1. President Nixon establishing a system of warrantless wiretapping for purposes of national security; or
2. President Jefferson considering the Louisiana Purchase; or
3. President Lincoln suspending the writ of habeas corpus without congressional authorization; or
4. President Franklin Roosevelt planning during World War II to establish 'relocation centers' for West Coast citizens of Japanese origin; or
5. President Truman seizing the steel mills during the Korean War.

Rohr suggests that the proper response for the public administrator to these constitutionally questionable activities depends on the circumstances. The oath to uphold the Constitution does not provide a neat formula from which one can rigorously deduce correct behavior. Rather, the oath is "an initiation into a community of disciplined discourse

in which one learns the ways of the constitutional heritage."<sup>61</sup> The responsible public administrator will gain a "sense" of what is constitutionally appropriate only from careful study of situations like those given above. Rohr emphasizes "sense" because it captures the essence of administrative statesmanship: the movement away from adherence to universal maxims or rules towards the careful study and dialogue around the particulars of concrete situations.<sup>62</sup>

### Filling the Gap

The following chapters answer Rohr's charge: the need to carefully examine a variety of administrative situations to better define the dimensions of what it means for a public administrator to exercise autonomy through simultaneous subordination to the three constitutional branches. If a "community of disciplined discourse in which one learns the ways of the constitutional heritage" is to be realized, practitioners need a heightened awareness of the range of factors that should be considered as they struggle to live the oath. As noted in the previous chapter, Aristotle's doctor develops prudence not by following canned remedies in a rigid fashion, but by applying knowledge gained through careful study of past cases to each new and uncertain sickness. In a similar vein, the public administrator will develop a "sense" of constitutionally appropriate action not

by adherence to guidelines or models, but by examining each new situation in light of factors identified through the study of past cases.

## ENDNOTES

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3. Ibid.
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15. *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).
16. *INS v. Chadha*, 462 U.S. 919 (1983).
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### III.

#### INDIVIDUAL PERSPECTIVE

The mass of men serve the state...not as men,  
mainly, but as machines.

- Henry Thoreau

The practice of constitutional subordinate autonomy requires public administrators committed to ongoing reflection on their roles and responsibilities as participants in our system of government. A constitutional government has no place for machine-like thinking, no matter the stripe. The zealot who is committed to the righteousness of a given cause, no matter what the context, may be every bit as misguided as the unquestioning worker bee who simply does what he or she is told without the slightest hesitation.

This chapter looks at constitutional subordinate autonomy from the perspective of a variety of individual public administrators, ranging from political appointees at the very highest levels of government to the street-level official who sees the impact of public policy decisions on citizens every day. Their reflections on the practice of their craft provides rich data on what it means to be a public administrator in the context of a government of shared powers, struggling with very complex and often value-laden issues. Their opinions and actions are examined in light of the concept of constitutional subordinate autonomy to unearth useful insights and lessons.

## GIFFORD PINCHOT: THE ADMINISTRATOR AS ZEALOT

Gifford Pinchot was the first director of the Forest Service, primarily under President Theodore Roosevelt and briefly under President Taft. Although his other government careers included the governorship of Pennsylvania, the focus here will be on his Forest Service days in the early 1900s. Considered to be the first American professional forester, Pinchot represents the public administrator on a crusade - a true zealot. This orientation is captured as Pinchot describes the forest situation in the United States on his return from studies in Europe:

When I got home at the end of 1890 the situation, if I had known it, was enough to discourage Sisyphus himself. Mercifully the worst of it was hidden from me. The widest opportunity for Forestry on this round earth was here, and the clear promise of the greatest returns in national safety and well-being. But there was no Forestry. Instead of it the most rapid and extensive forest destruction ever known was in full swing.

That gigantic and lamentable massacre of trees had a reason behind it, of course. Without wood, and plenty of it, the people of the United States could never have reached the pinnacle of comfort, progress, and power they occupied before this century began.

The Nation was obsessed, when I got home, by a fury of development. The American Colossus was fiercely intent on appropriating and exploiting the riches of the richest of all continents - grasping with both hands, reaping where he had not sown, wasting what he thought would last forever. New railroads were opening new territory. The exploiters were pushing farther and farther into the wilderness. The man who could get his hands on the biggest slice of natural resources was the best citizen. Wealth and virtue were supposed to trot in double harness.<sup>1</sup>

Pinchot was tremendously successful in his quest to address the situation he found so grave. When he entered the government service in 1898, there were 19 national forests with a total area of almost 20 million acres; by 1909, when Roosevelt left office, there were 149 national forests with a total area of about 193 million acres.<sup>2</sup> The way in which Pinchot achieved these and other dramatic results provides some interesting examples of constitutional subordinate autonomy.

### The "Midnight Forests"

Pinchot's aggressive moves to protect large amounts of public land put him squarely at odds with the citizens in the western states and their representatives in Congress. In his biography of Pinchot, M. Nelson McGeary describes the variety of interest groups which felt threatened by Pinchot's activism:

Some were speculators who saw their chances for easy profits disappearing into thin air. Some were lumbermen or mining men whose opportunities to acquire natural resources with a minimum of financial outlay were being curtailed. Some believed in speedy development at any cost. And some were ordinary citizens who could not see the justice of having Easterners prescribe the rules under which the West could be developed. Every step that Pinchot took toward conservation was bound to arouse antagonism.<sup>3</sup>

Pinchot, however, had the enthusiastic support of the conservation-minded President Roosevelt, and they made a formidable team indeed. Both men embraced the philosophy that

the executive is bound to do what he can for the general welfare in the absence of specific legal prohibitions, a theme repeatedly seen in Pinchot's writings.<sup>4</sup>

Nowhere was this philosophy more evident than in the case of Congress's attempt to slow the annexation of land by Pinchot and Roosevelt in 1907. An Oregon Senator, angered by the steady increase in the number and size of the national forests, offered an amendment to an agricultural appropriation bill transferring from the President to Congress the authority to establish such forests in the six states of Colorado, Idaho, Montana, Oregon, Washington, and Wyoming.<sup>5</sup> As soon as the bill passed, Pinchot was in the White House with Roosevelt figuring out some way to avoid the damaging effects of the amendment. They developed a strategy, and during the ten days preceding the final date on which the President could sign the bill, Forest Service staff worked day and night preparing plans and proclamations for new forest areas which Roosevelt could create before the deadline. On March 4, 1907, just before signing the bill which took away his power, Roosevelt issued proclamations creating a whole series of "midnight forests" comprising 16 million acres. The coup was a success. All the opposition in Congress and the affected states could do was protest.<sup>6</sup>

Under the concept of subordinate autonomy, Pinchot had a choice in this case. Although the law was not yet technically in effect, he could have exercised his

subordination to Congress by respecting their intent and abstaining from any last minute maneuverings. In fact, Secretary of Agriculture Wilson, who had to sign the papers for the new forests, expressed such concern over the whole procedure. He feared that the Department and the Forest Service would be regarded as seriously breaking faith with Congress.<sup>7</sup> It is apparent from his memoirs that Pinchot did not share Wilson's concern. He described with unabashed pride his quick response to the amendment:

At once I saw T.R. and got his enthusiastic consent to our plan. Thereupon we set every available man at work drawing proclamations for National Forests in those six states. We knew precisely what we wanted. Our field force had already gathered practically all the facts. Speedily it supplied the rest. Our office worked straight through, some of them for thirty-six and even forty-eight hours on end, to finish the job. As usual our people were superb.<sup>8</sup>

Another statement by Pinchot regarding the reaction by Congress is also revealing, as he states,

When the biters who had been bitten learned the facts they were furious. As T.R. said, 'The opponents of the Forest Service turned handsprings in their wrath, and dire were the threats against the executive; but the threats could not be carried out, and were really only a tribute to the efficiency of our action.'<sup>9</sup>

Pinchot exercised the autonomy technically available to him and sided with the President instead of the Congress. Was this a responsible exercise of administrative statesmanship or an unjustifiable example of an imprudent public administrator ignoring the intent of Congress because it did not agree with his understanding of the public

interest? It is not enough simply to say that because the law was not yet in effect, there is no question that Pinchot was justified. Such a response would ignore the rich constitutional complexities of the problem and collapse it into a shallow legalism. This is apparent if one considers a more striking example, such as Congress passing a law to stop all military aid to a foreign country. If an administrator, with the support of the president, decided to deliver huge amounts of aid just before the date the law would go into effect, one can imagine the uproar.

A thoughtful administrator should consider several factors in the midnight forest example. First is the historical context. It is reasonable to assert, as Pinchot did, that there was an imbalance at the turn of the century that favored the forces for development of public lands over those in favor of preservation or regulated use of the land. The Congress was captured by these forces, and therefore it was up to Pinchot to restore some balance. Given this perspective, Pinchot's actions seem more prudent; they would seem less so in 1990, for example, where the same degree of imbalance does not exist.

Another factor to consider in judging Pinchot's action in light of constitutional subordinate autonomy is the impact on individual rights. In the haste to get as many tracts of forest as possible approved, boundary lines were not drawn with precise care and agricultural land was needlessly

included. In Idaho, for example, 3 million acres of good agricultural land was taken out of circulation and could not be used by homesteaders.<sup>10</sup> Although Roosevelt made assurances that any reserves that included agricultural land would be restored to entry, not a great deal was done in this regard.<sup>11</sup> Senators such as Robert La Follette, otherwise supportive of Pinchot's conservation activities, stated that the "only well-grounded opposition" to conservation was caused by the inclusion within forest reserves of "purely agricultural lands, thus retarding agricultural development in some of the western states."<sup>12</sup> Does this factor make Pinchot's actions in the midnight forests case seem less prudent? The homesteaders would certainly have said "yes!" The agricultural lands issue at least leads one to question the seemingly reckless abandon with which Pinchot and his staff carried out their plan, and suggests that a more prudent administrator might have sacrificed some of the preserves by working more carefully in the name of homesteaders' rights. However, zealotry leaves little room for compromise and can interfere with the disciplined reflection needed to practice administrative statesmanship.

#### Disputes with Taft and Ballinger

Pinchot's later collision with President Taft and Secretary of Interior Richard Ballinger illustrates the

reaction of a public administrator to a new administration with an unwelcome policy agenda. As noted earlier, Pinchot and Roosevelt shared the same zeal for conservation, and stretched the letter of the law whenever possible to pursue their interests. As the time approached for Roosevelt to leave the White House, Pinchot became increasingly concerned that the new President would fail to promote conservation policies with the same zeal as did Roosevelt.<sup>13</sup> Pinchot's fears were well-founded. For example, Taft made a surprise move by replacing Secretary of Interior Garfield, a close ally of Pinchot's, with Ballinger, who was much more sympathetic to economic development interests. McGeary states that although no one knows exactly why Taft chose to drop Garfield, Taft clearly was very concerned over Garfield's inclination to "stretch the letter of the law" on occasion in order to protect what Garfield felt was the public interest. Not only did Taft reject this line of reasoning, he was also very sensitive to the opposition in the West to the conservation movement.<sup>14</sup> As Pinchot soon learned, just as he used his autonomy under the law to move public policy in the direction he believed was correct, so others could use the same device to scale back the progress he had made. A specific case is illustrative.

Under the law, private citizens were not allowed to purchase land in the national forests for the purpose of

developing power, but they were permitted to obtain land for mining or for quarrying stone. Pinchot feared that unless these power sites were protected, they would wind up in the hands of power companies who then, when they were ready, could develop electricity free of the restrictions that the Forest Service placed on them when it leased land for fifty year periods.<sup>15</sup>

To address this problem, Pinchot demonstrated typical creativity. He directed his men in the field to recommend for withdrawal a piece of land in each potential power site. The justification would be the need for "administrative sites" for ranger stations. These stations were tracts of land of 100 to 200 acres set aside for the headquarters of a forest ranger, where he could maintain a home and land for pasturing his horses.<sup>16</sup> McGeary notes,

It was pure pretext that more than a very few of these withdrawals were to be used as ranger stations. Instead it was hoped that each withdrawal, taken from the center of a potential power site, would give the government a key area by means of which it could maintain some control over the development of the site."<sup>17</sup>

To justify this action, one of the arguments put forth by Secretary Garfield was the "stewardship duty" of the President and the Secretary of the Interior. Citing a list of court decisions, Garfield argued that under the "supervisory power of the executive", he could withdraw lands from development to ensure that they would not be acquired wrongfully, and to

give Congress time to pass protective laws.<sup>18</sup> This line of reasoning once again reflects the Rooseveltian philosophy that an executive was often duty bound, if not specifically prohibited by the Constitution or by a law, to take positive steps for the public good.<sup>19</sup>

The problem with this reasoning, of course, is that the definition of the public good depends on who is doing the defining. Upon entering office, the new Secretary of Interior Ballinger, with Taft's support, almost immediately took action to begin restoration of the withdrawn power sites. He was much more sympathetic to the western developers and their representatives in Congress, and thought the danger, at least in the near term, of a power monopoly was minor.<sup>20</sup> Equally important was his different philosophy regarding executive power. To Ballinger, the "supervisory power" rationale used by Garfield was nonsense. He believed that when Congress by law opened public lands to entry for any purpose, such as homesteading or mining, the President or the Secretary of the Interior had no power to protect any part of this land by withdrawing it until Congress could act.<sup>21</sup> Taft concurred with Ballinger over Pinchot's protests. Taft's conception of his office was based on the philosophy that a President needed specific authority for any action which he might take; this view of executive power contrasted sharply with the Rooseveltian activism embraced by Pinchot.<sup>22</sup>

From Pinchot's perspective, not surprisingly, the actions of Ballinger and Taft were intolerable. Speaking to his eventual break with Taft, Pinchot summarizes his view in his memoirs, stating,

I did not break with the President because I wanted to but because, as one of the originators of the Conservation policy, it was obviously my duty to make the fight for its protection. That fight forced me to choose between my early friendship for Taft and my public duty to the people of the United States. To that there could be only one answer.<sup>23</sup>

#### The Problem with Zealotry

Looking at this case in light of constitutional subordinate autonomy, Pinchot had every right to exercise his autonomy by voicing his concerns over the direction of conservation policy under Taft. However, he went too far by claiming that there was only one correct answer to his choice between Taft and duty to the people. As a public administrator, Pinchot's duty was to uphold the Constitution, not uphold a specific conservation policy he equated with the public good. Since Taft was acting wholly within his discretion under the law, another administrator in Pinchot's position would have been perfectly justified in exercising his or her subordination to the president and giving him full support. In his zealous pursuit of conservation, Pinchot held no quarter with such a position. McGeary, Pinchot's biographer, recounts how Pinchot bared his feelings on this

subject in a talk he had with George Otis Smith, director of the U.S. Geological Survey. Although recruited by Roosevelt on the recommendation of both Garfield and Pinchot, Smith demonstrated a strong loyalty to Ballinger in disputes such as the one described above. Pinchot called Smith into his office one day, and made it abundantly clear to Smith that he believed him a traitor to Garfield and conservation.<sup>24</sup>

In fact, one could argue that an equal cause for concern was Pinchot, who seemed to have little appreciation for his subordinate position under the separate but shared powers of government. Pinchot often said the public good came first; perhaps what he should have said was his definition of the public good came first! This argument is not meant to diminish Pinchot's tremendous contributions. Given the abysmal state of conservation in the early part of the century, his zealotry was often appropriate. However, it would be impossible to run a government if the majority of public administrators were off pursuing their own agenda, no matter how noble. Rather, this discussion is meant to elevate those public administrators like a George Otis Smith who choose to exercise their subordination even if it goes against their personal definition of the public interest.

## JOSEPH CALIFANO: SERVING MULTIPLE MASTERS

Joseph Califano brings an informed perspective to the role of the public administrator in American government. Trained in the law, he served as Special Assistant for Domestic Affairs under President Johnson, and later as Secretary of Health, Education and Welfare (HEW) under President Carter from 1977-1979. His appreciation for the tensions inherent in our constitutional form of government, from one who has practiced public administration at the highest levels, provides numerous excellent illustrations of the subordinate but autonomous concept.

It is useful to compare two sources of information on Califano: his writings on presidential power, based on his experience in the White House under Johnson and on the aftermath of Watergate, and his reflections on his tenure at HEW, where he was responsible for a huge, complex government department that was involved in some of the most contentious social issues of the time.

### Presidential Power

Writing in the mid-1970's in the aftermath of the Great Society programs, Vietnam and Watergate, Califano expresses deep concern over the excessive concentration of power in the presidency. In A Presidential Nation, his primary theme is the need to restore the system of checks and

balances which the original framers of the Constitution had designed to prevent abuses by any one of the branches. Califano suggests that the power of the presidency, since the time of Franklin Roosevelt, has grown to the point where it now "dwarfs" the Congress, the states, the cities, the special interests, and is more than holding its own with the judicial branch and the media.<sup>25</sup> Commenting on the explosion of the size of the presidential staff, he suggests that it only partly reflects the increased difficulty of directing the complex executive branch:

It also dramatically evidences the unprecedented powers that have been assumed by the presidency and vested in the central executive. The preservation of freedom in America in the last quarter of the twentieth century requires a strong presidency, but one checked and balanced by energized institutions, public and private. The viability of these institutions is as essential to our freedom as adherence to the Constitution that set them in motion.<sup>26</sup>

Although written in 1975, later events such as the Iran-Contra scandal demonstrate that Califano's concerns have not lost their relevance. It is instructive to examine what Califano has to say about the institutions which need to be "revitalized and reshaped" to counter presidential power more effectively.

The Executive Branch: Consistent with the unitary executive view, Califano is entirely sympathetic with the

typical frustration encountered by a president as he attempts to effectively control the executive branch. He notes that efforts towards control are frustrated by the organizationally incoherent way in which the scores of domestic programs are scattered throughout a "crazy quilt of bureaus and divisions" in more than one hundred executive departments and agencies.<sup>27</sup> The control problem, however, is not only due to the irrational organizational structure, but is also a result of public administrators in the departments with ties to congressional subcommittees, special interest groups and other constituencies. He notes, "Smaller federal agencies and numerous bureaus within large departments respond to presidential leadership only in the minds of the most naive students of government administration."<sup>28</sup> Rather, they operate as "independent fiefdoms", essentially unaccountable to the president.

The answer to this dilemma has traditionally been to focus power and control in a White House staff comprised of individuals of unquestioned loyalty to the president and his interests. Califano states:

Since the time of Franklin Roosevelt, the concept of the White House staff has been that a president is entitled to have a group of people whose loyalty runs only to him, whose power derives solely from him (not the Congress or constituent pressure groups which often vie for the attention of cabinet and agency heads), and who can be trusted to share the president's perception of his interests and carry out his orders to protect them.<sup>29</sup>

For Califano, the need for such loyal staffers is a political reality for a president attempting to make progress on intractable public problems. The danger is when a president seeks out a "knee-jerk loyalty" that suffocates debate and inhibits public policy options from reaching him. The wise president, according to Califano, should perceive loyalty in staffers who truly serve his, (and the nation's) best interests by arguing with him, pressing him with new ideas, and helping him face harsh realities.<sup>30</sup>

Although few would dispute Califano's description of the ideal White House staffer, it is evident that he sees the public administrators in the agencies only as a problem, rather than part of the solution, to the unhealthy balance of power in favor of the president. He appears to accept as a given fact of life that the careerists in the agencies, if given the opportunity, will pursue personal agendas and be supportive of constituencies other than the president. Interestingly, Califano does not view this independence of careerists as having any positive role in checking presidential power; for Califano they are merely an instrument of presidential power who in an ideal world would be much more subservient to the president in their attitudes and actions. The counterbalancing of the presidency needs to come from White House staffers who are willing to argue with and question the president, or from the two co-equal branches.

The Congress: Califano despairs at the ineffectiveness with which the other two co-equal branches check presidential power and the executive branch. Focusing on the Congress, he sees this branch as the most inadequately staffed and least efficiently organized of the three branches. He provides numerous examples which demonstrate the extreme dependence of Congress upon the executive branch for most of its information. He notes,

Any congressman who has been in Washington any number of years can recount incidents where a recalcitrant executive branch has successfully refused to furnish information to congressional committees and, as a result, the committee has been unable to act or has acted in uninformed support of an executive action that it later regretted.<sup>31</sup>

For example, under the Johnson Administration, the Bureau of the Budget had developed the capability to project out-year costs up to five years for new and existing legislative programs. Proud of this new capability, the Administration revealed the five-year cost projections for its Model Cities program when the proposal was sent to Congress. The first year costs were estimated at \$10 million to analyze the proposed Model Cities areas; by the third year with the start of implementation the federal costs would exceed \$.5 billion; and in the fifth year, federal costs would reach at least \$1 billion.<sup>32</sup> The forces in Congress in opposition to the Model Cities program attacked the "astronomical" costs revealed by the five-year projections and almost blocked its

enactment.<sup>33</sup> Not surprisingly, President Johnson thereafter refused to release similar cost projections for future programs he recommended to Congress, despite repeated attempts by members of Congress to secure the figures.

Califano questions the propriety of the chief executive withholding such estimates from the Congress. He argues that it would be "outrageous" for the president of a corporation to refuse to tell the board of directors how much money a proposal would cost five years in the future. This is because in the business world success is measured against the easily quantifiable profit margin. In politics and government, however, success is not so narrowly defined, nor as readily quantifiable. Califano concludes:

Estimates are rarely solid, particularly five-years forward on a new program. A president inevitably will be able honestly (if self-servingly) to rationalize that the new legislative program he proposes is in the public interest; that if it works well, he wants certain high levels of expenditure for it; but that if it does not work well he will have enough sense to request lower levels of expenditures or terminate the program. Therefore, he can point out, there is no reason why the Congress should have the information at the start, especially where the Congress has the power to grant or withhold funds each year. The Congress, a president will say somewhat ingenuously, can make its own projections.<sup>34</sup>

Although Califano does his best to justify President Johnson's actions, there is certainly room for a rebuttal in a government of shared powers. Senator Abraham Ribicoff, who led the Congressional effort to obtain the cost projections,

certainly might respond that it is every bit as outrageous for a president of the United States to withhold cost figures from the Congress as it is for the corporation president to withhold numbers from the board of directors. The reason for Ribicoff's argument, however, would not be based on Califano's corporate analogy, where the president is in theory subordinate to the board of directors. The President of the United States is not subordinate to the Congress; however, he does share power with the Congress. In our constitutional form of government based on shared powers between the executive, legislative and judicial branches, it is outrageous for a president to refuse to provide numbers to the Congress because it impairs the institution's ability to properly assess the implications of the proposed legislation.

Just as Califano, in his role as special assistant, exercised his subordination to the president by defending Johnson's efforts to withhold the figures, would it not have been justifiable for a public administrator in an agency to have sided with Ribicoff and leak the figures to Congress, or perhaps more prudently suggest to a friendly congressman that he specifically ask the public administrator for the information?

Based on the concept of constitutional subordinate autonomy, a strong case could be made for an agency official providing the information to Congress. The agency official

could have reasonably asked, "If the president is so convinced that the model cities program is in the public interest, why won't he provide the full cost projections to the Congress and argue that the long-term benefits outweigh the costs?" Clearly, the answer is that Johnson would not supply the cost figures because he had grave doubts that such an argument would be successful. In a government of shared powers, a strong case could be made for the Congress' right to such information in order to make a more fully informed decision, even if that decision is likely to be unfavorable to the Administration. From his perspective as a White House special assistant concerned with pressing the president's agenda and keeping the agencies in line, Califano would have likely accused the agency official of disloyalty to the president. However, given his overall concern for the need to check presidential power more effectively, and the questionable nature of Johnson's actions in the case, Califano would also have a difficult time denying the source of legitimacy (the Congress) for such a leak.

The important point here is that Califano's answer to the imbalance in power is for Congress to build its own capacity to generate its own information. He fails to acknowledge another solution: the public administrators in the agencies providing Congress the information where the president is not being responsible. The concept of the public

administrator as a check on presidential power from within the executive branch, inherent in the concept of constitutional subordinate autonomy, is not evident in Califano's earlier writings based on his White House perspective. His later experience as a cabinet member provides a different perspective.

### Secretary of HEW

Califano's perspective on his tenure as Secretary of Health, Education and Welfare provides an interesting contrast, as well as a response, to his concerns about presidential power. As stated previously, his earlier views on the need to reenergize the institutions in government to counterbalance presidential power overlook any significant role for the public administrators in the agencies. In fact, the role of the Cabinet members is to rein in these agencies and increase their responsiveness to the president. In contrast, his views after living the role of a Cabinet member go much beyond this - it involves a significant role as a check on the president, as well as a servant of the president. The negotiation of that tension is the essence of Califano's tenure as Secretary, producing several excellent illustrations of subordinate autonomy.

Civil Rights: Califano's actions in the civil rights

arena is an example of a public administrator exercising his autonomy to push more vigorous implementation of a congressionally mandated mission despite a lack of commitment by the president and a divided Congress.

As Califano points out, there can be a striking difference in the manner in which different administrations approach enforcement of the same law. The Office of Civil Rights (OCR) in HEW (now Health and Human Services) is a good illustration. OCR had been established to ensure HEW fulfilled its responsibility under Title VI of the Civil Rights Act of 1964, which forbids recipients of federal funds to discriminate on the basis of race, color or national origin. Califano describes how the OCR thrived under President Johnson, who was deeply committed to civil rights, while it atrophied under President Nixon, where "...there was little sense of purpose or priority, and no sense of identification with the political leadership of the administration, or loyalty to it."<sup>35</sup> The decline of the office continued under President Ford.

Califano did not blame Nixon and Ford alone for the lack of commitment to the OCR, however. He also points out the "two faces" of Congress on civil rights issues. On the one hand, Congress passes glorious legislation such as Title VII of the 1964 Civil Rights Act, prohibiting discrimination on the basis of race. However, Congress then turns around and

effectively undermines the implementation of the law through the annual HEW appropriations bill by forbidding the use of any funds to bus school children.<sup>36</sup>

This was the environment when Califano took over at HEW under Carter. Califano felt it was imperative for him to "breathe life" into the OCR. He emphasized his deep commitment to civil rights in his confirmation hearings, telling the Congressmen "I intend to push you if you don't push me."<sup>37</sup>

Consistent with his promise, one of the first things he did was to use his discretion to address the backlog of cases in the OCR. When he became Secretary, an OCR investigator handled only three or four complaints each year, resulting in a backlog of over 3,500 uninvestigated cases despite a court order directing HEW to act on the complaints in a timely manner.<sup>38</sup> Califano reports that he was able to trim this backlog substantially by doubling the size of the OCR. This is a very basic but nonetheless essential example of subordinate autonomy. Using the administrative discretion that exists under many laws, the previous Secretary of HEW permitted the backlog of cases in OCR to persist, no doubt because it was not an Administration priority. Because of personal commitments, Califano chose to exercise his autonomy and address the backlog, citing the law and a court order as justification, regardless of whether it was an Administration

priority. This is an everyday occurrence in the agencies. The important point is that this is not simply an administrator pursuing personal commitments - Califano's personal commitment was grounded in the law and a court order. Others might have justified doing nothing about the backlog of cases by exercising their subordination to the Administration's agenda. In a word, this decision is part of what it means to administer in our government of shared powers; it is not merely the pursuit of personal commitments, as the unitary executive camp would argue.

Continuing with the civil rights issue, Califano notes that he did not know the extent of Carter's commitment to civil rights as the Administration began. He recounts how Johnson made deep personal sacrifices and spent considerable political capital on civil rights. He concludes, "...I knew you had to have fire in your belly and inexhaustible persistence to move effectively on discrimination, and I did not know how much Jimmy Carter had."<sup>39</sup>

Califano was to find out, much to his dismay, that Carter wavered in his commitment to civil rights issues, particularly when high political stakes were involved. His reflections on HEW's attempts to desegregate the North Carolina state system of higher education are instructive. In 1969, HEW asked ten states with dual black and white systems of higher education, including North Carolina, to

propose plans to eliminate them. North Carolina was one of five states that failed to submit a plan. When HEW took no action, the NAACP filed suit to force HEW to institute enforcement proceedings to cut off federal funds in any state that failed to submit an acceptable plan. After three years of litigation, Judge John Pratt ruled in favor of the NAACP, and ordered the Secretary of HEW to begin enforcement proceedings against any state that had not submitted a plan within a specified amount of time. In 1975, upon review of the situation, the NAACP was not satisfied. They charged HEW with not only accepting inadequate plans from the states, but failing to monitor compliance with even the substandard plans. Judge Pratt agreed, and ordered HEW to negotiate with the NAACP to establish criteria for developing adequate plans to desegregate six states, including North Carolina.<sup>40</sup>

Califano found North Carolina to be the most intractable state of all. Eleven of its colleges were predominantly white, five predominantly black. Ninety-four percent of the students at the white colleges were white, and 96 percent at the black colleges, black. Furthermore, the predominantly white institutions enjoyed a dramatic imbalance in new degree programs and facility construction and improvement.<sup>41</sup> The plan submitted by the University of North Carolina board in 1974 to redress the imbalances was rejected by the Court; nonetheless, the revised plan submitted to HEW

in 1977 during Califano's tenure was almost identical. One member of the board, Julius Chambers, a civil rights attorney from Charlotte, resigned, charging that the UNC plan "was not a sincere commitment to see that minorities are brought into the system."<sup>42</sup> Knowing that the court would not accept the plan, Califano entered into negotiations that dragged on into 1978. Califano notes that a significant factor contributing to the delay was the ambivalence of President Carter, who was under growing political pressure in North Carolina. Governor Hunt and Senator Morgan informed Carter that he was suffering politically from the move to desegregate the state's higher education system, and asked the President to blunt HEW's efforts.<sup>43</sup>

Nonetheless, at a Cabinet meeting on March 13, Califano told Carter that he was seriously concerned about HEW's ability to reach agreement with North Carolina before the March 22 deadline set by the court. While Carter privately expressed his concern to Governor Hunt and urged him to negotiate with HEW, Califano publicly made a point of the fact that North Carolina remained the only state without a settlement.<sup>44</sup>

On the day of the deadline, Califano announced that HEW would begin enforcement proceedings promptly. When the proceedings began, HEW would defer consideration of future applications for federal funds from the affected institutions,

in a carefully targeted and limited fashion, if those funds would contribute to continuing segregation in the North Carolina system. Not surprisingly, Califano was publicly blasted by Governor Hunt and Senators Morgan and Helms for being unrealistic and inflexible. However, he was also heavily criticized by civil rights groups, because he settled for a deferral of less than all federal funds from HEW. In response, Califano argued that "atomic bomb penalties" were counterproductive, because the fallout inevitably hurt the poor children who benefitted from a range of HEW-funded programs.<sup>45</sup>

President Carter started pushing hard for a settlement. He wanted to call Governor Hunt himself, but Califano urged him to hold off because he feared Carter would settle for too little and be embarrassed if the federal court rejected the agreement. As the responses by North Carolina continued to be inadequate, the pressure kept building. Hunt and other state officials increased their contact with the White House, and Califano indicates they had a sympathetic ear in UNC alumnus Stu Eizenstat. He called Califano with two messages: The UNC dispute was hurting the president, and HEW was hurting the university. Less candid than Eizenstat, other White House aids anonymously told reporters that the issue was damaging to the President and that the White House had its doubts about Califano's efforts.<sup>46</sup>

Califano states that the greatest pressure came from an unexpected source, Vice-President Mondale, who was the most committed civil rights voice in the White House. On March 8, 1979, Mondale told Califano that just before President Carter had boarded a plane for Cairo the previous day, he asked him to tell Califano that he did not want HEW to bring suit in North Carolina. Califano replied that they were missing the point; the issue was whether the NAACP or the state of North Carolina would sue first. Mondale then said the President felt strongly about not starting any proceedings. Califano responded that he was seeking a settlement, but if that failed he had "no choice" but to start an administrative proceeding.<sup>47</sup>

As promised, Califano worked out an agreement with Governor Hunt, but the University of North Carolina Board was so determined to litigate that they never considered the details of the agreement. The Board was convinced that if they litigated, HEW would back down or be blocked by a court order from initiating formal administrative proceedings. Califano notes that a year after he left HEW, the administrative proceeding was just completing pre-hearing maneuvers and fact-finding, and the UNC board of governors had already paid more than \$1 million in legal fees to block the federal government's effort to desegregate North Carolina's dual system of higher education.<sup>48</sup>

### The Tension Between Loyalty and Subordinate Autonomy

This civil rights case is just one of several examples from Califano's writings on his tenure at HEW in which he demonstrated a keen sense of what it means to serve all three branches of government simultaneously. Although Califano told Mondale he had "no choice" but to initiate administrative proceedings if a settlement could not be reached with North Carolina, in reality he could have chosen to exercise his subordination to the president and dragged his feet in a number of ways. Such foot dragging in response to court orders happens on a regular basis in government agencies. But Califano chose to throw his total support to the enforcement of the Civil Rights legislation and the intent of the court, despite its impact on the president politically. Why? He was clearly influenced by his personal commitment to civil rights, which was reinforced by a reasonable interpretation of the legislation and the court order.

A closer look at the law is instructive. Under Section 602 of the Civil Rights Act of 1964, each federal department and agency which is empowered to extend financial assistance to programs or activities may issue rules or regulations to ensure that the recipients do not engage in discriminatory practices.<sup>49</sup> The statute clearly states that these rules must be approved by the president. Furthermore, the statute states that compliance with these rules may be

effected by termination or refusal of federal assistance. However, there is nothing that says termination or refusal actions by a department must be approved by the president, although it does say a report must first be filed with the appropriate House and Senate committees. Given this language, Califano at the very least was empowered by statute to propose rules and enforcement actions independently with the president. The statute could be further construed to mean that the Secretary of HEW could terminate or refuse federal assistance to discriminating institutions without the approval of the president.

The White House staffers probably felt that Califano's actions were a clear case of a Cabinet member forsaking loyalty to the president to pursue a personal agenda. The key point, however, is that Califano had a legitimate right, grounded in the civil rights law and the court order, to exercise his autonomy from the president in this case. The White House staffers could question Califano's actions on the basis of loyalty, but they could not call his actions illegitimate or an example of bad government.

However, the concept of constitutional subordinate autonomy for a public administrator does not mean merely looking for every opportunity in the law or courts to justify pursuing personal preferences regardless of the context of the situation. In his reflections on the abortion issue, for

example, Califano went against personal commitments because of his responsibility to determine congressional intent.

Abortion: The fiscal 1978 HEW appropriations bill, after a tumultuous public debate, provided that no HEW funds could be used to perform abortions, "except when the life of the mother would be endangered if the fetus were carried to term, or except for such medical procedures necessary for the victim of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service..."<sup>50</sup> The language of the bill required the Secretary of HEW to issue regulations and establish procedures to ensure rigorous enforcement of the law. One of the most controversial determinations for Califano was to define "reported promptly" in the case of rape or incest. Clearly, given Califano's personal anti-abortion position, plus extreme pressure from his Catholic constituency and President Carter, he could have used his discretion under the law to define the reporting period as narrowly as possible. Instead, Califano closely studied the congressional debate that forged the bill, and determined that a sixty day reporting period was "within the middle range of the various time limits mentioned in the debates."<sup>51</sup> Carter made it very clear that he wanted the period to be much shorter, because he personally believed sixty days permitted too much opportunity for fraud and would encourage women to lie. Califano, who told Carter that what

counts is congressional intent, states his position eloquently:

My responsibility under the Constitution and under our system of government was to reflect accurately the law passed by the Congress. Neither Carter's personal views nor mine were of any relevance to my legal duty to ascertain what Congress intended and write regulations that embodied that intent.<sup>52</sup>

Carter did not agree with Califano's reasoning. At a meeting to discuss the state of his Administration, he cited the abortion case as an example of the failure of his Cabinet members to demonstrate sufficient loyalty to him.<sup>53</sup>

Califano's appreciation for his complex role as HEW Secretary in the abortion case is impressive. He took great pains to ensure that his personal beliefs did not override congressional intent, but also that he did not bend too far to compensate for his personal beliefs and approve inappropriately loose regulations. However, his conclusion that a sixty day reporting period was the best standard because it represented a compromise between the extremes reflected in the congressional debate is disturbing. Constitutional subordinate autonomy does not mean merely taking the middle road whenever there are struggles between the three branches of government. If that were the case, an administrator with a good calculator is all that would be required as opposed to a statesman. Certainly Califano was

also driven by the practical reality of finding a middle ground that would be acceptable to all parties.

The important point here is that the legislation stated that "The Secretary shall promptly issue regulations and establish procedures to ensure that the provisions of this section are rigorously enforced."<sup>54</sup> If Califano did not believe that the sixty day reporting period would ensure that the law be rigorously enforced, then he had a responsibility to propose a different reporting period independent of the congressional debate. In his memoirs Califano did state the following:

The sixty-day period was long enough for a frightened young girl or an embarrassed women who might not want to report a rape or incest, or one in shock who psychologically could not, to learn whether she might be pregnant and to make the report to public authorities. Sixty days was also prompt enough to permit effective enforcement of the law.<sup>55</sup>

However, it is not clear whether this reasoning truly drove Califano's decision or whether it merely rationalized a decision based on the average of extreme positions.

In summary, as Secretary of HEW, Califano struggled to balance his duty to serve the president as a member of the executive branch with his responsibility to follow the intent of Congress and make a good faith effort to enforce decisions of the courts. This difficult task, the essence of administrative statesmanship, is a far richer concept of the public administrator's role than he envisioned as a White

House special assistant, where the dominant theme was the insubordination of Cabinet members and the agencies. Indeed, the exercise of subordinate autonomy by Califano the Secretary would likely have been viewed as disloyalty by Califano the White House staffer!

### Balancing Personal Beliefs

In addition to loyalty to the president, the civil rights and abortion cases also illustrate the balancing of personal beliefs against the responsibility of public administrators under the Constitution. In the civil rights case, Califano's deep personal pro-civil rights stance certainly influenced him to take a strong stand even though it was unpopular with the president. In the abortion case, conversely, he subordinated his personal beliefs. This contrast is not incongruous; it demonstrates that although personal beliefs may play a legitimate role in a public administrator's decisionmaking, they must be subordinate to congressional intent, the courts and the president. In the civil rights case, both the legislation and the court order pointed to the strong stand taken by Califano. The fact that this direction was consistent with his personal beliefs made him even more determined to persevere despite the purely politically motivated pressure by the Administration to delay responding to the court order. In the abortion case, the

direction indicated by the legislation was not consistent with Califano's personal beliefs, but he felt that congressional intent had to take precedence even though it was clearly at odds with what he and Carter personally preferred.

The main point is that personal beliefs should not drive the decisions of public administrators, although they may be acted upon when they are justified within the parameters set by the Congress, courts and president. As argued earlier, the subordination of personal beliefs is what separates public administrators from lobbyists: although they both may possess strong personal beliefs, only one group takes an oath to support the Constitution.

#### JAMES LANDIS: CHAMPION OF THE ADMINISTRATIVE PROCESS

The perspective of James Landis on the role of the administrative process and the independent regulatory commissions provides abundant illustrations of constitutional subordinate autonomy. His dynamic career, including chairmanships of the Securities and Exchange Commission under Franklin Roosevelt and the Civil Aeronautics Board under Truman, as well as Dean of the Harvard Law School, provided an understanding of American government informed by a rare combination of practical experience and theoretical expertise. Focusing on the role of the independent commissions in the federal government, Landis makes an eloquent case against the

unitary executive model that is very consistent with Rohr's concept of the public administrator exercising subordinate autonomy to maintain equilibrium among the executive, legislative and judicial branches. The following discussion presents several key themes evident in Landis' writings and career which support this interpretation.

### Preserving Equilibrium

In The Administrative Process, a series of well known lectures delivered in 1938 while Dean of the Harvard Law School, Landis was exuberant in his discussion of the critical role for the administrative process and the independent regulatory commissions in American government. He notes that "The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes."<sup>56</sup> For Landis, the independent commissions represented the most practical response of the federal government to increasingly complex economic and social problems in American society. This growing complexity demanded public servants with a "continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem."<sup>57</sup> Because of its fragmented structure and the tremendous scope of its responsibilities, the Congress has neither the time nor the patience to supervise a diverse national economy on a daily

basis. Likewise, the judicial process is lacking, since it can only evaluate evidence submitted by the immediate parties in each case and cannot conduct independent investigations.

One answer to the dilemma is simply to expand the power of the executive branch, where the expertise and experience can be developed. Landis believed the mere expansion of executive power, however, would threaten the delicate system of checks and balances among the three branches. The ideal solution to this dilemma was the administrative process. He stated:

If the doctrine of separation of powers implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the measure for the preservation of the content of that doctrine.<sup>58</sup>

The concept of equilibrium was paramount to Landis. In his biography of Landis, Donald Ritchie points out that Landis saw American society as a composite of interest groups, diverse and competitive, whose demands liberal government needed to keep in equilibrium.<sup>59</sup> In such a pluralistic society, Landis believed the regulatory commissions should serve less as advocates than as mediators. Ritchie notes that Landis' sympathies were with neither the consumer nor the producer, the "people" nor the "interests", but rather with the healthy balance between them.

Landis' concept of the impartial judge as the ideal role for the commissions was a constant source of disagreement with the president. Roosevelt saw the commissioners not as judges but as representatives of the people, who must act "definitely and directly for the public."<sup>60</sup> He was never comfortable with the independence of commissions that influenced so much economic activity, and never wavered in his desire to bring their functions under the supervision of the Cabinet secretaries. Landis saw the danger in concentrating more power in the executive branch, as demonstrated in his experience as the Commissioner of the Civil Aeronautics Board (CAB) under President Truman.

Truman and the CAB: During his tenure as Chairman of the Civil Aeronautics Board (CAB) under Truman, Landis was constantly concerned about the degree of industry influence on CAB decisions through off the record discussions with the White House. The source of the problem was an unusual feature of the Civil Aeronautics Act that gives the President the authority to determine ultimately which airline carriers will fly what international and overseas routes.<sup>61</sup> Although Landis conceded the national security justification of such a unique executive power over an independent board, he argued that "...the decisions of the Board have been varied by the President in a manner that is definitely indicative of the exercise of power never contemplated by the original Act."<sup>62</sup>

An example of this situation was the 1946 case of a Seattle-to-Honolulu air route.<sup>63</sup> The White House had overridden a CAB certification for Northwest Airlines, claiming the route not economical enough to sustain profitable service. Before the CAB had a chance to revise its opinion, the White House reversed itself and approved the Northwest certification. Pan American Airways then protested, and a few weeks later the White House ordered certificates for both airlines on a route it originally rejected as too thin to support even one line. The White House had clearly been influenced by industry lobbying in a decision which hardly involved national security.

In a 1958 newspaper editorial entitled "Meddling from the White House", Landis criticized this misuse of the law to sanction illegitimate activity by the Truman and Eisenhower Administrations. He stated:

This practice contravenes basic conceptions of justice. As distinguished from courts and commissions where access is available to every party in interest, access to the White House is limited to a favored few. Conferences are held and decisions made "in camera" and no records are available to determine what facts underlie the ultimate conclusions. Unfortunately not only is the public interest involved in these determinations but millions of dollars can be at stake, and, where moneys of such a nature are to be had on the basis of intangible considerations, lawyers and others with political connections or who claim to possess them will always be found to urge causes on grounds having little relationship to merit.<sup>64</sup>

Landis' argument is important because it is an example of a

public administrator attempting to check activity by the Administration even though the activity is technically grounded in the law. Landis understood that the letter of the law was being used imprudently by White House and industry officials to undercut a fair and open administrative process, and he exercised his autonomy to correct the abuse.

These types of abuses convinced Landis of the danger of merely extending the power of the executive branch to regulate the economy, and the need for the independent regulatory commissions to ensure fair and open processes and ultimately more balanced, impartial decisions.

#### Subordination of the Commissions

Although convinced of the need for independent commissions, Landis also stressed the importance of their subordinate position to the three branches. He considered the Brownlow Commission's description of the commissions as constituting a "headless fourth branch of government" ridiculous. The beauty of the commissions is that although they are beyond the immediate control of any one of the three branches, they are ultimately subject to checks by each of them. With the advice and consent of the Senate, the president appoints the commissioners and has significant control over the commissions' budgets through OMB; Congress defines their authority; and the courts review their

decisions. Focusing on the role of Congress, he pointed out that although the commissions' authority was uniquely broad, it was limited to specific matters outlined by statute.

Landis summarized:

In the grant to it [the administrative power vested in the commissions] of that full ambit of authority necessary for it in order to plan, to promote, and to police, it presents an assemblage of rights normally exercisable by government as a whole. Moreover, its characteristic is this concept of governance, limited, of course, within those boundaries derived from its constituent statutory authority.<sup>65</sup>

The following example provided by Landis illustrates this point.

The Public Utility Holding Company Act of 1935: In his lectures on the administrative process, Landis argued that the appropriate limits of administrative discretion can best be understood from practical examples. He used an incident that occurred during the passage of the Public Utility Holding Company Act of 1935 to illustrate the boundary between congressional and administrative authority.<sup>66</sup> As passed by the Senate, the bill called for the abolition of all holding companies, except in those cases where the continuance of the holding company was required by state or foreign law in order to continue the unified management of an existing integrated public utility system. The House version of the bill, on the other hand, required the Securities and Exchange Commission to take actions necessary to confine each holding company

organization to a single integrated system. But the House bill also authorized the Commission to exempt any holding company from this requirement if such exemption was found to be consistent with the public interest. Landis points out that the two versions of the bill represent two very different approaches. Although one may disagree with the so-called "death sentence" of the Senate bill, it did indicate a definite course of action for the Commission to follow. The House amendment, however, turned over the whole issue of the future of the holding company in the public utility field to the Commission, without any guidance except that the public interest should be served. Landis concluded:

It was obvious at once that, for the Commission, this was an impossible responsibility. It meant nothing less than that the Commission, rather than the Congress, would become the focal point for all the pressures and counter-pressures that had kept the Congress and the press at a white heat for months. Instead of the controversy being concluded, it would have been protracted interminably with the rooms of the Commission the place of debate rather than the halls of Congress. Some determination as to the place, generally, of the holding company in the public utility field had first to be made by the Congress before the problem was defined sufficiently for an administrative approach.<sup>67</sup>

To Landis, therefore, the mere existence of the independent regulatory commissions was not a threat to the constitutional balance of powers, as the Brownlow Commission suggested. The real cause for concern was the failure by the Congress to define appropriately the scope of the commissions' authority,

as in the case above, or by similar failures by the executive or judicial branches to exercise controls and oversight available to them.

Not only are the independent commissions ultimately under the control of the three branches, Landis suggested that they are more accountable to the public than traditional executive branch agencies. With commissions, the public can place responsibility directly upon a particular group of commissioners charged with addressing a particular issue. In the case of large organizations such as the Department of Agriculture, however, the public rarely is able to attach responsibility directly to a given subordinate official. Neither is it possible to affix a like responsibility to the Secretary of Agriculture due to the almost limitless range of his or her other duties.<sup>68</sup> From Landis' perspective, the greater threat to accountability rested with the anonymous administrators buried deep in the large executive branch bureaucracies, not the relatively small, visible commissions.

In summary, the independent regulatory commissions, with the combination of executive, legislative and judicial functions in one unit, are an illustration of the concept of constitutional subordinate autonomy. Although the administrative power resulting from this commingling of functions provides substantial autonomy, it is grounded in subordination to the three branches.

## The Need for Administrative Statesmen

Landis was clearly enamored with the potential of the administrative process and the independent regulatory commissions based on his early experiences in the halcyon New Deal years. In time, however, problems with the commissions became apparent. In his report on the regulatory agencies to President-elect Kennedy in 1960, he raised many of these problems, including lack of management controls, bureaucratic inertia and unethical conduct.

The most important factor to the improvement of the administrative process, according to Landis, was the selection of qualified personnel. Reflecting on his experiences, he suggested that "Good men can make poor laws workable; poor men will wreak havoc with good laws."<sup>69</sup> Landis recognized that the full potential of the administrative process can be realized only under the direction of public officials of the highest quality and sense of professionalism. The responsible exercise of administrative power requires officials who can negotiate the tension between autonomy and restraint. As Rohr notes, the essence of professionalism implies not only independent judgement, but restraint in the exercise of this independence.<sup>70</sup>

This concept of professionalism for the public administrator is crucial for two reasons. First, as previously discussed, agencies with the type of administrative

power vested in the commissions are necessary to meet the demands of an increasingly complex society. Administrative discretion is simply a fact of life in modern American government. Landis also noted that no structure of government completely obviates the need for individual administrators to practice restraint in the exercise of that discretion. On the topic of industry lobbying, he states:

This tendency toward industry orientation is subtle and difficult to deal with. It arises primarily from the fact that of necessity contacts with the industry are frequent and generally productive of intelligent ideas. Contacts with the public, however, are rare and generally unproductive of anything except complaint...It is the daily machine-gun-like impact on both agency and its staff of industry representation that makes for industry orientation on the part of many honest and capable agency members as well as agency staff.<sup>71</sup>

Since constant pressure from representatives of interest groups is a given, it is essential to have prudent public officials who have the ability to balance the competing pressures and to resist excessive influence from any one group.

The second reason why the administrative discretion inherent in professionalism is important to the public official is simply because the job is much less attractive without it. Landis notes that one of the primary problems with the regulatory process is the extent of the "morale-shattering" practice of executive interference in the disposition of cases delegated to the agencies for decision.

The appeal of a job can be destroyed if the president permits his commitments on behalf of political associates or friends to dictate the disposition of a case. He concluded that "No truly good man can submit to such interference."<sup>72</sup> Landis' report on the regulatory agencies reflected his belief that the quality of the members of the agencies had deteriorated because of a lack of autonomy, thus denying the government the type of people needed to govern the administrative process properly.

James Landis' perspective on the administrative process and the independent regulatory commissions is very consistent with the concept of constitutional subordinate autonomy. Although his focus was on the commissions, the notion of independence grounded in subordination is applicable to the traditional executive branch agencies as well. In fact, Landis noted in his report to Kennedy that the "shadows" that surround the relationship between the "allegedly" independent commissions and those technically part of an executive department are "not too great."<sup>73</sup> The next section's discussion on the roles of mid-level public administrators from executive branch departments reinforces this argument.

#### Constitutional Subordinate Autonomy and Prudence

This discussion of Pinchot, Califano and Landis

illustrates the essence of constitutional subordinate autonomy: the legitimate exercise of discretion by public administrators in choosing which branch of government they will support to maintain the constitutional balance of powers. However, the definition of discretion implied by constitutional subordinate autonomy means much more than having a mere legal authority to make independent decisions. In his discussion of prudence and the law, Eugene Miller points out that a common definition of discretion today is "the freedom or authority to make decisions and choices; power to judge or act."<sup>74</sup> This usage, however, fails to address the nature of choice and the qualities of mind that should guide it. Miller correctly suggested that if discretion is simply the freedom to choose, a thoughtless and arbitrary act of will is just as much an exercise of discretion as a reasonable choice. Constitutional subordinate autonomy implies not merely choice but the responsibility to exercise discretion in a manner consistent with the subordinate position of the public administrator in our constitutional form of government. Older definitions of discretion are more useful for the public administrator, such as, "the quality of being discreet, or careful about what one does and says; prudence" and "the action or power of discerning; judgement."<sup>75</sup> In a similar vein, inherent in the concept of constitutional subordinate autonomy is prudence, the name used

traditionally to designate the virtue or excellence of practical reason in figuring out the best course of action in particular circumstances.<sup>76</sup>

The three public administration figures discussed were chosen because their statements and actions demonstrated an appreciation for the broad and complex responsibility inherent in constitutional subordinate autonomy. How well or prudently they exercised their subordinate autonomy depends on an examination of the particulars of each situation. Pinchot, for example, often failed to appreciate his subordinate position in government because of his passionate interest in conservation. This attitude led to what may be considered some imprudent actions on his part. However, given the tragic disregard for conservation in his time, Pinchot's use of administrative discretion to stretch the letter of the law whenever possible seems more prudent. Califano's reflections on his days as a Cabinet member demonstrate an impressive grasp of the tensions and complexity inherent in serving multiple constitutional masters, particularly when compared to his narrower views as a young White House Special Assistant. Although the prudence of some of his decisions is questioned, he clearly attempted to balance his personal beliefs with the law, court determinations and presidential directives. Landis' writings on the virtues of the administrative process are a testament to the need for public

administrators with carefully circumscribed degrees of independent power to ensure balance among the three branches. His example of White House interference in regulatory decisionmaking illustrates the legitimate use of autonomy by a public administrator to check the abuse of power by the executive branch. Ultimately, however, Landis recognized the importance of prudent statesmen to administer what are inevitably imperfect laws.

The discussion of the remaining cases in this dissertation employs a similar two-step analysis: first, how does the example illustrate constitutional subordinate autonomy, and secondly, how prudently did the public administrators in the case apply the concept?

#### A VIEW FROM THE TRENCHES

The previous discussion has focused on how the perspectives of public administrators at the highest levels of government are relevant to and informed by the concept of constitutional subordinate autonomy. The tensions inherent in serving multiple constitutional masters is most evident at these high levels, although the prudent course of action is typically subject to debate. The more difficult, and perhaps more useful question, is how the views of the more average mid-level public administrator relate to constitutional subordinate autonomy.

The remainder of this chapter presents the primary themes from discussions with public administrators from nine different federal agencies. To structure the interviews, each administrator was asked to respond to the following open-ended questions:

1. Can you recall any times in your career when you felt "caught in the middle" or "torn" on a significant issue you were working on? If so, what was the nature of the issue(s), and what were you caught in the middle of, or torn between?
2. In the situation(s) described above, where did you look for guidance? What did you do?
3. How about times in your career when you had discretion or leeway in the formulation or implementation of a policy or program? What was the issue(s), and what sort of discretion did you have?
4. In the situation(s) described above, where did you look for guidance? What did you do?
5. Reflect on your roles and responsibilities. Who or what are you responsible to in your work?

The type of positions and agencies represented are as follows:

- **Environmental Protection Agency:** Budget Division and Office of Information Resources Management

- **Department of Justice: Criminal Division**
- **Department of Health and Human Services: policy office in Family Support Administration and Social Security Claims/Hearings and Appeals Office in Social Security Administration**
- **General Accounting Office: Audit Division**
- **Federal Aviation Administration: Aviation Safety Office**
- **Department of Agriculture: Office of the Secretary**
- **Office of Management and Budget: Budget Examiner**
- **Department of the Interior: Office of Congressional and Legislative Affairs**

Although it is clear from the interviews that these mid-level public administrators do not consciously think of their actions in constitutional terms, many of their responses speak directly to the exercise of subordinate autonomy in a government of shared powers, where they use their discretion to maintain the constitutional balance of powers in support of individual rights. Their deliberations, although on different levels of government, reflect many of the same themes evident in the discussions of Pinchot, Califano and Landis.

### Serving the President

A dominant theme of the interviews was the

subordinate status of members of the executive branch to the president, as represented by the political appointees in the agencies. There was a keen sense of the importance of fully supporting the administration's agenda, even if it conflicted with personal policy preferences, in order to realize a government that is responsive to the electorate. The policy official in the Family Support Administration compared his role to that of a skilled actor, where he must absorb the basic principles of the current Administration, and implement them in a creative and imaginative way.<sup>77</sup> In the policy setting in which he works, the essence of an effective civil servant is to further the Administration's policy initiatives, regardless of whether one agrees personally with the initiatives. Once the overall policy tone is set by the Administration, the civil servant's role is to further the "intelligent development" of that policy. The lawyer from congressional and legislative affairs in Interior used the term "hired gun" to reflect her role of putting the Administration's position in the best light possible.<sup>78</sup>

However, serving the Administration's interests is a much more complex concept than merely following cues from the White House or political appointees in the agencies. An important aspect of the civil servant's role is the responsibility to confront the political leadership and ground his or her thinking in the "real world". The same

administrator who sees himself as a skilled actor also commented on the deep conflict he experienced when he worked for an ill-informed political appointee. He would sit through meetings during which his superior would lead senior administration officials down the wrong path because of his misunderstanding of welfare policy. He felt compelled to correct his superior privately at every opportunity, doing his best to explain why a viewpoint was simply not workable because of existing laws and regulations. At times, he also found himself exercising his discretion by pushing sound policies that he thought he could "get away with" given his superior's flawed beliefs. However, he stopped short of telling his superior that he was simply wrong, because he knew he would either lose his job or at least the confidence of his superior. In either case, someone else would replace him and would have to deal with the same problem. He believed the prudent course of action was to continue to cultivate a working relationship that would enable him to influence his superior's policy decisions.

In a similar vein, the "hired gun" at Interior also described her role as a "reality check" for the political appointees. She described the tendency of some officials, such as former Secretary James Watt, to surround themselves with other like-minded political appointees, thereby isolating themselves from competing points of view. This situation does

not serve them or the Administration well, for they often fail to consider whether a policy under review is consistent with other department policies, or how it will be received by the Congress. On more than one occasion she has found herself pointing out problems with the Secretary's thinking, much to the horror of the political appointees in the room. Although her advice may not be heeded, she sees this as a fundamental part of her job as a careerist with many years of experience and expertise in the department. She also acknowledged, nonetheless, that there is a certain amount of risk in this "devil's advocate" role; if one carries it too far you lose credibility, trust and access.

Thus the concept of the actor and the hired gun co-exists with the duty to step back from the administration's position and actively provide information when the position represents a misunderstanding of law or policy or is inconsistent or poorly thought out. However, if a public administrator is to be effective, prudence dictates that one can only go so far with questions or challenges before losing the confidence of political superiors. The autonomy must be balanced by a healthy respect for the subordinate position of the administrator. These two administrators believe they were able to strike this balance and responsibly serve their political superiors in a manner that enabled them to express opposing viewpoints. In other words, they were practicing

administrative statesmanship.

This concept of administrative statesmanship provides an interesting contrast to Pinchot's reaction to the unwelcome policy direction set by President Taft. Because of his personal commitment to the cause of conservation, Pinchot's intolerance for the more laissez-faire, pro-development approach of Taft led ultimately to his break from the Administration. Certainly, resignation in protest (or termination, in the case of Pinchot) is a legitimate option for public administrators who disagree with Administration policy. However, it would be very difficult to manage a government if large numbers of public administrators resigned on a regular basis because of disagreement with current policies. A more prudent alternative, as articulated by Califano and demonstrated by the respondents in this section, may be to serve the president's (and the nation's) best interests by arguing with his political appointees, pressing them with new ideas, and helping them face harsh realities. Although the overriding theme is subordination, autonomy is expressed through restrained argument and questioning. One could argue, for example, that Pinchot ultimately would have served the interests of conservation far better by remaining in the government and exerting such influence at every opportunity from the inside.

## Checking the President

Other respondents highlighted their role in checking presidential power through their relationship with the political appointees in the agency. Many of the discussions indicated that political appointees and career civil servants typically have very different roles. Consistent with the extensive literature on this topic, the political appointees represent the president's agenda and are harbingers of change. Their legitimacy is grounded in their direct link with the elected president. The career civil servants, while also bound to follow the president's agenda as members of the executive branch, have the sometimes competing responsibility to check or slow down the pursuit of that agenda when in their judgement it is "going too far" or too fast. The legitimacy for this role, based on the interviews, flows from a variety of sources, including expertise and a balancing perspective based on the civil servant's protected position in the agency, more immune from the political pressures driving the appointees.

Two examples are illustrative. As a branch chief in the Budget Division of EPA, one interviewee described the significant pressure in the early Reagan Administration to reduce the size of the federal government.<sup>79</sup> Consistent with this agenda, there were rumors in the agency that the top political leadership wanted to institute a Reduction in Force

(RIF). In his role as a budget analyst, he analyzed the workforce statistics in light of the reductions desired and concluded that a RIF was not necessary. A freeze on all new hiring for a given period of time would achieve the same results without putting people out of work.

A very real issue for him and his immediate supervisor was what to do with the information. Given the prevailing political climate that favored a RIF, they would be taking a risk by making their counter-argument to upper management. Nonetheless, they decided that the risk was worth the benefit to the agency and employees at risk, and they were successful in convincing management that a RIF was unnecessary. This is an example of what this interviewee described as the healthy "inertia" provided by the careerists in the agencies which prevents "large swings from one direction to the other." This slowing effect provides the time that is necessary for the Administration and Congress to examine whether a policy direction is working and whether it should be pursued.

In this case, although the respondent was very conscious of the political desirability of a RIF, he felt the responsibility to attempt to stop it because of the needless damage and upheaval it would cause to the Agency and the career employees. There is a sense here of balancing the responsibility to follow directives from the political

appointees with the responsibility to protect the integrity of the institution and the individual rights of the employees. The public administrator served the interests of all parties by proposing an alternative that provided the desired reductions without putting employees out of work. The decision by the respondent was both prudent and courageous.

However, responsibly checking politically motivated decisions in particular situations such as this RIF is very different from proclaiming that career civil servants in the agencies have a general responsibility to prevent "large swings" in public policies. Adherence to such a general maxim by careerists contributes to the typical charges of bureaucratic obstructionism voiced by political appointees attempting to introduce new policy directions in the agencies.

The EPA respondent would have been justified in saying that career public administrators must balance presidential interests, as represented by the political appointees, with other constitutional considerations. In the RIF example, the respondent decided that the policy initiative desired by the political appointees would needlessly disrupt the agency and its employees, thereby interfering with the capacity to carry out its statutory responsibilities. He had no basis, however, for obstructing large swings in policy simply because rapid change in general is inherently threatening to his agency and its employees. In this case the actions of the public

administrator reflected the prudent exercise of subordinate autonomy, but the lesson he drew from the example was flawed.

Another example of the checking role was provided by the policy analyst in the Criminal Division of the Justice Department. She mentioned a major political agenda under Attorney General Meese was the focus on anti-obscenity and anti-pornography initiatives.<sup>80</sup> Given this political environment, her management decided to start a public health initiative aimed at curbing illicit sexual activity in notorious "red light" districts in targeted urban areas. Although the evidence demonstrates that such enforcement efforts only displace the activity to other sections of the city, it was promoted nonetheless because, in the opinion of the interviewee, it was politically the right thing to be doing. As a part of this overall direction, the interviewee was asked to research the connection between pornography and criminal activity. After a thorough review of the literature, she concluded that the research was not at all definitive on this link. When she reported her findings, management told her she was being too analytical and neutral - they wanted an advocacy piece that took the politically correct position and supported it as much as possible.

She refused to write the report, stating that it would be a complete abdication of her responsibility to write a report that was not supportable by the evidence. She also

told them that she did not work for ED Meese, even though he was the "titular" head of the department. Her responsibility is to provide honest analysis, not "tell them what they want to hear." She acknowledged that you also have to be responsive to the political appointees, but that it is a matter of balance. In this case the politically-driven directive went too far and violated her sense of professional integrity.

This case is interesting because the respondent refused to exercise subordination to what she believed was an illegitimate request by the political appointees. Her actions suggest that a basic sense of professional integrity or standards was violated by the order to write the advocacy piece. This sense of professional integrity was further violated by having to work for Attorney General Meese, who in her opinion had lost all credibility in the department because of his legal problems.

There are two points to consider in this case. First, a sense of independent professional integrity or standards for public administrators is certainly important. A great deal of government activity involves technical or administrative issues that are independent of significant political oversight or influence, and the level of efficiency and effectiveness hinges on the competence of average career administrators. Furthermore, professional standards serve as

an independent reference point for public administrators who operate in political environments where ideology may tend to influence decisionmaking. Such a sense of independence may have prevented Oliver North from succumbing so willingly to his superiors in the White House during the Iran-Contra affair. In the case of the pornography report, the respondent clearly believed that there was no justification for interpreting the research in the direction desired by her management - it was unacceptable political manipulation of the worst order.

However, the other equally important point raised by this case is the fine line between adherence to professional standards and adherence to personal beliefs. The interview clearly indicated that the respondent disagreed strongly with the conservative ideology of the political appointees above her in the department. The question is: to what degree was her refusal to write the report influenced by her ideological differences rather than a sense of professional integrity or standards? Certainly she should not have agreed to write a report that completely misrepresented the facts, but could she have written a report that legitimately highlighted any findings, however small, that supported the Administration's position? One could also argue that she would have demonstrated greater prudence by fighting to write as balanced a report as her superiors would allow.

By refusing to write the report, the assignment was probably given to a more pliable staff member with the end result being a much more biased, distorted piece.

Regardless of the merits of the respondents's decision, it is important to emphasize the nature of the respondent's choice in this case. She understood the responsibility that comes with writing a report in the name of an executive department of the government. She also understood the often unchecked power of departmental officials who are under constant pressure to produce results that are consistent with Administration ideology. As a career public administrator, she saw the need to check that power in her own small way. Her concern is analogous to the fear of unchecked executive power expressed by both Califano and Landis, although at much grander levels. Indeed, she echoes George Mason's fears of abuses of executive power.

#### Representative of the People

Another common theme discussed during the interviews was the public administrator as a representative of the people. This concept was expressed in a number of ways, such as the public administrator as a steward of the taxpayers, ensuring that public funds are not wasted or misused; and the public administrator as a guardian of the public's right to information, as in the case of public citizen groups vying for

access to pollution data from a hesitant agency. Two examples from the Social Security Administration and the General Accounting Office are particularly instructive.

The interviewee from the Social Security Administration has had a career first as a claims representative, reviewing applications for entitlement programs such as Supplemental Security Income; and currently as an analyst in the Office of Hearings and Appeals, reviewing the appeals of individuals who have been denied benefits.<sup>81</sup> She described two cases where she felt caught between her responsibility to her clients and her responsibility to follow management policies set by the Social Security Administration.

During the early years of the Reagan presidency, an administrative policy was instituted to focus on the review of cases of individuals who had been receiving disability benefits for long periods of time. For a number of reasons, including overwhelming caseloads, a significant number of recipients were receiving benefits who were no longer technically disabled because their cases had not been periodically reviewed. The interviewee was torn in the implementation of this policy because although the agency had the right to cut off benefits to individuals who were no longer disabled, the fact remained that individuals were nonetheless unemployable because they had been out of the workforce for 20 to 25 years. As the representative of the

government on the front-line, dealing personally with the individual cases, she witnessed the impact of these types of ideas conceived by high ranking policy officials who have no concept of the impact on the client. She resolved her dilemma to some degree by exercising her discretion in very subtle ways to make the policy more reasonable and fair. For example, since there is always a backlog of cases,, it was up to her to decide which cases to review or put aside. If she came across a case that was particularly difficult, she would simply put it at the bottom of the pile of cases to be reviewed.

Another example is in her current position as an analyst in the Office of Hearings and Appeals. She reviews the decisions of Administrative Law Judges (ALJ) which are being appealed, and recommends whether to uphold the decision, in which case the appeal may go to trial, or to reverse the ALJ's decision and award benefits. In this role, she has witnessed a sharp change in the orientation of the agency over the past two years. When she started in the position, the orientation was clearly client-centered. If there was a possibility to make a case for the client, you did it. Now, however, the agency is driven much more by a "numbers game." The Administration is very concerned with handling as many cases as possible in the most efficient way. As a result, there is a strong ethic against overturning ALJ decisions.

Furthermore, when the ALJ decision is upheld, there is more effort now towards shoring up the case so that it will be upheld in court. The interviewee noted that because the tendencies of the judges and attorneys in circuit courts across the country differ, it has become a "legal game", where she is expected to weigh these tendencies as she analyzes the individual appeals. The result is a system less individual-centered and more attorney and court-driven.

Given this atmosphere, she believes her role is to maintain the focus on the individual merits of each case. At times she feels compelled to put aside the pressure to process as many cases as possible and take the extra time to check out inconsistencies or gaps in a case. She notes that to a large degree the fairness of the system is up to her - the other players in the process do not have the understanding, perspective or sensitivity to the cases that she possesses. The other interesting point is that she has significant power in her role. Because of the sheer volume of cases, upper management is forced to rely on her recommendations most of the time.

This case is an excellent example of a public administrator exercising autonomy in support of individual rights. The vast majority of public administrators, particularly at higher levels of government, rarely confront the impact of public policy decisions on individual citizens.

They are normally concerned over whether a policy is fair at a macro level. However, some public administrators experience the unfairness of certain policy decisions in particular cases at a personal level every day. They struggle constantly over whether to ignore troubling cases and "go by the book" or make an extra effort and bend the rules to make the policy more reasonable or fair. As the respondent noted, because of her proximity to the personal details of individual cases, she is in a unique position to pass judgement.

In the case of the disability reviews, the respondent believed that it was unfair to deny benefits to someone technically healthy enough to work but in reality unemployable because of years of inactivity. However, she also appreciated her responsibility to enforce a management initiative to review cases that were long overdue. She resolved the issue by prioritizing cases that seemed to her to be less blatantly unfair.

The second case, in which the respondent resisted the pressure from management to focus on processing as many cases as possible, is analogous to Califano's exercise of administrative discretion to reinvigorate the Office of Civil Rights in HEW. Although earlier Secretaries had allowed the civil rights office to atrophy because it was not a priority of the Administration, Califano believed this neglect was irresponsible given legal mandates to act on complaints in a

timely manner. In a similar fashion, management in the Office of Hearings and Appeals discouraged a client-centered attitude by rewarding analysts who processed the greatest number of cases. Despite this prevailing climate, the respondent continued to spend extra time on cases where individuals might benefit from a closer examination of the facts.

In both cases, the public administrators believed executive branch priorities were in conflict with the fair application of statutes to individuals in particular cases. Although at very different levels, Califano and the social security analyst illustrated constitutional subordinate autonomy by exercising administrative discretion to maintain the constitutional balance of powers in support of individual rights.

Certainly, prudence demands restraint in the exercise of autonomy in the name of individual rights. A public administrator in the Environmental Protection Agency, for example, could object to almost any given agency policy on the grounds that it negatively affects some individual or group. However, as Miller points out, the prudent administrator must distinguish between political arrangements that are simply best and those that are the best practicable in most cases.<sup>82</sup> In other words, there are few, if any, perfect public policies that benefit all citizens at no cost to anyone or anything. For example, the "simply best" policy

in terms of the environment would spell disaster for the economy as we know it. The most practicable public policy, therefore, is normally the result of a series of trade-offs, with winners and losers. A role of public administrators, given this reality, is to exercise their autonomy to help balance these inevitable trade-offs in support of individual rights when the appropriate situation arises.

The other interview which touched on the administrator as a representative of the people was the auditor from the General Accounting Office (GAO).<sup>83</sup> For the past three years, he has been involved in an evaluation of the impact of the Immigration Reform and Control Act of 1986. A key feature of the bill is the institution of sanctions on any employer who knowingly hires an illegal alien. The bill was defeated for many years because of the fear that the sanctions would result in discrimination against American citizens who looked or sounded like a foreigner. One of the key compromises that led to the passage of the bill was the inclusion of language requiring GAO to conduct three one-year studies to measure any increase in discrimination by employers. The preliminary results of the GAO study shows solid evidence that the law has resulted in a significant increase in discrimination by employers against minority American citizens.

As the head of the evaluation project, the

interviewee described the tension he was experiencing because of the findings. Because GAO has been a major advocate behind the bill since the early 1970's, reporting the findings and recommending repeal of the law would be acknowledging a failure on the part of GAO to consider adequately the potential for discrimination as a result of the law. He is convinced that the data justifies repeal of the law, but is receiving signals that upper management may want to tone down the report. For example, they could simply report the findings without making a recommendation, or they could recommend more education for employers to mitigate the impact on citizens. The interviewee pointed out, however, that his study found educational efforts have done little to clear up confusion about the law.

Although the final outcome of this case was still pending at the time of the interview, it is clear that although the interviewee feels responsible towards the GAO and the Congress, he also has a responsibility to the citizens who are being victimized by the law. Although he stated that he is not sure how he will feel if GAO decides to soften the implications of the data, he will do everything in his power and ability to present the data in such a way that the discriminatory patterns will be evident to readers of the report.

This case is similar to the Department of Justice

employee's dilemma over whether to write the biased pornography and crime report. However, her tension stemmed primarily from a general sense of compromised professional integrity. In the GAO case, the respondent is also concerned about the general integrity of the data interpretation, but his primary focus is the pure weight of the report because of its impact on the fair treatment of so many American citizens. Because of his closeness to the data, he realizes his responsibility to "do everything in his power" to ensure that the deleterious impact of the law on American citizens is clearly understood, regardless of the political consequences for GAO or a given member of Congress who supported the bill.

This example of constitutional subordinate autonomy is also instructive because it pertains to a public administrator serving in an arm of Congress. Although most of the examples discussed involve members of the executive branch, the implications of subordinate autonomy are no less relevant for more seemingly unique government settings such as GAO.

#### Promoting the Interests of the Agency

In responding to the question regarding who she feels responsible to in her work, the lawyer from the congressional and legislative affairs office at Interior stated that her primary client was the Secretary. The

following case demonstrates that her concept of this role goes beyond any sense of personal loyalty; it is serving the interests of the top official in a public institution with an important mission with which she identifies and which she wants to preserve.

The case involved a letter she received from OMB that had been written by the Coast Guard. The letter stated that the Coast Guard wanted stronger enforcement procedures under the Outer Continental Shelf Act, which established safety and environmental standards for companies operating off-shore drilling installations. A court in Louisiana had ruled that companies had to be given a reasonable amount of time to correct a detected violation before they were penalized. The Coast Guard argued this was a serious flaw in the law, for it provides no incentive for companies to comply with the safety and environmental standards until they are caught. However, if the law was changed so that they could exact penalties at the time of detection, there would be a strong incentive for the companies to be in continuous compliance. The letter affected Interior directly because it is the department responsible for enforcing the environmental standards under the law.

The interviewee thought the Coast Guard position was very sensible. Furthermore, the Interior Department was touting the safety and environmental records of the off-shore

drilling stations in its ongoing battle with the State of California to allow more off-shore stations. A move to strengthen enforcement procedures would certainly be consistent with Interior's argument. She sent the letter out for comment and received support from the Minerals Management Service (MMS) and the Solicitor's office.

She arranged a meeting with the responsible Assistant Secretary, the Coast Guard, and representatives from the MMS and the Solicitor's office to discuss the issue. The meeting, however, did not proceed as anticipated. The participants in favor of strengthening the law were stunned when the representative from the Assistant Secretary's office attacked the proposal as unreasonably harsh. It was apparent, according to the interviewee, that the Assistant Secretary had been in contact with industry groups and been persuaded to leave the law intact.

The interviewee found herself in a difficult position. On the one hand, she had to be more concerned with the Assistant Secretary's position than with that of the Coast Guard or the MMS. Normally, she can switch gears and support a different position that is desired by the political leadership. However, in this case the position seemed totally unreasonable. She was convinced that failure to support the strengthening of the law was not in the best interests of the Secretary or of the Department. She knew it was up to her to

take action; the MMS would not take a stand out of deference to the Assistant Secretary, and the Solicitor's role is to stay out of policy debates and only rule on legal issues. She resolved her dilemma in two ways. Since she believed that the Secretary's office would see the issue her way, she advised the Coast Guard to send a letter directly to the Secretary's office. She also used her informal contacts with the Secretary's office to ensure that they knew about the issue.

Secondly, she used the agency's sign-off system to her advantage. The MMS had earlier commented favorably on a separate bill which also addressed the penalty issue, and the Assistant Secretary had signed off, or concurred, with the comments. As often happens in the government, the Assistant Secretary's office probably did not focus on the details of this other bill, or they may have seen it before the pressure from industry groups. The interviewee turned this comments process into a formal report, thereby placing the Assistant Secretary's office on record in support of the more stringent enforcement procedures. She noted that once an office is on record on a given issue, it becomes more difficult to change positions. In summary, the interviewee explained that she is able to manipulate the system in this manner to bring issues to the forefront when she believes the Department's best interests are not being served.

Public administrators are often guided in their actions by a close sense of identity with their agency's mission. In this case the respondent believed that a change in the law would promote more effective enforcement of environmental safety standards, for which the department had responsibility, and exercised her autonomy to support the parties involved who favored her position. It is important to note, however, that her actions were guided by the belief that the change in the law was in the best interests of the Secretary and the department. She knew that by shifting control of the issue from the pro-industry assistant secretary to the attention of the Secretary's office, the interests of the department were more likely to be served. In other words, her autonomy was grounded in subordination to the Secretary, who has ultimate responsibility for ensuring that the department's statutory mandates are followed.

As demonstrated in his reflections on his years as a White House Special Assistant, Califano lamented the lack of presidential control over the agencies and their civil servants. He noted that the agencies often operate as "independent fiefdoms", essentially unaccountable to the president. The above case is instructive because it demonstrates how a public administrator can independently serve the interests of his or her agency in a manner consistent with the subordinate position of the agency in our

system of government. Rather than viewing the agency as some independent entity with its own agenda, the respondent's view of the agency was clearly grounded in its mission as defined by its statutory mandate. Furthermore, her independent maneuvering was designed only to bring the issue to the attention of the Secretary. In fact, one could argue that the truly unaccountable party in this case was the politically appointed assistant secretary who was serving the interests of an industry lobby.

This is not to say that Califano's concerns were ungrounded. There are doubtless more than a few public administrators buried in the agencies operating in an unaccountable manner, captured by some constituency or protecting turf. However, these cases of individual irresponsibility do not diminish the legitimacy of the constitutional subordinate autonomy displayed by the public administrator in the Department of the Interior.

#### Managing a Constitutional Process

The administrator from the aviation safety office in the Federal Aviation Administration (FAA) views his role as a "manager of a legitimizing process," which involves building a "national consensus" by balancing all the relevant public and private interests on each issue.<sup>84</sup> The agency's recent examination of infant restraints on commercial flights

is a good example. The FAA does not require infants under two years of age to be restrained in a seat. As a result, several infants were killed in a crash in Sioux City, Iowa, who may have survived if they had been secured in seats. Shortly after the accident, the major airlines, through the Air Transport Association, petitioned FAA to require that infants use an approved child safety seat on commercial flights. As the FAA must do with any regulation, the agency solicited public comment while it examined the proposal. Public comment was mixed, but no one challenged the notion that child restraints would make commercial aviation safer for infants.

The result might seem a foregone conclusion. Part of the FAA's central mission is to ensure aviation safety. The airlines had petitioned the FAA to impose a safety regulation on them, and all agreed that child restraints would improve aviation safety. However, some comments and, especially, many in the agency argued that requiring infant seats would make flying more expensive for families with young children. Consequently, more families might choose to drive on long trips, rather than fly. Since the Interstate Highway System has fatality rates about 15 times higher than commercial aviation, this could actually increase transportation deaths, though it may indeed make aviation slightly safer.

In addition to aviation safety, the FAA's statutory

mission also charges the agency to promote civil aviation, while the Department of Transportation (DOT), of which FAA is a part, is charged with transportation safety. As a public administrator in the FAA, the interviewee is responsible for weighing all these concerns before recommending the best course of action. The agency chose not to require infant safety seats.

The legitimacy of the process does not depend so much on the actual outcome, but on whether interested groups believe they have had an opportunity to be heard. Because many issues have so many competing interests, the agency can often make its own decision as long as it is within limits set by the consensus process. Thus the public administrators in the FAA are guardians or gatekeepers of a process whose legitimacy rests on how well they balance all the competing interests in the country on a given issue.

The interviewee's other example of the public administrator as part of a constitutional order is in the budget process, which is "designed for deceit." The FAA makes a budget request through DOT, based on what the FAA believes it needs to execute the laws it administers. DOT then determines the budget proposal that is sent to OMB (usually lower). The president, through OMB, then decides how much the FAA will request from Congress (lower yet). Neither the FAA nor DOT are allowed to tell the Congress directly what the FAA

needs. When Appropriations Committee members ask FAA officials, under oath, what they "really need," they must respond with what the Administration has essentially told them to say, even if it is far below what they believe they "really need." Though the committees have access to the earlier budget requests from the FAA and DOT, FAA officials still must support the president's final numbers.

Yet, viewed in the larger context of the government-wide budget process, the FAA Administrator is again playing a role in a legitimizing process. The interviewee noted that the individual FAA administrator is in no position to balance the agency's needs against other needs across the government. Since the president has the responsibility under the Constitution to faithfully execute the law, he has a legitimate right to make his decision on the overall budget and expect his subordinates in the executive branch to defend his position to the best of their ability. If every agency simply bypassed the president and made its full request directly to the Congress, only the Congress would determine national budget priorities. This scenario would destroy the balance between the executive and legislative branches in a fundamental area.

Yet, this does not mean that agency officials do not have a responsibility to fight with the administration for the resources they believe are necessary. For example, the agency

may appeal OMB decisions on their budget request directly to the president through the Secretary of Transportation. In any given budget process, a prudent agency administrator will not exercise this option lightly; deference to OMB's direction except on the highest priority issues may be the most practical course of action. Similarly, as will be discussed in a later case involving EPA, agency administrators may feel compelled to go directly to the Congress or the press if they believe the Administration is not making a good faith effort to provide the agency the resources it needs to meet its statutory mandates responsibly. Clearly, this exercise of autonomy is prudent in only unusual circumstances.

A similar theme was reflected in the interview with the management analyst in the Department of Agriculture.<sup>85</sup> He described a case in which a political appointee directed him to award a sole source contract to an individual to chair an advisory council. The purpose of the council was to solicit public opinion on various agricultural policies under consideration by the department.

The respondent was very disturbed by this order. The purpose of a sole source contract is to enable the government to procure the services of an individual or group on a noncompetitive (and therefore expedient) basis because of the existence of unique qualifications. In the respondent's opinion, the individual involved was in fact less

than qualified to chair the advisory council because of very well known biases towards agricultural policy. The respondent was convinced that this action would make the Administration look very bad and recommended that his superiors not award the contract on a sole source basis. His advice was not heeded, and he was told to follow through and award the contract.

Although he complied with the order, he also wrote a note to the contract file, explaining that he awarded the contract based on an order from the political appointee for whom he worked. At a later date, the note was uncovered during an audit of the contract files by the Inspector General. The political appointee was furious when confronted with the note, and it almost cost the respondent his job.

The respondent recalled that the political appointee demanded to know what gave him the right to include that note in the contract file. Upon reflection, he explained that although he felt a responsibility as a career civil servant to follow the orders of the political appointee, he also felt a responsibility to let others know that he felt the action was unfair and improper. He further explained that this competing need to "let others know" by writing the note was grounded in a sense of responsibility to the taxpayer.

One might criticize the public administrator in this case for not taking a stronger stand with the political appointee if he felt the order was improper. After all, the

discovery of the note by the Inspector General was pure happenstance. Nonetheless, he demonstrated an appreciation for his responsibility to safeguard the integrity of the federal procurement process that is designed to ensure fair and open competition for government contracts.

On one level, the thousands of public administrators involved in the federal procurement process probably see themselves as engaged in a mundane administrative process. On another level, however, they are constitutional officers who are guardians of the open and fair disbursement of the public dollar. This glorified responsibility is more apparent when one considers the mid-level public administrators who have critical roles in the administration of multi-million dollar defense or aerospace contracts. In the case above, although the money involved was relatively small, the respondent realized that the dubious contract award could result in a less than fair and open public comments process on agricultural policy.

The FAA and Department of Agriculture respondents reflect a prime role for public administrators suggested by Landis: the guardians of fair and open administrative processes. In Landis' view, the tendency of executive branch activities to be influenced by closed-door, political favoritism demands administrative processes in the hands of experienced, committed public administrators with the

independence necessary to balance competing interests. As constitutional subordinate autonomy suggests, however, this independence is grounded in the limits set by all three of the constitutional branches.

### The Relevance of Constitutional Subordinate Autonomy

Although the interviewees did not describe their roles in constitutional terms, it is clear from the discussions that the concept of constitutional subordinate autonomy can be highly relevant to their day-to-day lives. The presidency, through the political appointees and OMB, can be a very real concept for the mid-level administrator. Just as men like Pinchot, Califano and Landis exercised discretion at the top levels of government alternately to serve and check the president, so too may mid-level public administrators on a regular basis through their relationships with the political appointees in their agencies.

Consistent with the concept of professionalism inherent in subordinate autonomy, however, this exercise of administrative discretion implies restraint as well as independence. The responsibility to serve the president through his political appointees is a powerful, fundamental driving force for members of the executive branch that in most cases results in straightforward adherence to directions set by the Administration.

However, this subordination is tempered by a significant sense of responsibility to competing masters, including interpretation of congressional intent, professional and institutional integrity, preservation of individual rights and personal beliefs. The interviews demonstrate that these competing sources of responsibility may at times provide the public administrator with the sense that a given policy or order is somehow out of line, and administrative autonomy is exercised to bring that policy or order within acceptable boundaries.

The sense of legitimacy for these average public administrators is, therefore, a rich, complex set of factors that goes beyond serving a single master, whether it be the president, Congress or the courts. As constitutional subordinate autonomy implies, these public administrators see themselves as providing unique perspectives or contributions to help maintain a government of shared powers. Although they do not think of their jobs in constitutional terms, the cases presented do suggest that public administrators are at times engaged in the struggle to maintain an order consistent with the delicate balance that is a fundamental aspect of our constitutional form of government. This discussion also suggests that if they did see their work in constitutional terms, perhaps they would have a more principled basis for making the difficult decisions inherent in situations

involving responsiveness to multiple masters.

## ENDNOTES

1. Gifford Pinchot, Breaking New Ground (New York: Harcourt, Brace and Company, Inc., 1947) p. 22-23.
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#### IV.

##### INSTITUTIONAL PERSPECTIVE

The interplay of competing and often contradictory... forces within our constitutional system and pluralistic society has produced a smorgasbord of institutional types. There is something to suit almost every taste, no matter how exotic.

- Harold Seidman

Public administrators conduct their work in the context of many different types of institutions, as the above quote suggests. The institutional setting is not a neutral factor in the public administrators' world; just as their actions are guided by the law, courts and presidential directives, so too are they influenced by a host of interrelated concepts that define an institution.

The importance of institutions and collective action is reflected in a substantial literature in recent years. March and Olsen urge that "a perspective of politics as organized around the interactions of a collection of individual actors or events be supplanted with (or replaced by) a perspective that sees the polity as a community of values, norms, and institutions."<sup>1</sup> Selznick suggests that we "take seriously the shared beliefs we hold regarding what is good for a community or institution", for they may "form the basis for decisions that override our current preferences or proximate interests."<sup>2</sup> Although it is beyond the scope of

this dissertation to fully explore the influence of institutions on the actions of public administrators, it is possible to examine certain aspects of institutions that have clear implications for the practice of constitutional subordinate autonomy. Three of these concepts is organizational culture, mission and professionalism.

Culture, according to Schein, refers to "...the deeper level of basic assumptions and beliefs that are shared by members of an organization, that operate unconsciously, and that define in a basic 'taken-for-granted' fashion an organization's view of itself and its environment."<sup>3</sup>

This culture is in part defined by the sense of mission among the members of the institution, which in turn can be heavily influenced by professional standards. Drawing heavily on Selznick, Terry describes mission as an institution's reason for existence and addresses fundamental questions of "What shall we do?" and "What shall we be?". Furthermore, the mission defines the legitimate scope of institutional activities and processes.<sup>4</sup>

Professionalism refers to the "conduct, aims, or qualities that characterize or mark a professional or professional person", who is in turn defined by having specialized knowledge from often long and intensive academic preparation, and who conforms to certain technical and ethical standard associated with a profession.<sup>5</sup> Mosher points out

that the government employs large numbers of professionals, such as lawyers, doctors and scientists, who tend to experience tension between norms and standards of their professions and the demands of the governance process.<sup>6</sup>

This chapter explores how these interrelated factors that define an institution relate to the concept of constitutional subordinate autonomy. Although at one level all institutions in which public administrators work are part of our constitutional framework of government, each of them has its particular place and role that fits more or less comfortably with the subordinate but autonomous theory. Furthermore, that place and role is not static; it may change over time. To provide a flavor of this diversity, three very different government institutions are examined: the Department of Justice, the General Accounting Office and the Office of Management and Budget. These agencies represent a range of institutional types in which public administrators may operate: a traditional executive branch department, an arm of Congress, and the Executive Office of the President. Furthermore, extensive literature exists on these institutions because of their interesting place in the governance process. Each institution is examined in terms of how its mission and professional make-up defines the culture, how these factors relate to the concept of constitutional subordinate autonomy, and an example of these factors in practice.

## THE DEPARTMENT OF JUSTICE

Like all traditional executive branch departments, the Department of Justice's (DOJ) mission is partly defined by its responsibility to support the policies and directives of the president. As this dissertation argues, however, this subordination to the president must be tempered by the competing responsibility to Congress and the courts in support of individual rights. Beyond these defining characteristics, however, is the uniqueness of DOJ: it is a legal institution, staffed by a large number of lawyers. The orientation towards the law and the courts permeates the department, and does not always fit comfortably with the department's place in the governance process.

### Culture, Mission and Professionalism

Much of what has been written on DOJ as an institution focuses on the role of the Attorney General. The Attorney General was originally, and is still considered to be, the chief law officer of the federal government. Since 1870, however, this officer has also been the head of a large executive department, the DOJ.<sup>7</sup> Under his supervision the Department's 54,000 employees (including 4,000 lawyers) have responsibility for two quite different kinds of functions. On the one hand the Department serves as the principal law office for the government, responsible for prosecuting federal

crime, for representing the government in the courts in most of its civil litigation, and for giving legal advice to the president and the members of the Cabinet. These lawyerly functions include offices such as the Solicitor General, the Antitrust, Civil Rights, and Criminal Divisions, and the Office of Legal Counsel.<sup>8</sup>

On the other hand, the Department is the administrative home for a large and varied array of bureaus, agencies, and services, all of which have something to do with law or the administration of justice and yet have little to do with the traditional lawyering functions of litigating and counseling.<sup>9</sup> These non-lawyerly functions include the Bureau of Prisons, Immigration and Naturalization Service and the U.S. Marshals Service. The Department also houses huge investigative functions such as the Federal Bureau of Investigation and the Drug Enforcement Administration.

Each of these separate divisions and bureaus has its own individual culture, mission and sense of professionalism, but the examination of each of them is certainly beyond the scope of this chapter. For example, the unique culture of the FBI, particularly under J. Edgar Hoover, is legendary. As the analyst from the Criminal Division discussed in a previous chapter demonstrated, her actions were largely guided by the standards of professional policy analysis. This discussion focuses on the heavily legal aspects of the mission, culture

and professionalism of the DOJ in the traditional lawyerly functions presented above, where the professional standards of the legal profession contribute to a sense of mission and culture that does not always rest comfortably with the realities of the political process.

Again, focusing on the Attorney General literature, tensions have always surrounded this position. Daniel Meador points out that as a member of the bar and an officer of the courts, the Attorney General is bound to act in accordance with the professional canon of ethics and the rules of the courts. Furthermore, as a public officer he is bound to apply the law firmly and evenly to all citizens. At the same time, however, he serves at the pleasure of the president who has the ultimate constitutional responsibility for taking care that the laws are faithfully executed and for setting policies within the executive branch. The president, of course, also has an enormous array of political and public concerns. Meador notes that "These concerns coupled with the subordinate position of the Attorney General can and do influence - for better or worse - the opinions and actions of the Attorney General in his role as an attorney."<sup>10</sup>

Nowhere is this tension more evident than in Meador's own seemingly contradictory statements. On the one hand he states that "Any consideration of the role of the Attorney General must begin with the premise that this is the

principle subordinate officer through whom the President discharges his constitutional duty to see that the laws are executed."<sup>11</sup> In another passage, however, he states,

In all of this it cannot be overemphasized that the Attorney General is the chief law officer of the government, not one of its political operatives. His allegiance first and foremost must be to the law...the legal authorities are the starting point and provide the framework within which the Attorney General must function.<sup>12</sup>

These competing pressures can create two distinct cultures within the lawyerly function of the DOJ. On the one side, there is the legal culture, which is defined by the standards of the legal profession and driven by the mission to uphold the integrity of the law and see that justice is served. On the other side is the political culture, which is defined by the lawyer's responsibilities as a professional public servant in the executive branch of government, driven by the mission to faithfully serve the president who has the constitutional duty to see that the laws are executed. The DOJ lawyer straddles these sometimes competing cultures.

#### Relationship to Constitutional Subordinate Autonomy

Like all public administrators who take an oath to support and defend the Constitution, the Attorney General and his subordinate lawyers in the DOJ have three masters - the president, the Congress and the courts. And, like other lawyers serving in the federal government, the Attorney

General and his subordinates are also officers of the courts, bound by the professional standards of the bar. This status creates tensions for all lawyers in government; in serving all three masters simultaneously, their standing as lawyers tends to temper their subordination to the president, more than other public administrators, in the direction of the courts. This orientation is even greater for lawyers serving in the DOJ, which is the chief law office of the United States, and for the Attorney General, the "President's lawyer." As Meador suggests, the Attorney General "... is a unique bridge between the executive and the judicial branches of government."<sup>13</sup>

Not surprisingly, the degree of independence of the DOJ and its lawyers from the president has been the subject of great debate through the years. Meador points out that since the president does properly have some role to play and is ultimately responsible for the administration of the laws, the White House staff - not all of whom are lawyers - may tend toward to inflate the appropriate White House role in Department of Justice business. This tendency is reflected in a statement by a White House aide:

You elect a President because of a certain philosophy...and you expect that philosophy to be carried out. The White House should have a role in determining what briefs the solicitor general files, what civil cases are brought, what civil cases are defended.<sup>14</sup>

Although this statement is not without merit, its tone is

unsettling. One need only recall the excesses of the Watergate episode in the early 1970s. Reactions to the improprieties and illegalities revealed in those events resulted in calls for an "independent" Attorney General. A Senate Judiciary Subcommittee held extensive hearings on such proposals in 1974. Considerable discussion has ensued concerning ideas for making the Justice Department non-political.<sup>15</sup> Until the current structure of the government changes, however, the lawyers in the DOJ will continue to negotiate the tension between their subordination to the president as members of the executive branch and their independence as officers of the court.

The tensions created by membership in a separate profession while serving as a public administrator is not limited to lawyers. Physicians, scientists, engineers and other professionals in government may all experience conflict between actions they would take in a vacuum and actions they need to take because of the political process. For example, a research scientist may be convinced that the data indicate that an infectious substance is a significant threat to public health, but may not be able to address the problem adequately because of what other officials higher in the organization or legislators believe are higher funding priorities. Although as a public servant the scientist has a responsibility to abide by the decision (unless he decides to resign in

protest), he also has a responsibility to his profession to do everything he can to make his case.

### Illustration

Although constitutional subordinate autonomy implies that a public administrator's first responsibility is to the three constitutional branches and not to a particular profession, the existence of tension between these dual normative bases signals that careful reflection is in order. The following cases illustrate this tension, as public administrators made very different decisions regarding their subordination to the Administration.

Japanese Internment in World War II: When the Japanese navy bombed Pearl Harbor in 1941 and catapulted the United States into World War II, the question soon arose over what to do with the thousands of aliens of German, Italian and Japanese nationality (or ancestry) in the U.S.<sup>16</sup> For the Germans and Italians without U.S. citizenship, a selective process of internment was established and some 5,000 in all were confined to special camps set up in North Dakota. However, all Japanese living in the United States, even those born in this country and thus full American citizens, were removed from the West Coast and incarcerated in internment camps for the duration of the war. The Attorney General at the time, Francis Biddle, stated in his autobiography that he

was very troubled by this action. To him it was

...ill-advised, unnecessary, and unnecessarily cruel, taking Japanese who were not suspect, and Japanese Americans whose rights were disregarded, from their homes and from their businesses to sit idly in the lonely misery of barracks while the war was being fought in the world beyond.<sup>17</sup>

Arthur Miller notes that despite his misgivings, Biddle "swallowed his doubts" and dutifully went along with an action that has been called "the worst single wholesale violation of civil rights of American citizens in our history."<sup>18</sup> The tremendous pressure from the president and his military leaders to evacuate and intern the 125,000 Japanese from the West coast subdued the Attorney General, and the Supreme Court later validated the program. These actions were taken despite little factual basis for fearing the Japanese-Americans. As J. Edgar Hoover, head of the FBI, said in a memorandum to Mr. Biddle, the evacuation was "based primarily upon public and political pressure rather than on factual data."<sup>19</sup>

Biddle suggests that the blame for the unfortunate decision rests not only with the president or the army; in times of war it is natural for those preoccupied with military risk to consider rights more expendable. The blame also must rest with those who should have had a more balanced view of the situation. He states:

Although the decision has been handed by the President to the Army, and became primarily its responsibility, it is normal to expect the civilian branch of the government to have a vision less

narrowed to see only the conceivable risks, and to balance against them the seriousness of this basic violation of civil rights...If Stimson had stood firm, had insisted, as apparently he suspected, that this wholesale evacuation was needless, the President would have followed his advice. And if...I had urged the Secretary to resist the pressure of his subordinatism [sic] the result might have been different. But I was new to the Cabinet, and disinclined to insist on my view to an elder statesman whose wisdom and integrity I greatly respected.<sup>20</sup>

### Discussion

Miller correctly points out that the primary issue is not whether this action should have been carried out; rather, it involves the question of what should the attorney general do. Should he swallow his conscience and "go along?" Should he resist and render only "legal" opinions, whatever the consequences? If he does that, he is "likely to be bypassed by the President and ignored, while the President relies on other advisors, or (what is more likely) find himself a more pliable attorney general."<sup>21</sup>

Biddle chose to exercise his subordination to the president and "go along." In hindsight it is rather easy to see, as Biddle concedes, that he at least should have overcome his reticence and raised serious concerns with Secretary Stimson. His junior level status in the Cabinet is not a particularly compelling excuse for his silence, although the pressure may have been very real. The other reasons for his

subservience were the war situation and the possibility that he would lose credibility with the president if he objected. Certainly in a state of war one might justify more modest actions that compromise basic individual rights, such as conscription or curfews. However, when comparing the magnitude of the rights at stake in this case to an unsubstantiated potential threat to national security, Biddle should have exercised his autonomy to support the rights of the Japanese- Americans. In terms of credibility, earlier discussions have pointed out that prudence may dictate acquiescence to an objectionable action so that a public administrator may keep his or her job to fight other battles, but an important aspect of administrative statesmanship is the ability to dissent without losing the credibility and trust of superiors.

Biddle's subordination to the president also conflicted with the professional standards of the bar and his position as the chief legal officer of the country. The internment of the Japanese-Americans surely went against his training as a lawyer; perhaps he would have benefitted by following his legal instincts. It is instructive to compare this choice with the approach taken by a group of DOJ lawyers in a different setting.

Revolt at Justice: This case describes the reaction of a group of lawyers in the civil rights division of DOJ to

actions taken by their superiors to delay the desegregation of schools in Mississippi.<sup>22</sup> In August 1969, a majority of the attorneys from DOJ's Civil Rights Division gathered in a Washington apartment to ascertain whether, under the Constitution, any legal argument could conceivably support the Nixon Administration's request in a Mississippi courtroom to delay implementing desegregation in thirty-three of that state's school districts. The assembled lawyers concluded that no such legal argument existed. Thus was born the reluctant movement that the press was to call "the revolt" in the Civil Rights Division.

### Background

In May, 1954, the Supreme Court declared that "in the field of public education, 'separate but equal' has no place. Separate educational facilities are inherently unequal."<sup>23</sup> One year later, the Court decreed that school officials would be required to make a "prompt and reasonable start" toward achieving the constitutional goal with "all deliberate speed."<sup>24</sup> However, a decade went by without much being accomplished, due to massive resistance. In 1964, the Court ruled that "the time for mere 'deliberate speed' has run out."<sup>25</sup> In 1968, the Court held that school officials were under a Constitutional obligation to come forward with desegregation plans that worked, and to do so "now".<sup>26</sup> The

Fifth Circuit Court of Appeals interpreted that edict, in the summer of 1968, to mean that the dual school system, with its racially identifiable schools, had to be eliminated in all of the schools within its jurisdiction by September, 1969.

On August 19, 1969, Robert H. Finch, the Secretary of HEW, sought to withdraw school desegregation plans that his department had filed in the district court a week earlier. According to Gary Greenberg, one of the lawyers involved and author of this case study, "It marked the first time - since the Supreme Court's 1954 decision in Brown v. Board of Education - that the United States had broken faith with the black children of Mississippi and aligned itself with the forces of delay on the issue of school desegregation."<sup>27</sup>

Less than a week later, on August 25, Attorney General John Mitchell demonstrated the DOJ's concurrence with Finch's actions when Jerris Leonard, the Assistant Attorney General in charge of the Civil Rights Division, joined local officials in a Mississippi district court to argue for a delay.

The forty who attended the meeting discussed the legal principles at length. They could find, as lawyers, no grounds for these actions that did not run counter to the Constitution. They concluded that the request for delay was not only politically motivated but unsupportable under the law that they were sworn to uphold. They decided they had to

protest in some form. They knew they could not reverse the DOJ's actions in Mississippi. However, they wanted to ensure that decisions of this type were not made again. They hoped their protest could deter future accommodations.

### Rationale for the Protest

Why did they decide to protest? Greenberg recounts that part of the answer lies in the fact that the new Administration was elected largely by voters who expected - and, from the rhetoric of the campaign, had every reason to expect - a slowdown in federal civil rights enforcement efforts. Those political debts ran counter to the devotion and commitment of the attorneys in the Civil Rights Division. They had labored long and hard and knew that only unremitting pressure could bring about compliance with the civil rights statutes and the Fourteenth Amendment.

Yet this was not the only thing that led to the revolt. It was not inevitable. Jerris Leonard, the Assistant Attorney General, had alienated the civil rights lawyers. A politician with no background in civil rights, he distrusted the attorneys and isolated himself from them. Furthermore, he was inept as a lawyer. Leonard's handling of the case increased their irritation and frustration. For example, Secretary Finch's letter, drafted in part and approved in full by Leonard, said that the HEW plans were certain to produce

a "catastrophic educational setback" for the children involved.<sup>28</sup> Yet, the Office of Education staff who had prepared the plans, along with the civil rights attorneys on the case, found no major flaws.

Greenberg states that the paramount reason for the revolt, however, was their obligations to their profession and to the public interest. As lawyers, they were bound by the Canons of Professional Ethics and by their oaths upon admission to the bar; as officers of the United States, they were bound by their oath of office to support and defend the Constitution.

The Canon of Ethics states that an attorney "obey his own conscience" and strive to improve the administration of justice. U.S. District Judge George M. Bourquin wrote in 1917:

No...cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold....When rendering any such improper service...the lawyer invites and merits stern and just condemnation....Above all a lawyer will find his highest honor in a deserved reputation for fidelity to...public duty, as an honest man and as a patriotic and loyal citizen.<sup>29</sup>

In contrast to any notion of obligation to the law, Finch's letter suggested the possibility of a catastrophic educational setback if desegregation were effected at once, and spoke of the certainty of chaos and confusion in the school districts

if delay were not allowed. That allegation was based upon the undeniable existence of hostility to desegregation within the local communities. However the Supreme Court had ruled on several occasions that neither opposition to constitutional rights nor the likelihood of a confrontation with those opposed to the constitutional imperative may legally stand as a bar to the immediate vindication of those rights. Thus, Greenberg recounts that while pledged by their oaths to support and defend the Constitution, and bound by duty to follow their consciences and adhere to the law, the lawyers faced a situation in which the Administration had proposed to act in violation of the law.

#### The Means of Protest

The attorneys struggled with the appropriate means of protest. They decided that mass resignation would serve no purpose, for although it would have removed them from association with the supporters of the delay, it would not have fulfilled their "... obligation to act affirmatively to ensure that Constitutional rights would be protected and that the civil rights laws would be vigorously enforced."<sup>30</sup>

Whatever course of action the 65 attorneys chose, they recognized the need to act in a statesmanlike manner - they had to appear dignified and professional if their protest was not to be dismissed as the "puerile rantings of a group

of unresurrected [sic] idealists."<sup>31</sup> The ultimate goal was to make something positive happen, "action that had a chance to reap a harvest of practical results."<sup>32</sup>

The attorneys chose to go with a letter of protest, confident that gathering all 65 signatures would be quite a feat in itself. Other overt manifestations of disagreement were left open for individuals to pursue as they saw fit. The last two paragraphs of the protest letter said:

It is our fear that a policy which dictates that clear legal mandates are to be sacrificed to other considerations will seriously impair the ability of the Civil Rights Division, and ultimately the Judiciary, to attend to the faithful execution of the federal civil-rights statutes. Such an impairment, by eroding public faith in our Constitutional institutions, is likely to damage the capacity of those institutions to accommodate conflicting interests and ensure the full enjoyment of fundamental rights for all.

We recognize that, as members of the Department of Justice, we have an obligation to follow the directives of our departmental superiors. However, we are compelled, in conscience, to urge that henceforth the enforcement policies of this division be predicated solely upon relevant legal principles. We further request that this Department vigorously enforce those laws protecting human dignity and equal rights for all persons and by its actions promptly assure concerned citizens that the objectives of those laws will be pursued.<sup>33</sup>

However, many believed that a signed protest statement was not enough. Some of the attorneys refused to represent the Department in the case. Some went even further: they passed information along to the lawyers for the NAACP Legal Defense Fund in order to aid their Mississippi court battle against

the delay. Others spoke to the press to ensure that the public was fully aware of the role political pressures had played in the decision to seek delay.

In the case of Greenberg specifically, he was called into Leonard's office on October 1, where Leonard said he felt all his attorneys were obligated to defend the government's Mississippi action in court. Greenberg replied that he could not and would not. Leonard countered that their obligation is to represent the Attorney General, and John Mitchell had decided that delay was the appropriate course to follow in Mississippi. Greenberg explained that he was obliged to represent the public interest in court and that his responsibility was to enforce the law. Leonard ended the exchange by stating, "Around here the Attorney General is the Law."<sup>34</sup> The difference of opinion was irreconcilable. Greenberg was told to resign or be fired. He resigned.

### Discussion

At least two questions in this case are relevant to constitutional subordinate autonomy. First, who had the more principled argument, Leonard or Greenberg? Leonard argued that as members of the Department of Justice and the executive branch of government, they were obligated to support the Attorney General and the president. He could also have argued that in fact the DOJ was not violating any law by merely

joining the state of Mississippi in arguing for a delay in the enforcement of an impractical desegregation law. Greenberg and his fellow lawyers saw things differently. They argued that their obligations went beyond serving the Attorney General and the president; as public administrators sworn to support the constitution they had an even greater responsibility to see that the laws were enforced.

Realistically, Greenberg would have to concede that not every law is enforced to the same degree all of the time if for no other reason than finite organizational resources. However, the key issue for Greenberg was the historical perspective of the DOJ's decision to join Mississippi in arguing for a delay. This action was just the latest in a long series of attempts to delay enforcement of Brown v. Board of Education. DOJ was working with the state of Mississippi to add to what was already an unconscionable delay. The model of constitutional subordinate autonomy tells us that a legitimate role for the public administrator is to exercise discretion in order to maintain the balance of powers between the three branches. Given the sorry history of school desegregation efforts in this country, it was reasonable for Greenberg to view the DOJ decision as yet another example of the imbalance that favored the agenda of the executive branch over the holdings of the courts in support of the law.

The second question addresses the relationship

between institutional mission, professionalism and constitutional subordinate autonomy. Greenberg cites two sources to justify his exercise of autonomy: the oath to support the Constitution and the professional Canons of Ethics as a member of the bar, among which is the prescription that an attorney "obey his own conscience" and strive to improve the administration of justice.<sup>35</sup> In this case the standards of his profession reinforced the actions he believed were proper based on his sworn duty to support the Constitution. Unlike Biddle, Greenberg felt compelled to reconcile his obligations as a lawyer and a public administrator, and his deliberations clearly pointed in the same direction: oppose the DOJ decision to argue with the state for a delay.

Furthermore, as a lawyer in the Civil Rights Division, Greenberg identified strongly with the mission of the division. Echoing Califano, he noted how the enactment of a civil rights law is only the beginning of a long and difficult struggle to see that the law is implemented and enforced. He was frustrated by the lack of such commitment historically in the DOJ.

In summary, these examples illustrate that the responsibility of the public administrator to serve all three constitutional masters coincides with often compelling responsibilities to professional standards and the mission of

the institution. Any conflict or tension between these responsibilities should be a signal to examine carefully the nature of the tension before taking action. Although the public administrator's first responsibility must be to the three branches, professional standards or agency mission might indicate which of the branches he or she might favor in a complex situation. If Biddle, for example, had focused more on his responsibilities as a lawyer and the head of the nation's chief legal institution, it may have helped balance the tremendous pressure he felt as a subordinate of the president.

#### THE GENERAL ACCOUNTING OFFICE

The GAO provides yet another interesting institutional perspective because it is an arm of Congress and its culture has changed considerably over its history. It is staffed primarily by career public administrators, many of whom spend their entire government careers in GAO. Their responsibility to provide oversight of the executive branch agencies for the Congress has resulted in multi-faceted roles that provide useful examples of the concept of constitutional subordinate autonomy.

#### Culture, Mission and Professionalism

Frederick Mosher explains that the uniqueness of the

GAO stems in part from its legal and official status in the U.S. government.<sup>36</sup> It is an arm of the Congress, from which it receives its powers, responsibilities, and resources. But it is also independent, even of Congress, in the exercise of some of its powers and in its choice of the majority of its projects and the conduct of virtually all of them. This independence, which the GAO treasures, is enhanced by the nature of the appointment and tenure of its top leaders. The Comptroller General and the Deputy Comptroller General are both -like many other high federal officials - appointed by the President with the consent of the Senate; but unlike most other officials except judges, they have long terms (of fifteen years) and are almost unremovable. In terms of its relationship to the executive branch, Mosher notes that although most of the GAO's work concerns the executive branch, it is not responsible to it. This sense of independence permeates the self-perception of the staff and is essential to understanding the GAO culture.

Culture of Control: However, within this overall sense of independence, which has been a constant since GAO's creation in 1921, are a mission and sense of professionalism that has changed significantly over the years and therefore changed aspects of the culture as well. In his study of the changing organizational culture at GAO, Wallace Earl Walker explains that in 1940, four years after the first Comptroller

General left office, the GAO's structural arrangements were not much different from those of the old Auditors of the Treasury, whose functions the GAO inherited in the 1921 Budget and Accounting Act.<sup>37</sup> The staff was predominantly a clerical one whose principal function was to assess compliance of executive agency expenditures against rigid codes of performance. In essence the GAO and its clerks sought to control executive expenditures from the legislative branch.

Walker describes the early culture of control in GAO in colorful terms, noting that the principal ritual was the compliance audit, where the auditors would daily confront huge stacks of paper and "Armed with colored pencils and rubber stamps and reinforced by the 'coffee grinder' adding machines, they would check, stamp, tick, and turn over each voucher."<sup>38</sup> The mission and sense of professionalism was driven by mathematical correctness.

Culture of Oversight: By 1981, with the departure of the fourth Comptroller, Elmer Staats, the GAO had been transformed. Organized functionally to respond to the needs of a fractured Congress, Walker notes that the staff was a professional one that sought to evaluate the effectiveness of government programs, the efficiency of agency management, and the economy attained in government management and accounting systems. Walker terms this change a shift from a "culture of control" to a "culture of oversight", stating that the GAO

"now seeks to oversee or review public policy and administration and not to control it."<sup>39</sup>

A series of events starting in the 1940s realigned the GAO's culture. Chief among them was a reassertive Congress and the post-war influx of certified public accountants with commercial auditing expertise. According to Walker, the Depression and the war had drained the Congress of considerable authority and invested it in the executive branch, forcing the Congress to employ new techniques of control over the functioning of a more powerful executive.<sup>40</sup> Coinciding with this pressure was the arrival of professional accountants displaced by the war, who replaced the clerks and investigators responsible for the old compliance audit and brought with them the mindset of a large public accounting firm.

This new mindset, reinforced by Comptroller General Lindsay Warren, led to a strategy which sought to fulfill the second function Congress had prescribed for the GAO in the formative 1921 Budget and Accounting Act: inform the Congress. Warren recognized that the GAO could not successfully control executive behavior, but it could study government operations, gather information, and report faults in management and programs to Congress. The Congress would therefore be responsible for seeing to it that the deficiencies discovered by the auditors were corrected. Building on this core, Walker

describes that Warren and his new elite corps redesigned the Office under the guidance of five principles: responsiveness, cognizance, professionalization, precision, and evaluation.<sup>41</sup>

The principle of responsiveness refers to the GAO's responsibility to respond to congressional demands and needs. Cognizance meant that the GAO auditors would maintain an audit presence within federal agencies both in Washington, D.C., and in the field. Warren and his elites decided that the GAO could no longer rely on technicians to do the audit. Only college-educated, professionally-trained analysts were adequate to the task. The principle of precision meant that the GAO was to be totally accurate and fair in its reporting. Finally, the GAO was to evaluate agency financial systems, management and programs. Reporting details was not enough. As a critic, the GAO was to compare agency performance with the standards promulgated in the laws, orders, and regulations of the government and to "find faults."<sup>42</sup>

In summary, although the sense of independence has been a strong aspect of the culture at GAO since its inception, the sense of mission and professionalism has changed significantly. In the first twenty years, the "culture of control" was defined by the mindset of the professional auditor and driven by the mission to capture any errors in agency expenditures. In the past 40 years, the culture shifted to one "of oversight" which is defined by the

mindset of the professional evaluator or policy analyst, driven by the mission to determine how well agency programs are working and whether they are meeting congressional intent. This underlying sense of independence and change in other aspects of the GAO culture have implications for the subordinate but autonomous role of GAO employees.

### Relationship to Constitutional Subordinate Autonomy

At first glance, GAO's independent status and its position as an arm of Congress leads one to question the relevancy of constitutional subordinate autonomy. Like the respondent from GAO discussed in a previous chapter, the typical GAO employee would likely state that because of the unique status of the Comptroller General, GAO is not subordinate to anyone except the Congress to a limited degree. In reality, however, the issue of GAO's independence and responsiveness has been the subject of ongoing debate for years.

For example, Mosher interviewed a number of congressional staff and executive branch members on their views of GAO. The staff members with whom he talked were generally favorable toward the GAO, but some were critical of some aspects of its work and a very few were caustic. The criticisms did not run to the accuracy and reliability of GAO's findings but to the choice of projects, the toning down

of reports, and the timeliness of its submittals. Some thought it insufficiently responsive to Congress and thought that the Comptroller General should be less independent, particularly in the choice and definition of projects. Several considered the GAO too gentle in its treatment of executive agencies and criticized its practice of "clearing" reports through those agencies before submitting them to Congress. A few felt that it avoided controversial, political topics, while others criticized it as too political. Some thought that it was too submissive to the executive agencies and others that it was too deferential toward the prominent members of Congress as against lesser members. Some felt that it leaned too heavily on provable, quantifiable facts to protect itself, while a few felt that it should revert to being a pure audit agency and leave recommendations on legislation to congressman and their staffs. Others view it either as a pliant tool for their congressional mentors (and sometimes themselves) or as a competitor in digging out and publicizing information that may be politically significant. Finally, some congressional staff members request or utilize GAO studies that they think lend support to the positions of their congressional bosses, and avoid those that might weaken those positions.<sup>43</sup>

The criticisms that Mosher heard about the GAO from executive branch officials were in many cases the opposite of

those he heard from congressional staff. Some of the executive branch officials charged the GAO with being overly critical and selectively negative about small or unrepresentative practices when most of the activities on which it was reporting were being performed well. Some suggested that it sought out things that would provide political fodder for individual congressman and the press. Some were particularly sensitive that the GAO allegedly failed to issue positive reports, even when all or most of what it found about an agency's performance was favorable. A few charged that the GAO's negative posture contributes to popular disaffection toward government generally and to the damaged morale of managers and employees specifically. Lastly, some expressed their belief that the GAO is too responsive to Congress and fails to recognize that many administrative problems originate, not in the executive branch, but in Congress itself.<sup>44</sup>

This debate reflects the reality that although it is generally agreed that the GAO's primary boss is Congress, and although the majority of its products are made for and go to Congress, it has a number of other audiences who receive and may be importantly affected by its reports. Mosher notes that these include the executive branch and the various agencies of which it is composed (that may or may not welcome the GAO's observations and recommendations); the media, and

through them the general public; and a great variety of groups and interests affected by GAO studies, like state and local governments, international organizations, businesses contracting with the federal government, universities and other nonprofit enterprises, public interest groups, and others.<sup>45</sup>

Of course, the GAO insists that it must be largely independent in the selection, conduct, and products of its work in order to assure the accountability of agencies in the executive branch. Without such independence, its efforts might lack objectivity, and be subject to partisanship and political and special interest pressures. The argument is that independence of one agency is essential to the accountability of others.<sup>46</sup>

There is no one correct response to the general disagreement over whether GAO should be more or less independent, or who it should be more or less responsive to, but the concept of constitutional subordinate autonomy provides a useful framework for assessing how independent or responsive GAO should be in particular cases. The public administrators in GAO are subordinate to all three branches of government no less than members of a traditional executive branch agency. The unique status of the Comptroller General and GAO's position as an arm of Congress certainly legitimizes more independence and a stronger sense of subordination to the

congressional branch than is the case for executive branch employees, but this does not eliminate the GAO's responsibility to the executive and judicial branches inherent in our constitutional government of shared powers. This is why the GAO respondent who stated "I don't work for the president" is wrong.<sup>47</sup> He would be more correct to say that since GAO is an arm of Congress, his first responsibility is to the Congress; however, ultimately he is subordinate to all three branches. The sense of independence that permeates the GAO culture can blind employees to this fundamental perspective.

The other culture issue related to constitutional subordinate autonomy is the change from a culture of control to a culture of oversight. When GAO's mission was primarily auditing government expenditures, the concept of serving multiple masters was not very relevant. The role of the GAO employee was to conduct audits that were as accurate as possible, and errorless work was the measure of success. However, when the mission changed to oversight and evaluation of government programs, the situation became very different. Mosher points out that GAO's evaluative functions often lead, implicitly or explicitly, to a role as policy advisor, both for the agencies and Congress. He states:

There are dangers for the GAO in this role, especially in controversial areas. Its reputation for neutral, nonpartisan objectivity, above the

political fray, could be threatened were it often to take sides and appear as a lobbyist on disputed issues. Most of its legislative recommendations to Congress, of which there are several dozens every year, concern the manner in which legislative intent is carried out. But some in certain fields (for example, energy) can hardly avoid political implications.<sup>48</sup>

Once GAO became involved in oversight and evaluation, it entered an era of much more complex responsibilities because of the implications of its studies on the administrators and recipients of government programs. As the following case demonstrates, simplistic assertions of independence or narrow notions of responsiveness are not helpful in guiding the GAO employee in this more complex role.

#### Illustration

The following case involving GAO evaluations of a complex public program demonstrates the multiple responsibilities GAO has in its role of oversight and evaluation of government programs, as well as the limits on its independence.<sup>49</sup>

Evaluating Public Education of the Handicapped: In 1978, despite estimates that half of the nation's handicapped children were not being served by public school systems, a handicapped child's prospects for receiving a public education had never been more promising. For the first time in the 150-year history of special education, the Congress declared in

a public law (P.L. 94-142) in 1975 that a "free, appropriate education" is the right of every handicapped child.<sup>50</sup> Although the schooling of handicapped children continues to be, as it was in the past, a state and local responsibility, a significant advance in the federal role occurred in 1966 when Congress enacted the Education of the Handicapped Act. It established the Bureau of Education for the Handicapped (BEH) in the U.S. Office of Education of the Department of Health, Education and Welfare (HEW), and authorized a new grant program to strengthen state and local efforts. The federal strategy was to assume a catalytic role, seeking to upgrade educational services for the handicapped by injecting additional funds into the state and local governments that would stimulate the expansion of their programs.

By 1974, however, large numbers of handicapped children were still not being served by the public schools, and Congress responded by enacting two major laws. The Education Amendments of 1974 increased the level of federal aid to the states and required the states to establish plans for providing full educational service to all handicapped children. The Education of All Handicapped Children Act of 1975 went even further. It authorized increased levels of funding and required recipients of federal funding to provide all handicapped children between the ages of 3 and 21 years with a "free, appropriate public education" by 1980.<sup>51</sup>

### The 1974 GAO Study

GAO launched a self-initiated study which encompassed the education and training programs administered by BEH and three other HEW agencies. In the final report, released in December 1974, the GAO focused on the critical gaps in educational services for the handicapped and concluded that the planning, coordination, and evaluation of federal programs should be improved. This report is notable for the intensive criticism it received from BEH officials. The controversy also involved the Secretary of HEW and the Commissioner of Education.

Initially, the GAO conducted an opening interview to inform BEH officials of the planned study, but after granting the GAO full access to the files, the BEH headquarters staff had little contact with the auditors until they were asked to review the draft report. The GAO auditors apparently made little effort to tap the BEH staff's expertise to gain a better insight into the complex interrelationships of the federal, state, and local programs.

HEW asked the four bureaus involved to comment on the draft report. Their comments were then blended into a departmental response. In general, there were no objections to either the description of the massive unmet needs of the handicapped or to the GAO's broad and uncontroversial recommendations for improving federal programs. However, the

agency officials reacted angrily to the body of the report; in their view, the support offered for the report's recommendations was inadequate because of unsubstantiated findings, inaccurate and misleading generalizations, and single-minded focus on the negative aspects of programs. They further questioned the qualifications of the GAO staff and the fairness and adequacy of GAO procedures and methodologies.

For example, BEH pointed out that a negative finding regarding one program was inappropriately generalized to include all of HEW's efforts to aid the handicapped. Furthermore, the negative focus of the report failed to "place an adequate emphasis on the tremendous growth in education and rehabilitation opportunity which has resulted from Federal and State efforts. For example, more than 2 million handicapped persons have been afforded this opportunity in the last five years."<sup>52</sup>

Instead, HEW thought the GAO auditors had failed to address the fundamental cause of the serious gaps in services to the handicapped - grossly inadequate funding at all levels of government. During the Nixon administration, education for the handicapped received a very low priority, and consequently BEH was understaffed and underfunded to carry out its expanded responsibilities. At the time of the GAO review, BEH had only nine state plan officers to monitor and assist fifty states and over 16,000 school districts. In recommending that the

federal government provide greater assistance to the states in planning and evaluating handicapped services, the BEH claimed that the GAO did not adequately consider either BEH's available fiscal resources or the limits of its legally prescribed role in the delivery of educational services for handicapped children.

In BEH's view, the GAO's analysis consistently reflected the misconception about the federal role in education of the handicapped. The bureau commented that the report failed to "appropriately frame the role and magnitude of the federal government's efforts in relation to state and local governments which have the fundamental responsibility for service delivery to handicapped children."<sup>53</sup> BEH pointed out that even after accurately depicting the massive problems of "unserved millions of handicapped children and adults," the GAO apparently concluded that the solution would depend on better coordination of federal efforts, although federal funding accounted for only 6 to 8 percent of the total costs.<sup>54</sup>

Further, the GAO had recommended that HEW establish a system for assisting the states in setting priorities among handicapped children's educational needs to help assure that federal grants would be directed toward the most pressing problems. Approximately 80 percent of federal funds for handicapped programs were distributed through formula grants

to the states, which had the authority to allocate the money as they judged appropriate. The federal government was prohibited by law from requiring the states to target their funds toward any particular goal. Consequently, BEH considered that the GAO recommendations would require the federal government to overstep its legal authority to provide guidance to the states.

BEH also argued that GAO's report was unfair because it focused only on states with problems and ignored positive findings. For example, the draft report cited statements from several state officials who used some of their federal planning funds for other purposes. Based on those comments, the GAO concluded that the effectiveness of federal funds were hampered by the lack of adequate planning at the state level, even though Congress had authorized specific funding for administration and planning of programs. This conclusion directly contradicted the findings in a 1974 study by Exotech Systems, a private research and consulting firm, which stated that BEH's grants were "considered essential for state planning" in forty states. The Exotech study found that BEH planning grants "unquestionably made a significant contribution to the State education agencies' ability to identify statewide needs and to develop constructive approaches to meeting those needs."<sup>55</sup>

In HEW's formal comments to the GAO, BEH quoted

extensively from the Exotech study as evidence of more positive impacts of the state planning grant program. In conclusion, BEH stated, "While the contractor's finding that in 40 states the administrative funds were considered essential for State planning does not rule out GAO's impressions of conditions in one or more of its five state survey, GAO's statement that 'Funds available for administration and planning are misused' must certainly be seen in a different context."<sup>56</sup>

#### GAO Responds to Criticism

The GAO responded to this criticism by mentioning the Exotech findings in its final report. The last paragraph on the state grant program ends with the statement that BEH officials "said a 1974 study financed by the Office of Education (OE) identified a number of productive uses made by States of such funds." The GAO also incorporated some of the agency's other suggested changes but BEH officials felt they were incomplete or inadequate. In his letter of March 25, 1975, to the Comptroller General, the Commissioner of Education said that the GAO's concern with negative observations may be more appropriate for the discovery of errors in financial processing of federal grants or contracts, and less useful in presenting balanced appraisals of complex programs in the very difficult area of assessing human service

programs. He concluded that, as a result of the serious deficiencies in the GAOs methodology and procedures, the value of the report was no more than a summing up of broad information already available to the public. He urged that the future GAO program evaluations be conducted by experienced evaluators according to standard behavioral science research procedures.

### Improved Relations

BEH has observed progressive improvements in later GAO reports on education for the handicapped. While preparing a 1976 report on training programs for teachers of the handicapped, the GAO modified its procedures, methodology and reporting style. The auditors consulted with special education experts and displayed a greater willingness to listen to the BEH staff. To collect data, the GAO sent questionnaires to nationwide samples of school districts and universities, and to all fifty state departments of education. The samples were drawn according to standard survey research techniques. The final report presented a more balanced view of the successes and weaknesses of the training program and fully discussed BEH's comments and disagreements. Although BEH still had disagreements, progress had been made.

GAO and BEH achieved considerable agreement and cooperation in the 1978 GAO report on federal aid to the

states for education of handicapped children in state-operated schools (P.L. 89-313). BEH found the report quite useful, as it noted that Congress needed to clarify the manner in which the states should spend federal funds. This helped to establish a cooperative spirit between BEH and GAO during the course of the review. The GAO auditors discussed their preliminary findings with the BEH staff to make sure they did not overlook or misconstrue certain facts. BEH staff felt the positive relationship produced a more constructive and informed auditing of programs for educating the handicapped.

#### Discussion

On one level, this case simply represents the typical skirmishing that goes on between one agency that is critical of the way another agency is conducting its programs. On another level, however, this case reflects the change in GAO's culture from one of control to a culture of oversight. When GAO's role was simply the auditing of agency expenditures, its sense of independence served it well. GAO had little need to consult with or be responsive to the Agency in a typical financial audit - the books are either accurate or they are flawed. However, when GAO became one of Congress' primary means of determining the efficiency and effectiveness of public programs, the scope of GAO's responsibilities grew dramatically.

This case illustrates that, to provide accurate program oversight to Congress, GAO must consult with and be responsive to the agencies operating the programs. This may seem like an obvious point, but the GAO attitude of independence and responsibility only to Congress produced a report that was ill-informed, biased and negative. Because GAO did not genuinely involve and respond to the BEH's concerns in its analysis, the report failed to provide an accurate picture of the education and training programs for the handicapped administered by the BEH.

Adherence to the concept of constitutional subordinate autonomy would have kept GAO officials from adopting such a narrow and inappropriate attitude regarding their role in the government process. Responsibility to all three branches guards against the narrow pursuit of the interests of one branch at the expense of another. Certainly, this does not mean that GAO should overlook negative findings because they might damage the image of an agency, but it does mean that GAO has a responsibility to provide a balanced, fair picture. GAO should not focus only on the negative findings to serve the interests of a member of Congress or enhance the image and power of GAO.

In summary, though GAO is an independent arm of Congress, constitutional subordinate autonomy is a relevant and useful concept for GAO staff, particularly given the

change from a culture of control to a culture of oversight. Unlike traditional executive branch agencies, where the tendency towards subordination to the president must be tempered by responsibility to Congress and the courts, the tendency of GAO towards either independence or a narrow responsiveness to Congress must be balanced by responsibility to the agencies it oversees and evaluates.

#### THE OFFICE OF MANAGEMENT AND BUDGET

The Office of Management and Budget (OMB) provides another interesting institutional perspective on the concept of constitutional subordinate autonomy. As one of the principal support agencies directly responsible to the president, in many respects it is viewed as "the president" to the traditional executive branch agencies. Through its fiscal and legislative clearance, program coordination and development, budget preparation, and, to a lesser extent, executive management functions, OMB has played a central role in the operation of the federal government since its inception in 1921.<sup>57</sup> Most significant, however, has been the considerable change in the way OMB serves the president and relates to the agencies and the Congress. The dramatic impact of institutional change has been the subject of intense debate. This discussion of OMB will focus on how the concept of constitutional autonomy informs this debate.

## Culture, Mission and Professionalism

Like the GAO, OMB is a significantly different institution today from what it was in the 1920s and 1930s. The Budget and Accounting Act of 1921 established a Bureau of the Budget (BOB, which changed to the Office of Management and Budget in 1970) headed by a Director and Assistant Director appointed by the president. The Budget Director was to be the president's personal assistant, as indicated by the absence of a requirement for senatorial confirmation. The Act denied federal agencies independent influence in the budget decisions of Congress by specifically empowering BOB "to assemble, correlate, revise, reduce, or increase the estimates of the several departments or establishments."<sup>58</sup> The Act also authorized the Budget Bureau to make detailed administrative studies for securing greater economy and efficiency in the federal government, but this role was neglected for the most part in the early years.

Business Culture: General Charles G. Dawes, the first Director of BOB, insisted that the managerial staff to the president be completely nonpolitical and focus solely on improving the detailed business functions of government. Dawes believed that only a non-political staff could do a good managerial job for a political chief executive, and that the best way to let the technicians make their useful professional contribution was to keep them thoroughly subordinated to

political authority. As Dawes explained:

Much as we love the President, if Congress in its omnipotence over appropriations and in accordance with its authority over policy, passed a law that garbage should be put on the White House steps, it would be our regrettable duty, as a bureau, in an impartial, non-political way and non-partisan way to advise the Executive and Congress as to how the largest amount of garbage could be spread in the most expeditious and economical manner.<sup>59</sup>

This statement reflects the narrowly defined, business management direction of BoB that predominated until about 1939. Dawes represented the preference for hiring "hardheaded, economy-minded financial and logistical officers of the army."<sup>60</sup> The fact that BoB was a part of the Treasury Department during this time no doubt contributed to this mindset

Although this emphasis was adequate for ensuring economy in matters of routine business, it did not address broader issues of administrative management in government nor provide the institutional support that presidents need to oversee an increasingly complex government. In reviewing the Brownlow Committee recommendations on administrative management, President Roosevelt emphasized his need for more help from BOB in fiscal, personnel and planning issues. This position led to BOB assuming legislative clearance and expanded administrative management duties, which, according to Richard Neustadt, reflected Roosevelt's belief that BOB should not just protect his budget, but also "...his

prerogatives, his freedom of action, and his choice of policies, in an era of fast-growing government and of determined presidential leadership." <sup>61</sup> To reinforce this expanded role, BOB was removed from the Treasury Department and made a separate agency in the Executive Office of the President.

Neutral Competence: This expanded role for BOB as an institutional arm of the president reached its peak under Harold Smith from 1939 to 1946. Under his active encouragement, BOB staffers were indoctrinated with the philosophy that they served the President and the presidency. Smith saw himself as the Director of an institutional career staff, distinct from personal White House aides, but concerned with the problems of the president and the institution of the presidency. Whereas Dawes wanted staff to be non-political, Smith wanted staff to be politically sensitive to the president's agenda but equally concerned with the long-term interests of the presidency. Smith was determined that his staff's product not be duplicated anywhere in the federal service. His "ticket" into Roosevelt's advisory circle was the ability to offer the President something that most of his other aides could not - objective, impartial advice based on the BOB's staff work.<sup>62</sup>

According to Berman, the distinction between the president's personal and institutional interests represents

the cornerstone of the BOB's success under Harold Smith. He notes,

Harold Smith understood what some of his successors did not - that the political interests of the President and the long-term interests of the presidency as an institution are not the same, and that if a President happens to ignore this distinction, a Budget Director should be around to remind him of it.<sup>63</sup>

Mosher credits Smith with almost completely changing the posture and mission of the agency from that of solely an instrument of economy in government toward that of a general-staff agency to the president, an institutional, nonpartisan source of information and advice to presidents, Congresses, and executive agencies.<sup>64</sup>

Partisan Political Culture: A third distinct period for OMB, characterized by a blurring of the distinction between personal staff to the president and institutional staff roles, began in full force under President Nixon and remained the dominant culture at OMB through the Reagan Administration. The trend toward the blurring of these roles started in the Eisenhower years, where BOB was used essentially as a "negative" agency whose main purpose was to balance the budget for Eisenhower. The preoccupation with responding to Eisenhower eroded BOB's objectivity. Phillip Hughes, head of BOB's Legislative Reference Division at that time, described the institutional image as "completely negative in outlook and incapable of constructive

deliberation, and with a dollar sign as its only criteria."<sup>65</sup> This trend continued under President Johnson, where BOB's zeal in providing excellent staff support in the post-assassination period actually laid the ground for its institutional exploitation. The prevailing attitude is reflected by Budget Director Kermit Gordon's statement to Johnson, emphasizing that the BOB was a "staff agency to the President which, by tradition and fact, has no other constituency other [sic] than the Presidency and no obligations which complicate its allegiance to the President."<sup>66</sup>

Berman notes that by 1968 it was hard to distinguish personal from institutional staff responsibilities in the Executive Office. The trend continued with the Nixon Administration, during which the BOB was reorganized and renamed the Office of Management and Budget (OMB).

Early in his presidency, Nixon appointed Roy Ash to study the organization of the executive branch. One of the committee recommendations was to replace BOB with an Office of Executive Management (OEM). The reorganization report emphasized that OEM involved more than merely renaming BOB. At stake was a fundamental change that would go well beyond an emphasis on budget. For example, presidential appointees would head the institutional staff in the management area, thereby ensuring better responsiveness to presidential priorities.<sup>67</sup> Another symbolic change that drew congressional

objections was the delegation of all BOB functions to the president, who would then delegate them to the Director of OEM.<sup>68</sup> In short, a major focus of the reorganization was to increase the responsiveness of the new agency to the president's agenda, as Ash made clear in the following statement:

There was a lore that surrounded the old Bureau of the Budget and we deliberately tried to break it. One of the reasons for changing the name was to break the lore. The lore was that you had to be very anonymous, way back in the woodwork...doing things in an unchanging way, a narrow perception, even narrower than the 1921 Act. They had a nice comfortable spot down there with a degree of expertise that helped protect the institution.<sup>69</sup>

The reorganization was approved by Congress on July 1, 1970, although the name was changed to OMB as a concession to certain Congressmen who wanted the word budget in the title. Hugh Heclo points out that the ensuing years saw an institution that became increasingly identified as a "member of the President's own political family and less as a broker supplying an independent analytic service to every President."<sup>70</sup>

Berman is more colorful in his analysis, suggesting that OMB became perceived as a "Frankenstein monster" because its job was to help the president accomplish his mission. Nowhere was this more evident than at the Department of Justice, where the new Attorney General, Elliot Richardson, in his efforts to maintain independence from a troubled Nixon

presidency, instructed his staff not to deal with either the White House staff or with OMB.<sup>71</sup> OMB staff were shaken by this news, and the order was later clarified to apply only to White House personnel. Nonetheless, the order demonstrates the degree to which OMB had become associated with partisan presidential staff.

Although the perceived politicization of OMB disheartened those who valued the image of the BOB as the bastion of "neutral competence" in American government, it was hailed by others who saw it as a way for the president to exercise greater control over the federal government. Regardless of the advantages or disadvantages, this new institutional role of OMB was unquestionably tied to the political agenda of the president.

In summary, three distinct cultures have been identified at OMB since its establishment in 1921. In the first 10 - 15 years, the agency was characterized by a narrow business culture, defined by former military officers with financial and logistical backgrounds and driven by the quest for economy and efficiency in the routine details of government business. It was a decidedly non-political culture. In the midst of the Great Depression and the demand for more proactive presidential leadership to guide an increasingly complex government and society, the presidency needed much broader support from BOB. Under Harold Smith, a

culture of neutral competence thrived, defined by professional public administrators driven by the mission to serve the interests of the presidency by providing politically sensitive yet objective analysis. There was a conscious attempt to maintain a separate identity from the personal staff of the president. Finally, achieving predominance in the Nixon years and continuing today, is a political culture defined by a variety of professional economists and policy analysts and driven by the mission to serve the partisan interests of the current president in a fashion indistinguishable from personal presidential staff.

#### Relationship to Constitutional Subordinate Autonomy

The neutral competence role emphasized by Harold Smith is clearly the institutional culture that fits most comfortably with the responsibility to serve all three constitutional masters. As a member of the Executive Office of the President, an OMB administrator provides direct staff support to the president and, presumably, will follow presidential direction. However, subordinate autonomy implies that this is a rebuttable presumption; responsiveness to the president must be balanced by competing responsibilities to the Congress and Courts. Smith's concept of simultaneously serving the president and serving the institution of the presidency through neutral competence mirrors constitutional

subordinate autonomy. Furthermore, not only is there a normative case for balancing responsiveness to the president, this approach may be the best practical way for OMB to serve the president's interests.

Hugh Heclo states, "The independence entailed in neutral competence does not exist for its own sake; it exists precisely in order to serve the aims of elected partisan leadership."<sup>72</sup> There is no better example of this than the reference above to the Attorney General instructing staff not to deal with either the White House or OMB. If OMB is perceived by the rest of government as merely a partisan political tool of the president, it loses credibility and effectiveness. A partisan OMB becomes an obstacle to be avoided or manipulated instead of a legitimate partner with whom other agencies can work to achieve their goals within the framework of presidential policy.

There are certainly competing views on this issue, but these competing views would come from proponents of the unitary executive model of government who would find the fundamental concept of constitutional subordinate autonomy problematic in any case. The point is that different institutional cultures fit more or less comfortably with the normative framework of serving multiple constitutional masters. Under the business culture established by General Dawes, responsiveness to multiple constitutional masters was

simply irrelevant because of the narrow mission concerned with budgetary details. However, this narrow mission did not meet the needs of more activist presidential leadership. For different reasons, the partisan political culture which peaked under David Stockman during the Reagan Administration also is incompatible with responsiveness to multiple constitutional masters because its practice recognizes subordination to the president alone and distance from, and sometimes hostility to, the Congress.<sup>73</sup> The following cases illustrate this partisan political culture at OMB during the Reagan Administration and the reaction of several members of Congress.

### Illustrations

The role of OMB in the federal regulatory review process has been very controversial because of two Executive Orders issued by President Reagan which have dramatically increased OMB's influence in the regulatory activities of agencies. Executive Order 12291, promulgated on February 17, 1981, requires executive agencies to submit all proposed and final regulations to OMB for review prior to publication. Major rules, which are defined as rules with an annual effect on the economy of \$100 million or more, must be accompanied by a detailed cost-benefit analysis, known as a regulatory impact analysis (RIA). OMB's review is to be based on a set of substantive criteria outlined in the executive order.

These criteria direct OMB "to maximize the net benefits to society" of regulatory action."<sup>74</sup> In theory, OMB review under Executive Order 12291 is to occur shortly before publication of proposed and final rules and is to be completed expeditiously - within ten days for non-major rules and within thirty or sixty days for major rules. However, the executive order provides that if OMB notifies an agency that it is extending its review beyond the normal 10-day or 60-day review period, the agency shall "refrain from publishing" the rule until OMB review is concluded.<sup>75</sup>

Executive Order 12498, promulgated on January 14, 1985, authorizes OMB review of potential agency rulemaking actions up to a year in advance. Agencies are required annually to submit to OMB for review a "draft regulatory program" that describes all "significant regulatory actions" the agency intends to undertake during the next year.<sup>76</sup> OMB is authorized to review each agency's regulatory program to determine if it is consistent with the Administration's policies and priorities. Actions approved by OMB are incorporated into the Administration's "Regulatory Program," which is to be published annually. Agencies are prohibited from taking any significant regulatory action that is materially different from that contained in the "Regulatory Program" unless specific OMB approval is obtained.<sup>77</sup>

Arguments for and against these executive orders are

predictably passionate. The argument against the orders is typified by Senator Albert Gore. In congressional hearings on OMB's role in the regulatory review process, he pointed out that when Congress passed the Occupational Safety and Health Act, the Toxic Substances Control Act, the National Environmental Policy Act, and other statutes designed to protect the American public safety and health, the Congress delegated its constitutional authority to certain regulatory agencies. Nowhere in these laws does Congress use the words "Office of Management and Budget," or "Executive Office of the President." OMB has merely usurped this regulatory authority through the executive orders and they are therefore unconstitutional.<sup>78</sup>

The argument for the executive orders is typified by Wendy Lee Gramm, Administrator of the Office of Information and Regulatory Affairs in OMB during the Reagan Administration. In her testimony at the same hearings, she pointed out that the executive orders are constitutional because the agency's regulatory decision remains the responsibility of the agency head. No rulemaking decision authority is transferred to OMB; the agency's rulemaking decisions must continue to be based on the agency's rulemaking record. Furthermore, the President's authority for issuing the executive order is derived from the Constitution. The President is obligated by the Constitution to take care that

the laws are faithfully executed; as part of this responsibility he is accountable for the implementation of the totality of Federal law, including regulatory policy, through the supervision of his subordinates in the federal agencies.<sup>79</sup>

The point here is not to take a position on the theoretical constitutionality of the executive orders. In reviewing this issue, the Justice Department concluded that because OMB review under Executive Order 12291 would only be "advisory and consultative" and would not include authority to reject an agency's ultimate judgement about regulatory actions, the order was legal.<sup>80</sup> Assuming that this is a correct interpretation, the following excerpts from a congressional hearing illustrates what this "advisory and consultative" role means in practice.

OMB Review of Grain Elevator Standards: The following excerpts from a Senate hearing concern OMB's review of a notice of proposed rulemaking by the Occupational Safety and Health Administration (OSHA) to set safety standards for grain handling facilities.<sup>81</sup> The hearing is instructive because the testimony addresses a wide range of issues related to OMB's review authority in practice. The participants included Senators Gore and Levin from the Senate Subcommittee on Intergovernmental Relations, James Miller, Director of the Office of Management and Budget, and Deborah Berkowitz, Director of Safety and Health, Food and Allied Services Trades

Department, AFL-CIO.

#### Opening Remarks of Senator Levin

Senator Levin. Mr. Chairman...I do want to echo your comments about the importance of these hearings. These are obviously life and death issues. The identity of the persons who have been making these decisions has been hidden from the public. OMB's role in this whole rulemaking process has been hidden. We have made efforts over the years to try to bring this to public light so that people will be accountable for those decisions, but we have so far not succeeded, and OMB has not complied with what is obviously strong signals [sic] coming from the public and from the Congress.

#### Criticism of OMB by AFL-CIO

Ms. Berkowitz. Mr. Chairman, thank you for the opportunity to appear here today...For 6 years, OSHA has been working on a safety standard to prevent grain dust explosions, and for 6 years OMB has blocked any attempt by OSHA to publish such a standard and protect the lives of working people in grain elevators and mills. As you said, the costs of OMB's actions have been high. In the past 6 years, 132 elevators and mills have exploded, resulting in 49 deaths, 230 injuries, hundreds out of work, and the economic bases of many small communities destroyed.

OMB started to block the grain dust standard in late 1980, 2 years before OSHA had even proposed one. That was in December 1980, when David Stockman wrote in the Washington Post that one regulation he wanted to block, when assuming the directorship of OMB, was any rule to control explosive grain dust. This was 2 years before OSHA even proposed such a regulation, and this was the first time that it was clear that OMB would block this regulation, not out of evidence, but out of the dictates of ideology.

Then in 1982, the National Academy of Sciences published a report on preventing dust explosions.

They concluded that dust accumulations greater than one/sixty-fourth of an inch can trigger these devastating explosions. Soon after its publication, the head of the Academy team that wrote the report testified that 80 percent of the Nation's grain elevators have conditions ripe for major explosions.

Following this report, and testimony, OSHA wrote a grain dust proposal. In early 1983, after spending 10 months soliciting comments on this proposal from all parties, OSHA sent the proposal to OMB for review. OMB did not review the standard in its allotted time of 60 days, instead it extended its review for 8 months, finally forcing OSHA to significantly weaken the proposal in order to get it published.

Though OMB had no safety engineers, health professionals, or occupational health specialists working on this review, they succeeded in getting OSHA to significantly weaken their proposal, if not destroy it. OMB forced OSHA to change the proposal because they said that it would cost too much for smaller elevators. Do you know what OMB decided was costing too much? Sweeping! All that OSHA said that smaller elevators would have to do is increase sweeping, but for OMB, this was too much. This was too much for an agency that was bent on undermining the right of American workers not to be killed on the job.

OMB's role in this rulemaking did not end with the changed proposal. The staff at OSHA is so terrified of an OMB rejection of their final standard that they have tailored it to make sure it will be accepted. I have seen a copy of the final draft standard circulating in the Agency, it will have exempted, of the total 11,200 elevators in the United States, 10,415 from dust control provisions. Thus OSHA is carrying out its mandate, it just won't cover anybody or protect anybody. Most of the explosions that you saw on this tape, except for the larger one, were in elevators [containing] less than 1 million bushels, they would not have been covered by this proposal. There is a high cost for letting OMB be the final and only word in the rulemaking process.

### Response by OMB

The following is the conclusion from OMB's formal review of the Regulatory Impact Analysis (RIA) for the grain elevator standard proposed by OSHA:

Our analysis of OSHA's proposed grain handling rule leads to two major findings. First, the RIA overstates the likely benefits from the proposed rule by overstating the baseline risks and by making overly optimistic assumptions about the rule's effectiveness. Second, after reviewing the risks and costs of the rule for different segments of the grain handling industry, we conclude that the evidence does not support the need for this rule for segments other than large or high through-put grain elevators. We have also identified four specific provisions which are in particular need of further examination--grain driers, grate openings, bin entry testing, and inside legs.

Furthermore, in his testimony OMB Director Miller highlights the following concern:

Mr. Miller. There are 16,000 grain handling facilities that would be covered by the OSHA proposal. About 10,000 of these are small country elevators. According to data supplied to us by OSHA, the cost of complying with the many safety and housekeeping responsibilities of their original proposal would have exceeded on average the profits of these small country elevators. OSHA data also indicated that the risks that OSHA sought to prevent - that we also believed were grossly overstated - were not high compared to the risks of the larger elevators. In many instances, what you had was a choice between having no elevator at all, and none of the service at all.

### Senator Gore's Comments on OMB's Reviews

The following is a sampling of Senator Gore's comments regarding OMB's review of the proposed OSHA standard:

Senator Gore. It illuminates yet another problem with this whole procedure. The standard was devised by scientists, safety engineers, and occupational health specialists. It was designed in full and open public view, according to safeguards established by the Congress, with the National Academy of Sciences.

Then it goes over to OMB, and what happens, OMB gets a telephone call from the people who own the companies that are going to have to spend money to comply with the regulation. They are not health specialists, or health scientists, or engineers. They are looking at the bottom line, and they say to OMB, "Please don't let this regulation go through, it is going to hurt our bottom line on our annual report this year, and it is going to have to make us spend some money."

#### Senator Levin Comments

This final excerpt from Senator Levin provides an interesting perspective on what OMB's "advisory and consultative role" means in practice.

Senator Levin. In my opening statement, which I gave earlier, I indicated a growing frustration with the OMB role in rulemaking. I have been one who has supported executive oversight. I think that there is a useful management role to be played, providing the OMB acts as an advisor and not a dictator.

The testimony that we have and that other hearings have solicited indicates a much stronger role for OMB than just an adviser. For instance, there was testimony at a house hearing where the former Chief of Staff for EPA, John Daniel, testified that when EPA went ahead and issued some regulations over OMB objections, he got a call from Jim Tozzi...Director of OIRA at that time, who said words to the effect, "There was a price to pay for doing what we had done and that we hadn't begun to pay."

During the confirmation hearing, Dr. Miller, I asked you the following questions:

Senator Levin. Do you want the agencies to conform to OMB comments relative to their rules?

Mr. Miller. Yes; and if there is a difference that it be raised and worked out in some way.

Senator Levin. But you want them to conform?

Mr. Miller. Yes

Senator Levin. That is the message you are trying to get to the Agency; right?

Mr. Miller. Yes

Senator Levin. You don't consider them advisory only, those OMB comments, do you?

Mr. Miller. No. I anticipate or would anticipate that the agency heads would respond to them. Again, if they had a difference of opinion that they felt was sufficient to, in a time frame that was very short, they might make a decision differently. But I would anticipate and hope that the process would work where differences would be worked out.

Senator Levin. I am not talking about responding to them. I am talking about complying with them. Is that what we are talking about?

Mr Miller. Right

It is a very different tone from the Attorney General's opinion in briefs that says, "OMB is advisory only." You want compliance, and most of the time you get it. As a matter of fact, at your confirmation hearing, you couldn't even identify any occasion where substantively the recommendations were ignored, but perhaps one. I think that your own testimony at the confirmation hearing indicates

a very different role for OMB than what the Attorney General says is constitutional.

Mr. Miller. On the question of advisor, of course, an advisor hopes that the decisionmaker will conform to the advice delivered. That is not inconsistent with being an advisor. Of course, the advice is, in our judgement, whether the proposed regulation conforms with the President's regulatory principles set forth in his Executive Order. Again, I think that is a very legitimate type of advice to give.

### Discussion

The purpose of presenting these excerpts from testimony at the hearing is not to determine whether the Congressmen or the OMB officials won the debate over the constitutionality of the executive orders. There seems to be general agreement that the executive orders are theoretically constitutional if final rulemaking authority rests with the agencies to which it has been statutorily delegated, with OMB acting only in a consultative and advisory manner. The passionate disagreement is over the reality of OMB's role in practice. Although OMB officials may claim that their role is advisory and consultative, there is strong evidence that they heavily influence the outcome of agency rulemaking processes to ensure that they are consistent with the regulatory principles of the president.

Given the partisan political culture at OMB where the mission of the agency is to further the president's

agenda, it is hardly surprising that OMB has taken such an influential posture. When the Department of Justice held that only an "advisory and consultative" role for OMB was constitutional, it was in essence saying that OMB is in fact subordinate to the agencies in the rulemaking process, since by law Congress has vested final authority in the agencies. This subordinate role, however, is diametrically opposed to the political culture which has evolved at OMB. The root of this culture, of course, is the unitary executive model of administration which maintains that the president should have tight control over the regulatory agencies. Even though final rulemaking authority is vested in the regulatory agencies by statute, OMB is there to use the autonomy inherent in its "advisory and consultative" role to influence the rulemaking process wherever possible. As the hearing indicates, OMB exercised this influence by delaying review of the grain elevator standard, taking issue with a public review process, and sending not-so-subtle messages to agencies which would consider ignoring OMB's "advice and consultation." The effectiveness of OMB's influence is indicated by Mr. Miller's inability to remember an agency ever overruling OMB's wishes.

In this partisan political culture of OMB, the concept of constitutional subordinate autonomy is hardly relevant. OMB staffers are likely to see themselves as personal staff to the president rather than constitutional

officers responsible to all three branches. OMB staffers in the earlier culture fostered by Harold Smith appreciated the difference between these roles, as did the Department of Justice when it held that OMB's role under the executive orders could only be advisory and consultative. Consistent with the constitutional subordinate autonomy, Justice was saying that even though OMB is in the executive Office of the President, it is subordinate to the agencies in the rulemaking process.

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## V.

### SITUATIONAL PERSPECTIVE

He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or governance.

- Judge Benjamin Cardozo

A third useful perspective from which to view the relevance of constitutional subordinate autonomy is the rich case literature on classic situations in which public administrators often find themselves, such as representing the agency to Congress on a controversial issue, interpreting vague legislation, and balancing competing organizational and statutory responsibilities. Each of these situations provides examples of administrators exercising subordinate autonomy to maintain the constitutional balance of powers. These cases demonstrate that although the above quote refers to the exercise of discretion by judges, it is equally applicable to public administrators.

### REPRESENTING THE AGENCY TO CONGRESS

Public administrators represent their agencies to Congress on a regular basis in a variety of ways. Higher level officials testify before committees on the president's budget and the impact of proposed legislation, and lower level analysts may spend a great deal of time responding to formal

congressional requests for information. Even more common are the scores of informal conversations between agency officials and congressional staffers. These interactions can be classic illustrations of public administrators, caught between conflicting Administration and congressional priorities, having to choose which side they will support. The following case is instructive.

#### The Rural Electrification Administration Personnel Report

In December 1939, a congressman's request for information regarding certain personnel actions of the Rural Electrification Administration (REA) led to a situation which required a crucial decision by the agency's Director of Management and Personnel, Mr. Kendall Foss.<sup>1</sup> That decision was later the subject of acute controversy and led to Mr. Foss's dismissal.

The request was from Representative Everett M. Dirksen of the Committee on Appropriations of the House of Representatives, and related to REA promotion practices in the year ending June 30, 1939. The agency had in fact followed a policy of rapid and widespread promotion, which could be interpreted in such a way as to embarrass the Administration. Mr. Foss believed that the request was a 'fishing expedition' on the part of an opponent of public power and that the information would be used to discredit the whole REA program.

On the basis of this belief, Mr. Foss made certain decisions about the compilation of the statistical information requested by Congressman Dirksen that were later sharply criticized in Congress and in the Department of Agriculture.

### Background

Six months prior to this case, a consolidation between REA and the Department of Agriculture resulted in disputes between the Department and the REA over the extent to which REA would retain control over organizational and policy issues. The reorganization plan, submitted to Congress by the president under the Reorganization Act of 1939, stipulated that the Administrator of REA would be responsible to the Department of Agriculture; however, it did not specify how the relationship would operate in practice, nor did it provide for any review process to address disputes over roles and responsibilities. However, in placing overall responsibility in the Department of Agriculture, the reorganization plan brought into sharper conflict two divergent philosophies: the cautious, conservative approach of the department, while REA embodied an aggressive, New Deal approach to social programs.

This relationship produced constant friction between REA and various departmental officials over program and administrative issues such as departmental supervision of

publicity, budget, and personnel matters. The REA officials believed their loss of autonomy weakened their power to defend their program not only in interdepartmental disputes, but also against attacks by an anti-public power congressman, which they thought Representative Dirksen to be, as well as by powerful opponents in the public utilities field.

In December 1939, at the hearings on the Department of Agriculture Appropriations Bill for the Fiscal Year 1941 (beginning July 1, 1940), members of the House Committee on Appropriations, including Congressman Dirksen of Illinois, showed an acute interest in the subject of administrative promotions, i.e., pay raises within a given grade granted at the discretion of the agency. Comments made during the course of the hearings indicated that, in addition to a general interest in the subject of administrative promotions, Congressman Dirksen expected to confirm his belief that REA had been especially liberal in granting such promotions and particularly so after the filing of the Reorganization Plan affecting REA. This filing date was significant because under the law employees in transferred agencies could receive no pay increase whatever for the fiscal year that followed the date of transfer. Thus REA officials knew on May 9, 1939 (when the reorganization plan was filed), that salaries of all REA employees would be frozen for a year beginning on July 1, 1939.

## The Request for Information by Congress

The issue began to develop with a request by Dirksen on the cost of administrative promotions in REA for FY 1939. Upon receiving the information, Dirksen computed that the total annual cost of the REA promotions for the fiscal year 1939 was about \$90,000 to \$100,000. About this time, the Bureau of the Budget (BOB) submitted a report on administrative promotions to the Committee on Appropriations covering the whole Executive Branch for the Fiscal Year 1939. BOB showed the annual cost of the REA promotions as \$67,390.

Dirksen, surprised by the discrepancy, asked BOB to recheck. BOB asked REA for information, and was advised that the correct annual figure was \$67,420. This reply seemed to confirm BOB's figure.

Dirksen was still unconvinced. On June 29, 1940, he advised the Secretary of Agriculture of the discrepancies and said that he intended to reopen the matter the following winter, noting that he would expect the department to have made the appropriate investigation by that time. In addition, Dirksen asked the General Accounting Office to investigate the promotion figures of the REA. GAO found 141 employees had received three or more promotion steps; REA had listed 85, a difference of 56. Of the 85 listed by REA, GAO found that 18 had received more promotion steps than REA had indicated.

During hearings on the 1942 Appropriation Bill, in

February 1941, REA officials were questioned regarding the figures in the GAO report. Mr. Foss said that he had instructed the appointment clerk to omit the 56 names in question because these promotions had been made on the "eve of reclassification." However, since the justification given in the REA report for some of the promotions actually listed was "pending anticipated reclassification", this omission was said by Mr. Dirksen to be arbitrary and unwarranted. Mr. Dirksen furnished a copy of the GAO report to the Department, which found that this report (which differed only slightly from its own) was correct. The facts were now in.

Dirksen then asked for an investigation by the department to determine whether REA Deputy Administrator Robert B. Craig testified in good faith before the Committee on Appropriations with respect to promotions in the REA during fiscal year 1939, or whether he "willfully deceived the Committee and Congress."<sup>2</sup>

### The Explanation

The investigation rested on Mr. Foss's explanation, since Deputy Administrator Craig's testimony was based on figures supplied by Foss. In defending his figures, Foss explained that he knew Dirksen, an opponent of public power, was behind the investigation. He believed that this was therefore a "fishing expedition", or an attempt to find

something to use against the REA. Foss therefore wanted to use every legitimate means available to keep the report from appearing unnecessarily top-heavy.

Foss distinguished between two types of promotions: (1) within-grade promotions, given in reward for work well done; and (2) grade promotions, generally known as reclassifications, made on the assumption of new duties. Foss did not want to include promotions of the second type in his report, even though they were sometimes preceded by a within grade increase to raise an employee's salary to the anticipated level from a grade promotion, pending reclassification approval. He therefore worked out guidelines to justify omitting certain of the requested promotions of three or more steps. It was left to a clerk to determine which promotions were given "pending reclassification," but the difficult cases were discussed with Foss.

Foss demonstrated that he had given serious thought to how he could rationalize his manipulation of the data. He explained that the commonly accepted meaning of the administrative promotion is an increase in salary as a reward for work well done. However, when a reclassification is pending and an individual is raised in salary to the level of the pending classification because he is already performing the new duties, and this is done only to avoid penalizing the individual for the slowness of a Civil Service Commission

action, such an action did not, in his opinion, come within the accepted meaning of an administrative promotion. Therefore, to report such promotions as administrative promotions would have misled the reader in an effort to determine how many people were given more money for work well done.

During the investigation, Foss was questioned about his interpretation of Dirksen's request.

Question: Didn't you think it was sufficiently important when the request had come from a member of the Appropriations Committee that the instructions be followed to the letter and exactly what was requested should be furnished?

Answer: In my experience, many requests have come across my desk from Members of Congress. Quite frequently it is possible to determine from the language of the request what they really want. I felt it my duty to provide what they wanted, not what they asked for, if they appeared to be confused.

Question: Was there anything in this request which would indicate that Mr. Hendrickson or the Appropriations Committee appeared to be confused as to what they wanted?

Answer: They appeared to want a list of those who had received more money without regard to change of duties. I therefore eliminated from their consideration those cases where there was a change in duties and where to report that these are administrative in the sense of no change in duties would have been misleading.

Question: And you took it upon yourself to interpret what the committee wanted rather than to give them what they asked for?

Answer: That I have said several times; it is still true.

Mr. Foss was then asked why he had not included in the report to the Department personnel administrator, Mr. Hendrickson, an explanation of his method of making out the report.

Question: But in view of the fact that Mr. Hendrickson's letter was so specific and clear and not subject to any such interpretation, do you not think it would have been a fair thing to do to tell him, "Well, we omitted certain steps because they had been given pending reclassification," rather than to word the letter in such a way that he would have no way at all of knowing that any step had been omitted?

Answer: I say that it doesn't sound fair now, but at the time the question of fairness did not enter my mind.

Question: Just why, then, didn't you include some such statement?

Answer: I am not sure, but I suspect it goes into other matters that are not here under discussion, long involved series of considerations.

Mr. Foss was then pressed to go into these considerations.

Answer: If those matters are under discussion, there were, I believe, already at that time numerous intangible, but to my mind unmistakable, evidences that Mr. Hendrickson was more concerned with pleasing an anti-public-power Congressman than with defending a new member of the Department of Agriculture. I therefore probably felt that in the larger problem of the Administration's public power program I could not count on Mr. Hendrickson as an ally, and accordingly would have to take steps which I felt I could defend, but go no further than I had to in taking other people into my confidence.

Foss again stated that the perceived "power fight" did enter into the inquiry, stating, "...I knew that Mr. Dirksen was anti-public-power and I had no doubt of the correctness of my deductions that he was on a fishing

expedition."<sup>3</sup>

In summary, Foss had the following closing comments:

From the tenor of the questioning this morning, I feel that my integrity and loyalty to the Government is not accepted as established. I want to call attention to the fact that the agency with which I was associated had at that time been experiencing some rough weather, the program was under attack, the future was far from clear. I accept responsibility for the execution of this whole incident, but I point out that there was absolutely nothing for me to gain personally, that my motives here that appear to have led me into action at variance with specific requests were wholly and entirely dictated by a desire to protect REA against any and all comers from whatever side...But the motive in all of that is absolutely simple; it is to endeavor to ward off what appeared to me to be a disguised utility attack. That is all.<sup>4</sup>

The department did not substantiate the charge against Deputy Administrator Craig, but it formed the basis for a formal reprimand to Craig from the Secretary. Furthermore, the report concluded that "incomplete and inaccurate information with respect to promotions in the fiscal year 1939 was submitted to the Committee on Appropriations, to the Bureau of the Budget, and to the Department personnel office."<sup>5</sup> The report indicated that Mr. Foss was primarily responsible, and he was subsequently dismissed.

### Discussion

The dilemma experienced by Mr. Foss in this case occurs frequently in government agencies. Congressmen rarely

request information in a vacuum; the agencies are typically very aware of the underlying agenda of the Congressman or Senator behind the request. Consequently, as Foss demonstrated, care is taken to craft responses which answer the questions but in a manner which puts the agency in the best light possible.

These types of situations are excellent examples of constitutional subordinate autonomy. Consistent with his subordinate position to a member of Congress, Foss could have ignored his misgivings about the agenda behind the request and provided information on all types of administrative promotions, including a careful explanation of the differences between promotions given in recognition of good work and promotions based on the assumption of new duties. Or, he could have exercised his autonomy by not including certain types of promotions, but provided an explanation to his superiors in the department before releasing the information to Congress. In either case, Foss believed he would have been failing to protect the interests of his agency and the cause of public power. He was convinced the information would be used by Dirksen to embarrass the REA, and he had no faith in higher officials in the department to see his point of view.

Foss clearly believed the balance of power was unfairly against the REA in this case, and exercised his autonomy to support his agency. Certainly he had a right to

use his discretion to legitimately portray the information in a manner which put his agency in the best light possible. This legitimate role for the public administrator was also reflected in comments by several of the interviewees discussed in Chapter II.

However, there are two points to consider in assessing the prudence of Foss's actions. First, there can be a fine line between legitimately manipulating information to support one's position and simply misleading the audience. It is reasonable to say in this case that Foss crossed the line and provided misleading information. When Dirksen asked for the cost of administrative promotions, it would have been reasonable to assume that he was interested in both promotions given in reward for good work and those due to the assumption of new duties. As pointed out in the investigation, if Foss had a concern about the interpretation of the request he could have asked for clarification or he could have explained the rationale behind the figures when he submitted them.

Of course, Foss did not take these seemingly reasonable actions because he believed the request was essentially unfair. This brings us to the second point in assessing Foss's actions. He felt justified providing misleading information because it would be used to damage the REA. The issue for public administrators, however, should not be whether information requested will damage their agencies,

but whether the request is legitimate. Foss failed to acknowledge that Dirksen's request was legitimate. Under the law, employees in transferred agencies could receive no pay increase whatever for the fiscal year that followed the date of transfer. As stated earlier, REA officials knew on May 9, 1939 (when the reorganization plan was filed to transfer them to the Department of Agriculture), that salaries would be frozen beginning July 1, 1939 for one year. By requesting information on administrative promotions for FY 1939, Dirksen was attempting to determine if the REA had executed an inappropriately large number of administrative promotions to circumvent the freeze. Foss would have had a much stronger case if the Dirksen request had been merely a "fishing expedition", as he termed it, but the request was much more than that.

This case illustrates the significant influence that can be exercised by average public administrators because of their access to and knowledge of information. The manner in which information is displayed, or what is not shown as well as what is emphasized, all tend to influence the perception of the audience in certain ways. This knowledge and ability, of course, carries with it great responsibility because of the position of the public administrator in the governance process. Foss's attitude was not flawed because of his concern for the interests of his agency, but because he failed

to understand his equal or perhaps greater responsibility to be responsive to Congress, the Administration or the courts. The fact that the information being requested may be damaging to one's agency is all the more reason to be careful to portray it accurately.

#### BALANCING ORGANIZATIONAL AND STATUTORY RESPONSIBILITIES

Constitutional subordinate autonomy is clearly illustrated when a public administrator, though in a subordinate position in an agency's organizational structure, has explicit statutory authority to carry out duties independent of that structure. The role of the Inspector General in government agencies is a classic example of this situation, as the following case from the Department of Health, Education and Welfare (HEW) demonstrates.

#### Fraud, Waste and Abuse at HEW

This case focuses on Thomas Morris, Inspector General (IG) for HEW in the late 1970's, who faced conflicting demands regarding the release of a potentially explosive report on fraud, waste and abuse in the department.<sup>6</sup>

#### Background

HEW's Office of the Inspector General was created in October 1976 to enable Congress to obtain information the

Department itself had been unable to supply. Specifically, the office was to "keep the Congress fully and currently informed by means of the reports required...and otherwise, concerning fraud and other serious problems, abuses, and deficiencies" in HEW programs (PL 94-505, Sec. 203).<sup>7</sup> That HEW was the first department to have an IG established by statute was indicative of the congressional concern over the practices at HEW.

HEW's Inspector General (IG) was to report directly to Congress, as well as to the Secretary of the department, and would have an extraordinary degree of independence within the department. If, for example, the IG suspected that an investigation was dragging or a law was not being enforced, he or she was specifically authorized to appeal to Congress. As a presidential appointee, the IG could be removed from office by order of the president. However, because the president must inform Congress of the reasons for the removal, this authority is not likely to be exercised.

Thomas Morris was selected as the IG by Secretary Califano in March 1977. Califano had known Morris since the early 1960s and thought he possessed "impeccable integrity and fairness, but a sense of loyalty as well."<sup>8</sup> Morris was described as a 63 year-old "gentleman from the old school," a career bureaucrat with a reputation as a highly capable and efficient manager.

## The Report

This case is about a report prepared by IG Morris which described \$6 - \$7 billion in waste, fraud and abuse at HEW. Despite Califano's desire to show that HEW could be managed with a minimum of waste, fraud and abuse, Morris had received very few comments on drafts that had been circulated in the department - no one really focused on it enough to realize the explosiveness of the report until the statutory deadline of the report was imminent.

Bob Wilson, a staff assistant to Eileen Shanahan, the HEW Assistant Secretary for Public Affairs, saw the report the day before it was to go to Congress and became very concerned. He noted that the format of the report was such that the press would treat the report as "\$7 billion going down the tube, going down the drain at HEW."<sup>9</sup> The first three pages of the report stated, for example, that the \$6.3 to \$7.4 billion estimate of waste, fraud, and abuse at HEW, representing 4.7 to 5.4 percent of HEW's annual budget, was no more than an initial inventory.

Wilson also complained that neither the IG gave no estimate of how much of the \$7 billion was recoupable through improved management procedures, nor did he distinguish between either "HEW-inspired waste" and "legislative waste" or HEW waste and waste in HEW programs run by state and local intermediaries. Legislative waste reflected waste that

resulted from legislative restrictions and was a significant component of the estimate. Wilson was convinced that the report was "political dynamite", but was unsuccessful in his attempts to convince Morris to delay release of the report so that a press release could be crafted.

### The Debate

Wilson reported the situation to Shanahan, explaining that they were going to have a very difficult time either changing the report or keeping the coverage of it in any kind of perspective. Shanahan had Morris come to her office to talk about options. Although the report was scheduled to go to Congress at noon the next day (Friday, March 31), she asked Morris if they could defer the report until Monday so that they would have the weekend to work on the report or a press release and give the report an "affirmative send-off" by Califano. She told him he "absolutely had to put out a press release with the report."<sup>10</sup> She didn't want the first public announcement of the report to come from their critics, or to appear that they were hiding bad news by sneaking a report to Congress that they hoped nobody would read.

On his part, Morris acknowledged that he made some serious tactical errors in approaching the report. He had no prior agreement with the Secretary about what would be an

adequate lead-time for him to review the report; it just hadn't occurred to either of them that this would be a problem. The problem in this case was that Morris used all the time allotted by Congress in writing the document. He explained that his objective was to make the report as complete and current as he could. For that reason, his office accumulated statistical data right through March by various efforts, audits, and investigations. Morris admitted that in his "overzealousness in wanting to be current," he used up the lead-time in writing and prevented others from having an adequate review period.<sup>11</sup> Nonetheless, Morris informed Shanahan that he had no intention of missing the statutory deadline, despite the fact that Shanahan told him he was "crazy."<sup>12</sup> Morris faced significant pressures to meet the deadline. Jim Naughton, counsel for the congressional committee which sponsored the IG legislation, had made it very clear he wanted his copy right on the 31st. Not surprisingly, members of HEW thought this commitment to Naughton was absurd, given that Naughton clamored for things all the time. They routinely told him they were doing the best they could and would get it out soon. Morris disagreed. He knew that Naughton was expecting the report, and was concerned that because Naughton's subcommittee had sponsored the IG legislation, there would be interest in making a public statement with the first annual report.

Morris also described other considerations besides the pressure from Naughton. He noted that because of the short timeframe, he had a last minute choice to make between his commitment to Congress, which was one of his two bosses, and loyalty to the Secretary, his other boss, who would surely want more time to look at the report. He elected the former because he felt it was more important:

With the law being so explicit I didn't want to be in the position of missing my deadline, especially as this was our first report. We were a brand new office under a brand new law with a committee looking at everything we were doing day-by-day, and there could have been negative repercussions that the IG was dragging its feet, being influenced, or not revealing information promptly as required by law. I felt, moreover, that I was going way beyond what was required of me to make that report as complete and as current as I could -- according to the statute, the report only needs to cover up to December 31, but we had tables in there that covered right up to March. I was determined, in short, to meet that deadline; even if the Secretary asked me to hold up, I think I would have gone ahead.<sup>13</sup>

Morris did not miss the deadline, and HEW officials issued a press release the following Sunday to control the negative reaction.

### Discussion

The conflict between organizational realities or pressures and statutory mandates is an ongoing source of tension for public administrators. As indicated by the HEW officials in the case, statutory deadlines are missed by

agencies on a regular basis because of inadequate organizational capacity. As noted in an earlier chapter, Califano was critical of a political process which produces inspiring legislation but fails to provide the resources needed to make the laws a reality. The result of this situation is an ongoing negotiation process between the agencies, the White House, the Congress, the courts and interest groups over which statutory deadlines will be given highest priority.

Consequently, as this case demonstrates, relying strictly on the statute does not always shield the public administrator from competing pressures from the different branches. On the one hand, Morris was obligated under the statute to submit his report no later than the 31st, and Califano did not have the right to change or approve the report. The HEW Secretary did, however, have the right to review and append comments to the report, and it was the IG's responsibility ("insofar as [was] feasible") to provide the Secretary with enough lead-time to enable him to do so.<sup>14</sup> As the case analysis correctly points out:

In a narrow sense, Morris fulfilled these obligations, since it was not 'feasible' to get the Secretary a copy of the report (as it was not ready before the 29th). In a larger sense, however, Morris failed, as he acknowledged, to give the Secretary adequate lead-time to look at the report.<sup>15</sup>

There are at least two other choices Morris could have made

and perhaps better served both the Congress and the department. First, he could have decided that having the most current figures possible in the report was not as important as providing adequate lead time for review by the department. In fact, Morris states that he went beyond the statutory requirement by collecting data through March (the statute required data only through December 31). This approach still would have provided Congress with a picture of waste, fraud and abuse at HEW but also provide the Secretary his statutory right to append comments to the report. The second option, of course, would have been to inform Naughton that the report would be delayed over the weekend because he had failed to give the Secretary an opportunity to comment. If Naughton had complained, Morris could have referred to the Secretary's statutory right to comment, which is as important as the Congress' right to the report by a certain date.

Instead of these courses of action, Morris chose to support Congress more heavily. It is not clear why, on the one hand, he went beyond the letter of the law by collecting information past the December requirement, yet on the other hand refused to exercise similar flexibility by delaying the release of the report over the weekend. In both cases he was favoring congressional interests over agency interests, which Morris felt was appropriate given that this was the first report to Congress and would be closely scrutinized.

In summary, a strong argument can be made that Morris carried his subordination to Congress too far in this case; nonetheless, he clearly was aware of the nature of his decision: choosing between competing constitutional masters.

This case raises two other points worth noting. First, as Morris demonstrated (perhaps in error), the public administrator must at times consider doing more than the letter of the law requires. As discussed in the introductory chapter, members of Congress severely criticized the Inspector General of the Department of Housing and Urban Development (HUD) for not doing more to bring attention to management fraud and abuse at HUD. HUD's IG met the letter of the law by submitting the required reports to Congress which cited problems at HUD, but should he have done more, given the magnitude of the HUD practices? Can the IG reasonably argue that he should not be blamed because Congress failed to pay attention to the reports? As in the HEW example, these questions can only be answered by examining the details of the situation, but the key point is that subordination to statutory mandates does not free the public administrator from the responsibility to consider doing more than is merely required by the letter of the law.

The second point concerns the issue of statutory deadlines. As mentioned at the beginning of this discussion, statutory deadlines are frequently missed simply because the

deadlines are unreasonable given existing organizational capacity. However, this reality does not absolve agencies from making a good faith effort both to meet all deadlines and focus resources on the most important ones. Public administrators have the responsibility to exercise appropriate autonomy to influence the president, the Congress or the courts when managing compliance with statutory deadlines. For example, is the failure to meet a statutory deadline legitimately due to organizational incapacity or is it more because it did not mesh with Administration priorities? How important is the deadline, given other legitimate priorities? EPA staff, for example, often despair over unrealistic deadlines or priorities imposed by Congress because of constituency pressure, when other less visible problems pose a much higher environmental risk. This is precisely the nature of the Califano's struggle in the civil rights case.

#### ACCOMMODATING POLITICAL IDEOLOGY AND LEGAL MANDATES

Public administrators can be involved in situations where political ideology clashes with the intent of the law. For example, the law might require regulation of an industry, while the ideology of the Administration is anti-regulatory. The conflict between these competing philosophies rarely results in total victory by either side. Administration officials do not totally subordinate themselves to

disagreeable statutes, which may be unrealistic if taken literally in any case, nor happily do they brazenly flaunt the law. Rather, an accommodation typically occurs that is often played out in the agencies with several levels of public administrators involved. In these situations, the administrator must decide whether the net result of the accommodation is within acceptable bounds. The following case illustrates this point.

#### The Reagan Agenda and the Environmental Protection Agency

The following case presents the reactions of career civil servants in the Environmental Protection Agency (EPA) to the tumultuous tenure of Administrator Ann Gorsuch in the early years of the Reagan Administration.<sup>16</sup>

#### Background

From the outset of her tenure, career staff were apprehensive about Gorsuch. There were reports that she was "aloof" and "frosty" in her dealings with career staff, and rumors abounded that she had been meeting extensively with industry representatives and was planning to revamp the agency. For example, a Philadelphia Inquirer headline read "...the regulated have all but captured the EPA".<sup>17</sup> Of course, Gorsuch's orientation was perfectly consistent with Ronald Reagan's approach to environmental issues. During the

1980 presidential campaign, he stated that air pollution "had been substantially controlled and that he would invite the steel and coal industries to 'rewrite clean air rules.'"<sup>18</sup> Reagan nominated Gorsuch in part because she was a willing adherent of his budget-cutting and regulatory relief goals.

Other causes for concern by career employees included allegations that the Gorsuch team had in hand a "hit list" of career employees to be fired or transferred, and the fact that the majority of new EPA appointees were formerly lawyers, lobbyists or consultants for industries heavily regulated by EPA. There was also an uproar over a mid-June reorganization of headquarters, which, among other things, abolished the enforcement office and farmed out most of its segments to corresponding program offices. Critics said the change would make EPA a "toothless tiger" in the enforcement area. A more detailed look at these issues is helpful to assess the reactions by the careerists.<sup>19</sup>

### Budget

From the last Carter EPA budget (1981) to the proposed 1984 budget, EPA's total operating budget (excluding Superfund) had been cut by 22%, and its research and development arm by over 50%. Personnel levels were down some 27%. The Reagan proposal for 1984 would cut EPA's operating budget by nearly one-third from 1981. If inflation were

considered, the cuts would appear even more draconian. Critics of the Reagan EPA budgets were distressed by more than just the stark numbers, however, pointing out the irony that a "cost-benefit conscious" administration had cut back scientific assessments, which were precisely what was necessary to improve environmental cost-benefit analyses.<sup>20</sup> Furthermore, at the time in which the agency's resources were dramatically shrinking, its legislative mandate -- particularly regulating toxic substances and managing hazardous waste (including Superfund) -- had increased significantly.

#### Personnel

In FY 1981 alone, 4,129 career people left the agency. Most of the departing employees left because of policy disagreements, fear of firing, and/or perceived mismanagement by the Gorsuch team. Even more irregular was the use of "hit lists" to get rid of career employees who were viewed by industry (in solicited as well as unsolicited letters) and incoming political appointees as unsympathetic to the goals of less regulation and less government. The master hit list was constructed in the form of a chart on which top career employees were listed and beside whose names colored pins were affixed to denote their status: RIF, transfer, team player, loyalist, etc. As Charles Dempsey, the

interim management team's inspector general, noted:

No question what they were doing. They had white pins and red pins and black pins and each one meant a different thing. Good guy, bad guy, team member, whatever it may be. I sent that to the Merit System Protection Board for investigation.<sup>21</sup>

Many on that chart were victims of Reductions in Force (RIFs), transferred or banished to insignificant and inconspicuous locations during the Gorsuch years.

Paul Stolpman, an acid rain expert in the air programs office, was sent to an obscure office where his policy/analytical writings were rarely used. He commented on the effects of Gorsuch's team on career people at the agency:

The thing that you [used to] associate with what this agency was: vibrancy, an intellectual curiosity, spirit...Gorsuch removed much of the creative middle level. You look at that list, those were some of our best creative middle managers and many of them are gone--and they can't be replaced for the most part.<sup>22</sup>

Bob Dyer, a career program manager in the ocean waste disposal area, recalled that while many EPA people were jumping ship, even more "began to withdraw...to weather the storm. Some day the sun will come back out and we can emerge and go back and do what we were doing. My program really couldn't do anything for over two years...But if we all quit, then what's the agency left with?"<sup>23</sup>

### Enforcement

Enforcement activity was the area that many

considered the most adversely affected during the Gorsuch years. In July of 1982, Senator Patrick J. Leahy (D-VT) charged that "mismanagement and mixed signals" had "virtually destroyed" the effectiveness of EPA enforcement efforts. In particular, he criticized EPA for its "misallocation of resources" and its failure to establish consistent enforcement policies in its hazardous waste cleanup program.<sup>24</sup>

Career attorneys were particularly dismayed by the policy of negotiating compliance with a company prior to filing any enforcement action. Elliott Gilberg, one of the enforcement attorneys, explained:

It simply doesn't work....There's no incentive for a company to really negotiate with you in good faith...unless there is some kind of enforcement action that has sanctions attached to it. They just string you along....There's got to be some incentive not to be in violation. [That's why] Congress...amended the Clean Air Act in 1977, [adding] Section 120 -- which is non-compliance penalties.<sup>25</sup>

### Discussion

This case is interesting for three reasons. First, it is an example of a president, through the Office of Management and budget and his political appointees, doing everything administratively possible to scale back the ability of an agency to carry out its statutory mandates. William Ruckelshaus, both the first administrator of EPA and the person chosen to replace Gorsuch, captured the Reagan

Administration's philosophy in commenting on OMB Director

David Stockman:

To the extent there is any in-depth knowledge of the environment in the administration outside of EPA, it's in OMB....Stockman's own belief was that all of the [environmental] laws came from this terrible alliance between the environmentalists, the staffs on the Hill and the staff at EPA. [To him] most of these laws didn't make any sense and they ought to be changed and if not changed, then at least we ought to do our best not to administer them as written.<sup>26</sup>

This description of Stockman's attitude towards the law is, of course, at odds with our constitutional form of government. The responsibility of the president and the executive branch is to faithfully execute the laws passed by Congress. In reality, however, Stockman's attitude also reflects that the degree to which the laws are enforced is to a large degree determined by the discretion of public administrators directly implementing the laws. For example, one administrator may decide to devote ten staff to the enforcement of a law while another might decide to devote half that number, with the difference often largely determined by internal agency priorities. Both are enforcing the law, but to different degrees.

However, public administrators must make a minimal effort to implement the laws as written or our constitutional system of checks and balances will collapse. The EPA under Gorsuch clearly crossed that line, initiating a series of

strong reactions from the members of Congress, EPA employees and interest groups concerned with the environmental laws under which EPA operated.

The second interesting point is the variety of ways in which the career public administrators in EPA responded to the situation. As members of the executive branch, some chose to exercise their subordinate status and continued to faithfully serve Gorsuch as the legitimate representative of the president. Others chose to exercise autonomy in a variety of ways: actively protest from within the Agency, resign, provide information to the Congress or the press, or remain but do as little as possible administratively to further the Gorsuch directives.

There is room for each of these choices under the concept of constitutional subordinate autonomy; the important point is not which of these choices was made but the reason or attitude underlying the choices. Did the administrators who chose to subordinate themselves to Gorsuch appreciate their competing responsibilities to enforce the laws as intended by Congress, or did they unquestioningly do as they were told in order to advance their careers? Did the administrators who leaked information to Congress understand their competing responsibility to support the policies of the Administration, or did they simply make this choice because they found those policies personally abhorrent? Did those

who did nothing at all and carried on with a "business as usual" attitude understand that something of consequence was in fact going on, and that by taking no action they were making a choice?

The point is that public administrators, like citizens in all walks of life, can make the right decision for the wrong reason. In this EPA example, constitutional subordinate autonomy provides a normative framework that does not point towards one particular course of action, but gives public administrators a reasoned, principled way of examining the choices before them.

The third point worth noting is the use of "hit lists" by the Gorsuch team in order to identify those careerists who were unsympathetic to the goals of less regulation and less government. As a political appointee entering an Agency with the legitimate goal of implementing the president's agenda, how far should one go in dealing with holdover administrators who openly oppose the new agenda? The case states that many of those on the hit list were victims of RIFs, transferred or banished to unimportant and inconspicuous locations.

Using the model of constitutional subordinate autonomy, two issues are important to consider in assessing these actions. The first issue concerns the definition of "unsympathetic" careerists. Does unsympathetic mean only that

these careerists have been known to openly question the Administration's goals, or does it mean that they have taken action to obstruct these goals? It is reasonable to argue that those careerists who initially question, but ultimately implement the disagreeable policy, are playing a legitimate, useful role and should not be viewed in the same manner as those careerists who actively subvert legitimate if distasteful policies.

The second issue concerns the difference between a RIF and a transfer. To RIF an employee on purely ideological grounds, particularly with no evidence that the individual is subverting policies, is indefensible from the perspective of constitutional subordinate autonomy. Transferring the individual to a less visible or policy-related position is more acceptable, for then the government would be keeping an experienced employee whose particular point of view might become in demand again in the future.

The RIF option also eliminates the possibility of using careerists with different ideologies as a sounding board. The statements of the respondent from the Department of the Interior, for example, indicate that she effectively plays this role. Although viewed as one of the Department's "liberals", she noted that she was able to keep her position because although she took every opportunity to promote her position, the more conservative political appointees trusted

her to put their position in the best light possible.

In summary, this chapter has presented three classic situations which are likely to confront public administrators at some point in their careers. Whether it be representing the agency to Congress, balancing organizational and statutory responsibilities, or accommodating ideology and legal mandates, even average public administrators have choices to make in their sphere of influence. Just as Kendall Foss struggled with how to present personnel data in the least damaging way to a hostile Congress, budget examiners and policy analysts throughout government influence decisions by how they present information they control. However, the lesson of constitutional subordinate autonomy from the Foss case is to urge these public administrators to reflect upon the variety of audiences who have a legitimate stake in the information they provide, and not simply assume that their sole responsibility is to protect the interests of any one group or cause.

The other two cases illustrate the often gray world in which public administrators operate. Although government agencies administer statutes and operate under a variety of legal mandates, there rarely is a clear blueprint to follow. The case of the Inspector General from HEW demonstrated that although he had a clear statutory mandate to meet a Congressional deadline, he had an equally clear statutory

responsibility to the Secretary of HEW that conflicted with meeting the Congressional deadline. As constitutional subordinate autonomy indicates, he recognized his duty to balance the competing responsibilities and make a difficult choice; his quandary could have been avoided if he had reflected on the need to serve both masters earlier in the process.

Finally, the EPA case demonstrates the power of an incoming Administration to scale back the ability of an agency to implement existing laws that reflect a different ideology. Given the reality that finite organizational resources rarely permit the full implementation or enforcement of any set of laws, the agencies' new political leadership typically attempts to further a new direction by shifting resources and the focus of agency staff. The task for responsible public administrators is to examine their areas of responsibility and determine whether the shifts in resources and priorities reflect a reasonable exercise of discretion by the new Administration, or whether the actions cross the line into illegitimate disregard for the Agency's legal mandates.

### Attitude Versus Behavior

The cases presented in this chapter examine a range of choices exercised by public administrators faced with significant administrative discretion. It is suggested that

some administrators exercised discretion consistent with the concept of constitutional subordinate autonomy, while others "crossed the line" and went too far (or not far enough) in their actions. However, the fact that Kendal Foss manipulated data or EPA employees chose to support highly questionable administrative actions is not as important as the attitude behind their behavior.

No set formula can guide public administrators in determining the most appropriate course of action, nor provide the courage that may be required even when the appropriate behavior is fairly clear. However, constitutional subordinate autonomy suggests an attitude of responsiveness to multiple constitutional masters that may prove a useful reference point for reflection and dialogue.

## ENDNOTES

1. The following narrative follows closely the account in Harold Stein, ed., Public Administration and Policy Development (New York: Harcourt, Brace and World, Inc., 1952) pp. 621-632.
2. Ibid, p. 627.
3. Ibid, p. 631.
4. Ibid, pp. 631-632 .
5. Ibid, p. 627.
6. This narrative follows closely the account presented in case study by David Whitman, "Fraud, Waste and Abuse at HEW", for use at the John F. Kennedy School of Government, Harvard University, 1980.
7. Ibid, p. 2.
8. Ibid, p. 3.
9. Ibid, p. 9.
10. Ibid, p. 12.
11. Ibid, p. 9.
12. Ibid, p. 12.
13. Ibid, p. 14.
14. Ibid. p. 13.
15. Ibid.
16. This narrative follows closely the account presented in a case study by Don Lippincott, "Environmental Protection Agency: Ruckelshaus Returns", for use at the John F. Kennedy School of Government, Harvard University, 1985.
17. Ibid, p. 2.
18. Ibid, p. 1.
19. Ibid, p. 2.

20. Ibid, p. 5.
21. Ibid, p. 6.
22. Ibid.
23. Ibid.
24. Ibid, p. 8.
25. Ibid, p. 8.
26. Ibid, p. 16.

## VI.

### CONCLUSION

Good men can make poor laws workable; poor men will  
wreak havoc with good laws.

- James Landis

This dissertation has examined a source of legitimacy for the exercise of discretion by public administrators that is grounded in the Constitution. Absent a strong sense of legitimacy that provides a principled foundation for action, the numerous situations that call for the exercise of administrative discretion by public administrators will continue to be clouded by competing views of their proper role.

These competing views of the role of the public administrator are as old as the republic itself. At one end of the spectrum are the proponents of the unitary executive model of the administrative state. Under this view, the ideal form of administration consists of a unified executive branch under a powerful president with absolute control over the agencies and their civil servants. Under this model, administrative discretion is viewed negatively since ideally all decisionmaking is in the hands of the president through his political appointees. The appeal of this model is that in theory it provides a government responsive to the citizenry because the federal bureaucracy marches to the orders of the

elected president. A key premise is that the unelected career public administrators in the agencies are a threat to responsive government because they are captured by special interests or personal commitments and are not accountable to the electorate.

A competing model of the administrative state focuses on the powers shared by the executive, legislative and judicial branches. Under this view, the administrators in the agencies safeguard the balance of power between the three branches through their unique authority and area of expertise. The chief threat to responsive government comes not from unelected civil servants but from an imbalance in power that favors any one of the three branches. To the degree that vesting discretion in public administrators contributes to the maintenance of the balance of powers, it is not only acceptable but desirable. When an agency is placed under a court order, or a statutory responsibility is delegated to an agency administrator, it is precisely because the courts or the Congress believe it is necessary to exert more control over aspects of executive branch activities.

This dissertation argues that in addition to the competing theoretical arguments, we must recognize the realities of modern government. Even if one could make a stronger case for the unitary executive model on a theoretical level, the shared powers view is more consistent with the

practical world. Because of the enormous complexity and sheer size of the federal government, a president with a tight circle of loyalists simply cannot make all the decisions. Public administrators exercise discretion in their work, whether it is formally delegated in statute or merely de facto. The president, courts, or the Congress frequently do not, or cannot, provide clear directions on issues, or they must rely heavily on public administrators for critical information.

These competing views leave public administrators in a dilemma. They cannot always follow the unitary executive model and simply do as they are told by the Administration, either because they lack clear direction or the clear direction conflicts with competing, equally legitimate directions from the other branches. On the other hand, although the shared powers model recognizes the value of administrative discretion, it provides no legitimate basis for how far the public administrator should go in the exercise of this discretion.

A contribution to the debate is John Rohr's concept of constitutional subordinate autonomy. It provides a normative basis for the exercise of administrative discretion that recognizes the responsibility of public administrators to serve the president, but only as a means of serving a greater goal: supporting the Constitution as stated in the

oath of office. Responsiveness to the sovereign people means more than serving the president; it involves simultaneously serving Congress and the courts as well. This does not mean that public administrators constitute an independent fourth branch of government; it does mean that public administrators are legitimate, albeit subordinate, constitutional officers in the same sense as elected officials and judges. They exercise autonomy or discretion by choosing which of the three constitutional masters they will support on any given issue.

However, the question remains as to whether this is simply a clever theoretical argument, or whether it is relevant and useful to the practical world of government. Does the theory provide a principled way for public administrators to view their role, and if so, how? Furthermore, how is the concept of constitutional subordinate autonomy influenced by other factors that guide the exercise of administrative discretion?

#### The Exercise of Administrative Discretion: Influential Factors

By examining the model in light of practice from a variety of individual, institutional and situational perspectives, this dissertation demonstrates that the concept of responsibility to all three branches of government is relevant to the practice of public administration. However, this responsibility must be viewed in the context of competing

factors which also influence the exercise of discretion by public administrators. The following reviews all the factors illustrated by the cases presented.

Individual Rights: Because of public administrators' in-depth knowledge and familiarity with policies, programs and processes, they at times have a unique perspective on the impacts on individual citizens. This understanding carries with it a responsibility to ensure fairness within their sphere of influence.

The President: As the elected head of the executive branch of government, the president's agenda is a dominant source of responsibility for public administrators, as experienced through the political appointees in the agencies or OMB.

Congress: The responsibility to carry out faithfully the legislation passed by Congress and to be responsive to members and their staffs is an important aspect of public administration in a government anchored in the principle of separate but shared powers.

Courts: Although not as consistent a factor as the president or Congress in a public administrator's daily life, the sense of responsibility to specific court orders or more general holdings of the court is evident in several cases.

Personal Beliefs: All public administrators are influenced by personal commitments to certain causes or have

opinions about which policy directions best serve the public interest. Several cases address how individuals struggle to reconcile personal beliefs with policy directions.

Institutional Mission: Identification with the purpose of the agency in which one works can be a significant factor in the discretion exercised by public administrators. This source of influence is particularly evident when attempts are made to alter or challenge the accepted mission of the institution.

Institutional Culture: Closely related to the concept of mission, the values, norms or attitudes that pervade an agency influences the exercise of discretion by public administrators.

Professional Standards: Although public administrators take an oath to support the Constitution and may receive training as to their roles and responsibilities as civil servants, they also may be influenced by separate and distinct standards and training as members of other professions.

Interest Groups: A final source of influence evident in the cases presented is special interest groups. The struggle to balance the influence of interest groups with other competing considerations can be a fundamental part of a public administrator's responsibility.

To establish the model of constitutional subordinate

autonomy as a useful concept for the practicing public administrator, this dissertation has shown how these various factors interrelate with the core responsibility to support the Constitution through serving all three branches. The following sections review the insights gained by this approach.

### The Basic Model of Constitutional Subordinate Autonomy

The primary theme illustrated through the cases presented in this dissertation has been public administrators using their legitimate discretionary power in order to maintain the constitutional balance of powers in support of individual rights. According to the authors of the Federalist Papers, the rights of the people are best ensured when there is equilibrium or a balance of power between the three branches.<sup>1</sup> Public administrators make their unique contribution to preserving this balance by exercising discretion, but it is in the context of subordination to the three branches. This basic model is demonstrated by the following cases.

Serving The Courts: Agencies are often sued and placed under court order to address a deficiency or speed up the enforcement or implementation of a law. However, because of deficient organizational resources, lack of political will, or simply unrealistic deadlines, administrations will at times

attempt to negotiate delays in meeting court orders for substantial periods of time. As seen in the discussion of Califano revisited below, there is no better example of this phenomenon than the enforcement of the civil rights laws in this country, where the political will has often been lacking.

As Secretary of HEW, Califano could have chosen to exercise subordination to the Administration, and not made enforcement of the civil rights laws one of his highest priorities. However, as constitutional subordinate autonomy suggests, he recognized his competing responsibilities to the courts and shifted more resources to the civil rights program and struggled with the Carter White House over the desegregation of schools in the south. Although Califano was clearly motivated by personal beliefs to take this stand, his expression of autonomy was grounded in the civil rights law and court orders. Other public administrators in Califano's position have chosen to exercise subordination to the Administration and taken a softer stand on civil rights. Are they wrong? The model does not provide a clear answer to that question, but it does take issue with those who do not recognize and seriously reflect upon their competing responsibilities to court orders even though they may not be an Administration priority.

Serving the President: Although high-level public administrators like Pinchot, Califano and Landis deal directly

with the president, the typical public administrator experiences the presidential agenda primarily through political appointees in the agencies and OMB. The administrators from the Family Support Administration and Department of the Interior described their responsibility to serve the president by furthering the intelligent development of Administration priorities or presenting the Administration's position in the best light possible. Although they also feel it is their duty to take a step back from the Administration's position and speak up when they believe the position represents a misunderstanding or is poorly thought out, their subordinate role as members of the executive branch requires that they only go so far with questions or challenges before losing the confidence of political superiors.

The essence of constitutional subordinate autonomy is balancing this responsibility to serve the president with competing responsibilities to the other branches. Attorney General Biddle, for example, recognized in hindsight that he took his subordination to the president too far and did not give enough weight to the civil rights of the Japanese-Americans under the law.

Serving the Congress: Although often directly subordinate to the president as members of the executive branch, public administrators nonetheless have competing

responsibilities to the Congress. Nowhere is this more explicit than in those cases when laws are written which delegate responsibilities specifically to someone other than the president. In the abortion case involving Califano, the HEW appropriations bill required the Secretary of HEW to issue regulations and establish procedures to ensure rigorous enforcement of the law. Although Califano was under heavy pressure from the president and his own personal beliefs to interpret the regulations as narrowly as possible, he recognized his statutory responsibility to determine what Congress intended and write regulations that embodied that intent.

Another good example is the case involving Thomas Morris, the HEW Inspector General, who was caught between his statutory responsibility to submit a report on waste, fraud and abuse to Congress by a certain date and pressure from the HEW hierarchy to delay the report to allow time for a press release to explain the alarming figures. Morris decided that meeting the Congressional deadline was more important. Although he may have gone too far in his support of Congress, the key point is that Morris was responding to legitimate demands from Congress that conflicted with demands from the executive branch.

Promoting Individual Rights: At the center of the model of constitutional subordinate autonomy is individual

rights. In most cases, public administrators promote those rights by contributing to the balance between the three branches, but the cases demonstrate even average public administrators sometimes have opportunities to directly support individual rights through the exercise of administrative discretion. The disability claims analyst from the Social Security Administration indicated that because of her unique perspective, she has a responsibility to translate policies crafted by isolated decisionmakers when they clearly result in unfairness to individual citizens in particular cases. However, consistent with constitutional subordinate autonomy, she was not merely administering her own brand of "frontier justice"; her actions were the result of careful deliberation which tried to balance the intended purpose of the Administration's policy with unintended deleterious impacts in particular cases. For example, she understood the rationale for reviewing long-neglected disability cases and the need for more efficiency in the hearings and appeals process; however, she also understood that she was in a unique position to have a more balanced perspective because of her familiarity with individual cases. In her opinion, it would be irresponsible for her to simply "go by the book" and ignore her unique perspective.

Similarly, the GAO auditor involved in evaluating the impact of the Immigration and Control Act felt a special

responsibility to the individual American citizens adversely affected by the law. It was not enough for him merely to conduct the evaluation and present the results in a dispassionate manner. He realized that being both close to the data and aware of the political pressures to downplay the implications of the data demanded that he "do everything in his power" to ensure that the deleterious impact of the law on American citizens was clearly understood by the readers of the evaluation report.

In summary, these cases studies illustrate the basic model of constitutional subordinate autonomy, with public administrators alternately supporting one of the three branches in support of individual rights.

#### An Expanded Model of Constitutional Subordinate Autonomy

As reviewed above, however, this basic model does not capture the range of other factors which influence public administrators as they play out this subordinate but autonomous role. The case studies demonstrate that public administrators deal with more than merely choosing which of the three branches to support on a given issue. This dissertation demonstrates how each of these competing or external factors, sometimes simultaneously, may influence the public administrator to favor one branch over the other, or, at times, to bypass the three branches completely in his or

her desire to promote personal beliefs or commitments. Several cases illustrate this interplay and demonstrate how the model of constitutional subordinate autonomy can provide a normative guide for addressing these external pressures.

Personal Beliefs: The powerful influence of personal beliefs or commitments on the actions of public administrators is evident in many of the cases. Gifford Pinchot is a prime example of a public administrator driven by his personal commitment to the cause of conservation, leading him to stretch the letter of the law whenever possible to promote his cause. His zealotry did not rest comfortably with a position subordinate to the three branches, and resulted in numerous confrontations first with the Congress and later with President Taft. Pinchot's writings indicate that he defined his role as the single-minded pursuit of his understanding of the public interest, rather than as someone with the responsibility to serve and balance the interests of all three branches. Although Pinchot made enormously important strides for the cause of conservation, his narrow approach infringed upon the legitimate rights of farmers in the west and made it impossible for him to operate effectively under a president with different views.

Another illustration of the influence of personal commitments is Kendall Foss in the Rural Electrification Administration case study. His passion for the cause of

public power led him to take a very controversial position in providing sensitive personnel information requested by Congress that ultimately cost him his job.

In both of these cases the public administrators lacked a model that enabled them to reconcile strong personal beliefs with their position in our system of government. If one believes that the role of the public administrator is to exercise discretion to promote personal beliefs, then to submit to disagreeable policies is tantamount to selling out or playing the role of a lackey. This reasoning is precisely why Pinchot states that there could be only "one answer" to his decision to choose between supporting conservation policy or President Taft. This reasoning is also why many public administrators, choosing to work in agencies such as the Environmental Protection Agency because of passionate personal commitments to a cause, find it so difficult to deal with the competing interests that inevitably produce policies that compromise their personal beliefs.

Constitutional subordinate autonomy provides a model for addressing strong personal beliefs. Public administrators should reflect on their personal beliefs, but in the context of their subordination to the three branches. Guided solely by personal beliefs, Califano surely would have used his discretion to issue much more restrictive abortion regulations than were finally promulgated. However, understanding his

role in a government of shared powers, he recognized his duty to subordinate personal beliefs to the intent of Congress.

Professional Standards: How does the strong influence of professional training and education on public administrations relate to serving multiple constitutional masters? This factor is illustrated by the analyst in the Department of Justice, who refused to write an advocacy report that was not supported by the available data. Her sense of responsibility to maintain high standards of professional policy analysis conflicted with her responsibility to follow the orders of her political superiors.

A similar force was at work in the protest by the lawyers in the Civil Rights Division in DOJ. They were clearly influenced by their sense of responsibility to the legal profession, and felt the politically motivated decision by the Attorney General to argue for delay of school desegregation simply went against any reasonable interpretation of the law, particularly given the history of delays associated with enforcement of school desegregation.

In both of these cases the public administrators were driven by professional standards to exercise autonomy from their political superiors. Under the constitutional subordinate autonomy model, the legitimacy of these actions would depend on the degree to which they were grounded in the responsibility to maintain balance among the three branches.

The case of the civil rights lawyers is fairly straightforward. Their actions were clearly driven by what they believed was the unresponsiveness of the Department of Justice to the intent of the other two branches. One may disagree with their protest, but not on grounds of illegitimacy. Their professional legal training reinforced a direction which was reflected by the courts and legislation.

The professional policy analyst decision is more subtle. What branch was she serving by refusing to write the report? In explaining her decision, the analyst determined that because her political superiors simply wanted a report that fit their predetermined ideology, they were not concerned with the substantial evidence that refuted their position. She also realized that because of the formal authority of the Department of Justice, the flawed report could have significant influence. Because of her knowledge, she was in a position to take a stand against what otherwise was the unchecked power of her superiors to issue biased information to the public. The amount of information controlled by the executive branch represents a tremendous source of power that is not easily checked by the courts and Congress. Public administrators should be guided by the highest sense of professional standards in the use of this information.

These cases demonstrate the use of professional standards by public administrators to indicate which of the

three branches of government they should favor or, in some cases, check.

Agency Mission: Another strong influence on public administrators is the mission of the institution in which they work. This mission may be consistent with the concept of subordinate autonomy or may be at odds, depending on the point in history or situation.

The BoB under Director Harold Smith, who carefully maintained the distinction between serving the interests of the presidency and the personal agenda of the president, operated under a mission that was consistent with the model of subordination to all three branches. As director of a staff office to the president, Smith wanted his staff to be politically sensitive to the president's agenda, but he wanted them to be equally concerned with the long-term interests of the office as a part of a larger system of government that included Congress and the executive agencies.

However, the gradual change in the OMB mission to serving primarily the partisan political agenda of the president makes the model of constitutional subordinate autonomy becomes problematic for OMB officials. Although in theory OMB's role in the regulatory process is "advisory and consultative" (i.e., subordinate), in practice the evidence strongly suggests that OMB officials use their administrative discretion to influence heavily the decisions of the

regulatory agencies. OMB's mission to serve the president's goals of less regulation is at odds with its subordination to the agencies who have been delegated final rulemaking authority. The lesson for OMB officials is to reflect on the tension between the current mission of their institution and their responsibility to serve all three branches of government. Although this responsibility may sound ludicrous to OMB staff under recent Directors such as James Miller or David Stockman, it was considered a fundamental role for staff during earlier administrations when some would argue the institution held far greater respect.

In contrast to the OMB example, the EPA case study demonstrates how the sense of independence provided by the mission of the Agency can be a positive force in support of constitutional subordinate autonomy. The identification with EPA's mission to protect the environment gave some staff reason to pause and question when the Gorsuch Administration came in and took administrative steps that seriously affected EPA's ability to carry out its mission.

Agency Culture: An examination of GAO demonstrates that the predominant culture of oversight places the institution in the relatively new role of evaluating complex public policies and programs. This role requires GAO evaluators to be responsive to the viewpoints of many parties, particularly Congress and the executive branch agencies. This

new culture is consistent with the concept of responsiveness to multiple masters. At the same time, however, the historical sense of independence that permeates GAO does not rest as comfortably with the concept of subordination. The case study involving a GAO evaluation of programs under the Bureau of Education for the Handicapped (BEH) demonstrates the movement of GAO from a stance of independence, where auditors rarely consulted with BEH officials, to a situation where GAO was much more responsive to the executive branch agency.

Constitutional subordinate autonomy provides a response to public administrators in many agencies like GAO who believe they are responsible to only one entity, be it an individual, group, institution or branch of government.

Interest Groups: A final source of pressure evident from the cases that can affect the exercise of discretion by public administrators comes from interest groups. Landis saw American society as a composite of interest groups, whose demands government needed to keep in equilibrium. Focusing on the members of the regulatory commissions, he saw their role less as advocates than as mediators who should maintain a healthy balance between the interests of the consumers and the producers. President Franklin Roosevelt disagreed with this view - he believed the commissioners should act not as impartial judges but as representatives of the people. The problem with this view for Landis was that it translates into

unbridled power. If any one group in our system of government, be it the president, Congress or the courts, claims to have a monopoly on the definition of the public interest, then democratic government is at peril. For Landis, the key to a balanced government where all points of view are openly considered is to have impartial judges in places like the regulatory commissions. This role is demonstrated by Landis' tenure as Chairman of the Civil Aeronautics Board, where he constantly fought the influence of the airline industry on the White House.

A similar viewpoint was expressed by the administrator in the Federal Aviation Administration. He has the responsibility to give all interested parties the opportunity to comment on proposed rulemaking, weigh their interests impartially, and determine what is the best course of action. The legitimacy of the process does not depend so much on the actual outcome, but on whether interested groups have had the opportunity to be heard and that no one group has had unfair influence.

In the context of constitutional subordinate autonomy, interest groups are not a neutral factor; on any given issue a powerful interest group may attempt to influence public administrators to favor one branch over the other. There is no better example of this pressure than at the EPA, where officials will often be caught between an Administration

captured by powerful industry groups, congressional committees promoting a myriad of interests, and environmentalist groups armed with data predicting imminent death and destruction. In these situations, Landis' image of the impartial judge attempting to balance all the competing interests is perhaps the best guideline, and it reflects a fundamental theme of constitutional subordinate autonomy: the cause above all causes is the Constitution, not any particular issue or program.

#### Related Sources of Normative Guidance

Although the purpose of this dissertation has been to illustrate the concept of constitutional subordinate autonomy, it is important to note in closing other fruitful sources of normative guidance for administrative discretion in the literature that merit further attention. For example, the cases demonstrating the promotion of individual rights by public administrators also suggests adherence to the concept of regime values, described by Rohr in an earlier work. Regime values refer to the "values of that political entity that was brought into being by the ratification of the Constitution that created the present American republic."<sup>2</sup> These values, such as equality, freedom and property, represent other sources of normative guidance for public administrators that are certainly compatible with the

responsibility to serve multiple constitutional masters.

The discussion of agency culture and mission only touches on the much broader concept of the Agency Perspective as described by Wamsley, et.al. This perspective views the agency as a normative institution based on a fundamental concern with the public interest and the common good. The Agency Perspective "calls upon us to develop a new kind of leadership that fosters legitimate authority of the state and its 'agencies' by maintaining the capacity to act agentially, by being reason-giving and by fostering participation, citizen development, and community."<sup>3</sup> This rich concept provides another related normative perspective suggested by this dissertation.

#### Prudence: The Essence of Administrative Statesmanship

This dissertation has illustrated how the model of constitutional subordinate autonomy can be relevant to the practicing public administrator struggling to exercise discretion in a responsible manner. In a complex government of separated but shared powers, this is no simple task, but it can be aided by models which facilitate and foster reflection and dialogue around the multiple, sometimes competing masters that pressure public administrators for their support.

Although the model of constitutional subordinate

autonomy provides a legitimate basis for the exercise of administrative discretion, it does not provide a formula that tells public administrators what actions to take in specific cases. After all of his years of experience and intent study, James Landis conceded that the ultimate success or failure of any administrative process rests on the quality of the people involved; hence his well known quote at the beginning of this chapter. This dissertation has suggested that one of the most fundamental qualities needed for the public administrator is prudence -- the quality that enables a person to see what course of action to choose in practical situations, where all is contingent and uncertain. The constitutional norms suggested in this dissertation are intended to elevate administrative prudence from mere self-interest and thereby infuse such prudence with statesmanship that recognizes the role of public administrators in carrying out their oath to uphold the constitution.

The case studies presented in this dissertation give life to this constitutional role: public administrators using their discretionary power legitimately to maintain the balance of powers in support of individual rights. The development of prudent public administrators requires ongoing reflection and dialogue around such situations to heighten awareness of what it means to be an administrative statesman in a government of shared powers.

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1. Jacob E. Cook, ed., The Federalist (Middletown, CT: Wesleyan University Press, 1961), pp. 47-51.
2. John A. Rohr, Ethics for Bureaucrats (New York: Marcel Dekker, Inc., 1978), p. 59.
3. Gary L. Wamsley, et.al., Refounding Public Administration (Newbury Park, CA: Sage Publications, 1990), p. 154.

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